DOCKET

No. 08-559

Title: E. K. McDaniel, Warden, et al., Petitioners
v.
Troy Brown

Docketed: October 28, 2008
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (07-15592)
Decision Date: May 5, 2008
Rehearing Denied: July 30, 2008

Questions Presented

---Date---	--------Proceedings and Orders----------
Oct 24 2008	Petition for a writ of certiorari filed. (Response due November 28, 2008)
Nov 28 2008	Brief of respondent Troy Brown in opposition filed.
Nov 28 2008	Motion for leave to proceed in forma pauperis filed by respondent.
Dec 10 2008	DISTRIBUTED for Conference of January 9, 2009.
Dec 16 2008	Record Requested .
Dec 22 2008	Record received from the U.S.C.A., for the Ninth Circuit. (1 envelope)
Dec 23 2008	Record received from US District Court District of Nevada (1 box).
Dec 30 2008	DISTRIBUTED for Conference of January 16, 2009.
Jan 21 2009	DISTRIBUTED for Conference of January 23, 2009.
Jan 26 2009	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Jan 26 2009	Petition GRANTED.
Feb 12 2009	Brief amicus curiae of Wayne County, Michigan filed.
Feb 26 2009	The time within which to file the joint appendix and petitioners' brief on the merits is extended to and including April 16, 2009.
Apr 10 2009	The time within which to file the joint appendix and petitioners' brief on the merits is further extended to and including May 1, 2009.
May 1 2009	Joint appendix filed (four volumes). Statement of costs received.
May 1 2009	Brief of petitioners E. K. McDaniel, Warden, et al. filed.
May 8 2009	Brief amicus curiae of United States filed.
May 8 2009	Brief amici curiae of Michigan, et al. filed.
May 8 2009	Brief amicus curiae of Criminal Justice Legal Foundation filed.
May 20 2009	The time within which to file respondent's brief on the merits is extended to and including July 17, 2009.
Jul 17 2009	CIRCULATED.
Jul 17 2009	Brief of respondent Troy Brown filed. (Distributed).
Jul 22 2009	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed
Jul 24 2009	Brief amici curiae of 20 Scholars of Forensic Evidence filed. (Distributed)
Jul 24 2009	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed)
Aug 14 2009	Reply of petitioners E. K. McDaniel, Warden, et al. filed. (Distributed)
Sep 4 2009	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae

and for divided argument GRANTED.

Jan 11 2010 Judgment REVERSED and case REMANDED Justice Thomas filed a concurring opinion in which Justice Scalia joins. (Detached Opinion)

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
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08-559 OCT 24 2008

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In The
Supreme Court of the United States

E. K. MCDANIEL, WARDEN and THE ATTORNEY GENERAL OF THE STATE OF NEVADA,
Petitioners,

v.

TROY BROWN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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October 24, 2008

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QUESTIONS PRESENTED

1. What is the standard of review for a federal habeas court for analyzing a sufficiency-of-the-evidence claim under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)?

2. Does analysis of a sufficiency-of-the-evidence claim pursuant to *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979), under 28 U.S.C. § 2254(d)(1) permit a federal habeas court to expand the record or consider non-record evidence to determine the reliability of testimony and evidence given at trial?

PARTIES TO THE PROCEEDINGS

There are no parties to the proceedings other than those listed in the caption.

The Petitioners are E.K. McDaniel, Warden and the Attorney General of the State of Nevada. Craig Farwell was the previous Warden listed as the Appellant in the Ninth Circuit. Fed. R. App. P. 43(c); Sup. Ct. R. 35(3).

The Respondent is Troy Brown.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

ARGUMENT 6

A. The Court of Appeals' decision conflicts with United States Supreme Court precedent because it performed a sufficiency-of-the-evidence analysis by considering non-record evidence, excluding some evidence, and analyzing other evidence in a light most favorable to Brown. 7

B. The Court of Appeals' decision conflicts with United States Supreme Court precedent by expanding the record with newly discovered evidence. 9

C. The Court of Appeals' decision conflicts with United States Supreme Court precedent because it found the Nevada Supreme Court applied an incorrect standard for determining sufficiency of the evidence. . . 10

D. The Court of Appeals' decision conflicts with United States Supreme Court precedent when it found that on appeal of the District Court's grant of habeas relief, "However, it is Respondents' burden to establish guilt beyond a reasonable doubt for each and every element of the offense, a burden that Respondents not carried here." *Brown v. Farwell*, 25 F.3d 787, 797 (9th Cir. 2008) . 13

E. The Court of Appeals' decision conflicts with United States Supreme Court precedent because it mixed and matched legal theories and factual allegations presented in the state courts to find exhausted a claim and factual basis that were never presented to the state courts. 15

APPENDIX

Appendix A: Ninth Circuit Order Amending Opinion and Amended Opinion, dated July 21, 2008 ..... 1a

Appendix B: District Court Judgment in a Civil Case, dated December 15, 2006 ..... 29a

Appendix C: District Court Order on Merits, dated December 14, 2006 ..... 31a

Appendix D: District Court Order, dated July 22, 2005 ..... 55a

Appendix E: Amended Judgment of Conviction, dated March 18, 1998 ..... 63a

Appendix F: Nevada Supreme Court Opinion, dated February 26, 1997 ..... 68a

Appendix G: Ninth Circuit Order denying rehearing, dated July 30, 2008 ..... 97a

Appendix H: Statutes 99a

Appendix I: Appellant's Opening Brief, dated November 20, 1995 ..... 111a

Appendix J: Appellant's Reply Brief, dated March 4, 1996 ..... 122a

Appendix K: First Amended Petition for Writ of Habeas Corpus By A Person In State Custody Pursuant to 28 U.S.C. § 2254, dated November 12, 2004 ..... 130a

Appendix L: Motion to Dismiss, dated March 28, 2005 ..... 175a

Appendix M: Answer, dated October 19, 2005 ..... 186a

Appendix N: Motion to Expand Record, dated March 1, 2006 ..... 219a

Appendix O: Opposition to Motion to Expand Record and Motion to Strike, dated March 30, 2006 ..... 222a

TABLE OF AUTHORITIES

CASES

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 11

Berryhill v. Calpone,
168 Fed.Appx. 253 (10th Cir. 2006) 12

Brown v. Farwell,
525 F.3d 787 (9th Cir. 2008) ..... *passim*

Brown v. State, 934 P.2d 235 (Nev. 1997) 3

Bruce v. Terhune,
376 F.3d 950 (9th Cir. 2004) (per curiam) 8

Davis v. Kemp,
829 F.2d 1522 (11th Cir. 1987) 12

Duncan v. Henry,
513 U.S. 364 (1995) (per curiam) 6

Duncan v. Walker, 533 U.S. 167 (2001) 14

Dupuy v. Cain, 201 F.3d 582 (5th Cir. 2000) 11

Early v. Packer, 537 U.S. 3 (2002) 6, 13

Gray v. Netherland, 518 U.S. 152 (1996) 6, 15

Herrera v. Collins, 506 U.S. 390 (1993) ... 1, 4, 5, 9

Holland v. Jackson, 542 U.S. 649 (2004) 5, 10

Jackson v. Virginia, 443 U.S. 307 (1979) . . . . *passim*

Juan H. v. Allen,
408 F.3d 1262 (9th Cir. 2005) 11

Kazalyn v. State, 825 P.2d 578 (Nev. 1992) . . . 6, 11

Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992) 12

Marshall v. Lonberger,
459 U.S. 422 (1983) 1, 5, 9

Miller-el v. Cockrell, 537 U.S. 322 (2003) 14

Picard v. Connor, 404 U.S. 270 (1971) 6, 16

Rose v. Lundy, 455 U.S. 509 (1982) 15

Schlup v. Delo, 513 U.S. 298 (1995) 11

State v. Bennett, 81 P.3d 1 (Nev. 2003) 17

Townsend v. Sain, 372 U.S. 293 (1963) 12

U.S. v. Marek, 238 F.3d 310 (5th Cir. 2001) 11

Williams v. Taylor,
529 U.S. 362 (2000) 5, 6, 13, 14

Williams v. Taylor, 529 U.S. 420 (2000) 5, 10

Woodford v. Garceau, 538 U.S. 202 (2003) 14

Woodford v. Visciotti, 537 U.S. 19 (2002) 12

STATUTES AND RULES

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2101(c) 2

28 U.S.C. § 2254 ..... 2, 3, 14

28 U.S.C. §§ 2254(b), (c) 15

28 U.S.C. § 2254(d) 13, 14

28 U.S.C. § 2254(d)(1) ..... i, 1, 2, 4

28 U.S.C. § 2254(e)(1) 14

28 U.S.C. § 2254(e)(2) 2, 3, 10

NRS 200.366 2

Fed. R. App. P. 43(c) ii

Sup. Ct. R. 13(1) 2

Sup. Ct. R. 13(3) 2

Sup. Ct. R. 20 2

Sup. Ct. R. 35(3) ii

N.R.A.P. 28(c) 17

OTHER

Black's Law Dictionary (6th ed.) 12

The American Heritage Dictionary
(Second College ed.) 12

Webster's Dictionary and Thesaurus (2002 ed.) . 12

PETITION FOR A WRIT OF CERTIORARI

The Warden files this petition for writ of certiorari seeking an order vacating the June 3, 2008 Opinion and Order of the United States Ninth Circuit Court of Appeals in *Brown v. Farwell*, 525 F.3d 787 (9th Cir. 2008). The Court of Appeals determined that there was insufficient evidence presented during a jury trial to support the defendant's convictions for sexual assault. Contrary to the requirements of *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Herrera v. Collins*, 506 U.S. 390, 402 (1993); *Marshall v. Lonberger*, 459 U.S. 422, 434-35 (1983); and 28 U.S.C. § 2254(d)(1), which limit the analysis to record evidence and require the court to consider the record evidence in the light most favorable to the prosecution, the Court of Appeals considered non-record evidence and newly discovered evidence, excluded record evidence, discounted record evidence, analyzed only part of the trial record evidence and resolved conflicting testimony and credibility questions in the light most favorable to the federal habeas petitioner.

OPINIONS BELOW

The opinion of the Court of Appeals is published at 525 F.3d 787 (9th Cir. 2008). Appendix A. The Order of the United States District Court granting the petition is unpublished. The Nevada Supreme Court's opinion is published at 934 P.2d 235 (Nev. 1997). Appendix F.

JURISDICTION

The federal district court reviewed the Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254. Appendix C. Following the grant of the petition, the Warden appealed to the United States Court of Appeals for the Ninth Circuit. Appendix A. The Ninth Circuit, in an opinion filed May 5, 2008, and amended on July 21, 2008, affirmed the grant of the petition. However, because it affirmed the grant of habeas relief with respect to a claim of insufficient evidence, it did not reach claims of ineffective assistance of counsel, *Id.* The Warden filed a petition for rehearing and suggestion for rehearing en banc which was denied on July 30, 2008. Appendix G. This petition for writ of certiorari is filed within ninety (90) days of the judgment of the circuit court. 28 U.S.C. § 2101(c). *See also* Sup. Ct. R. 13(1), (3) and 20. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The statutes involved are 28 U.S.C. § 1254(1); 28 U.S.C. § 2254; 28 U.S.C. § 2254(d)(1); 28 U.S.C. § 2254(e)(2) and NRS 200.366.

STATEMENT OF THE CASE

A jury convicted Troy Don Brown (Brown) of two counts of sexual assault on a child under the age of 14, violations of NRS 200.366, and one count of abuse or neglect of a child resulting in substantial bodily harm. Appendix F at 69a.

In his direct appeal, the Nevada Supreme Court rejected Brown's contention that there was insufficient evidence to convict. *Brown v. State*, 934 P.2d 235, 277-285 (Nev. 1997). Appendix F at 82a-83a. The Nevada Supreme Court vacated the third conviction and remanded for resentencing on the second sexual assault charge. Appendix F at 96a. Brown was resentenced to life with the possibility of parole after ten years on both sexual assault counts, to run consecutively. Appendix E.

Subsequently, Brown filed an amended petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in which he claimed that there was insufficient evidence to convict him. Appendix K at 147a-163a.

The Warden moved to dismiss ground one of the amended petition which alleged insufficiency of the evidence as unexhausted because Brown attacked the reliability of the DNA evidence used to convict him. Appendix L at 176a-184a. Brown opposed the motion and the federal district court denied the motion. Appendix D.

The Warden answered the petition. Appendix M. Brown filed a motion to expand the record pursuant to Rule 7 of the Rules Governing Section 2254 Cases to include non-record evidence. Appendix N. The Warden opposed the motion arguing that expansion was not permissible under either Rule 7 or 28 U.S.C. § 2254(e)(2). Appendix O.

The federal district court permitted expansion of the record and considered the non-record evidence presented to determine that the testimony of a witness

and evidence during the trial was unreliable and thereafter determined that there was insufficient evidence to convict Brown. Appendix C at 37a-46a. As a result, the federal district court failed to review the evidence in the light most favorable to the prosecution, excluded from its analysis record evidence it found unreliable, reassessed the credibility of witnesses and reweighed the evidence contrary to *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979), and *Herrera v. Collins*, 506 U.S. 390, 402 (1993).

The Warden appealed to the Ninth Circuit Court of Appeals. Appendix A. The Court of Appeals, conducting its analysis pursuant to 28 U.S.C. § 2254(d)(1), affirmed the district court's decision to supplement the record with non-record evidence. Appendix A at 9a-21a. The Court of Appeals also considered the non-record evidence and, like the district court, failed to review the record evidence in the light most favorable to the prosecution, excluded from its analysis record evidence it found unreliable, reassessed the credibility of witnesses and reweighed the evidence, contrary to *Jackson v. Virginia*, 443 U.S. 307, 318-319 (1979), and *Herrera v. Collins*, 506 U.S. 390, 402 (1993).

The Warden filed a petition for rehearing and a suggestion for rehearing en banc. Appendix G. The Court of Appeals denied the petition. Appendix G.

REASONS FOR GRANTING THE WRIT

The Court of Appeals' opinion conflicts with this Court's precedent, in particular, *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979), and *Herrera v. Collins*,

506 U.S. 390, 402 (1993). Consideration by the Court is necessary to secure and maintain uniformity of the Court's decisions. The Court of Appeals' opinion conflicts with United States Supreme Court precedent as stated below:

1. The Court of Appeals' decision conflicts with controlling United States Supreme Court precedent when it performed a sufficiency-of-the-evidence analysis by expanding the record, excluding some evidence, and rather than reviewing all of the evidence in the light most favorable to the prosecution, analyzed only part of the evidence and resolved conflicting testimony and credibility questions in the light most favorable to the Brown, contrary to *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Herrera v. Collins*, 506 U.S. 390, 402 (1993); and *Marshall v. Lonberger*, 459 U.S. 422, 434-35 (1983).

2. The Court of Appeals' decision conflicts with United States Supreme Court precedent because it expanded the record with newly discovered/developed evidence and considered the evidence in its resolution of the *Jackson v. Virginia* claim contrary to *Herrera v. Collins*, 506 U.S. 390, 402 (1993). *See also Holland v. Jackson*, 542 U.S. 649, 652-54 (2004); *Williams v. Taylor*, 529 U.S. 420 (2000); and *Williams v. Taylor*, 529 U.S. 362, 375-90 (2000).

3. The Court of Appeals' decision conflicts with United States Supreme Court precedent when it found that on appeal of the District Court's grant of habeas relief, "However, it is Respondents' burden to establish guilt beyond a reasonable doubt for each and every element of the offense." Federal habeas actions are not

retrials and do not impose that burden on the state. *Williams v. Taylor*, 529 U.S. 362, 375-90 (2000); *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979).

4. The Court of Appeals' decision conflicts with controlling United States Supreme Court precedent when it found, without any citation or distinction, that the state court erroneously applied the "reasonable" juror standard of *Kazalyn v. State*, 825 P.2d 578, 581 (Nev. 1992), rather than the "rational" juror standard of *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979), to its sufficiency of the evidence analysis. *Early v. Packer*, 537 U.S. 3, 8-11 (2002).

5. The Court of Appeals' decision conflicts with United States Supreme Court precedent because it mixed and matched legal theories and factual allegations presented in the state courts to find exhausted a claim and factual basis that was never presented to the state courts. *Picard v. Connor*, 404 U.S. 270, 275-78 (1971); *Duncan v. Henry*, 513 U.S. 364, 366 (1995) (per curiam); and *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996).

ARGUMENT

Over a well-reasoned dissent, the Court of Appeals affirmed the District Court's judgment granting the petition for writ of habeas corpus on the grounds that there was insufficient evidence to sustain Brown's convictions, in violation of due process. Appendix A at 9a-21a. This petition for writ of certiorari should be granted because the state court record provided ample support to find that the Nevada Supreme Court's decision was in accordance with Federal law as

determined by the United States Supreme Court and that, in light of the evidence presented in the State court proceedings, the Nevada Supreme Court reasonably determined that the evidence was sufficient to sustain Brown's conviction.

A. The Court of Appeals' decision conflicts with United States Supreme Court precedent because it performed a sufficiency-of-the-evidence analysis by considering non-record evidence, excluding some evidence, and analyzing other evidence in a light most favorable to Brown.

Jackson requires that:

> Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review ***all*** *of the evidence is to be considered in the light most favorable to the prosecution.*

Jackson v. Virginia, 443 U.S. 307, 318 (1979) (emphasis added). The Court of Appeals violated the *Jackson* standard in several respects. First, it expanded the record, considered non-record evidence, and excluded evidence in its analysis that it deemed unreliable.[1]

---

[1] The Warden reiterates that Brown never raised a constitutional reliability-of-the-evidence claim in state court.

Second, rather than consider the evidence in the light most favorable to the prosecution, the panel majority reweighed the evidence and considered it in a light most favorable to the defense. *Brown v. Farwell*, 525 F.3d 787, 795-98 (9th Cir. 2008). Appendix A at 9a-21a.

The Ninth Circuit wisely noted in another case:

> *Jackson* cautions reviewing courts to consider the evidence "in the light most favorable to the prosecution." 443 U.S. at 319, 99 S.Ct. 2781. ***If confronted by a record that supports conflicting inferences, federal habeas courts "must presume-even if it does not affirmatively appear in the record-that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution."*** Id. at 326, 99 S.Ct. 2781. ***A jury's credibility determinations are therefore entitled to near-total deference*** under *Jackson*.

Bruce v. Terhune, 376 F.3d 950, 957 (9th Cir. 2004) (*per curiam*) (internal quotations omitted) (emphasis added).

In addition, this Court has held:

> The Court of Appeals' reliance on respondent's testimony, discussed above, and the fact that "the state produced no contrary evidence," is quite wide of the mark for purposes of deciding whether factual findings are fairly supported by the record. 28 U.S.C. § 2254(d) gives federal

> habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them.

Marshall v. Lonberger, 459 U.S. 422, 434-35 (1983).

Despite the foregoing, the District Court and the Court of Appeals resolved the inconsistencies and contrary testimony in favor of Brown. *Brown*, 525 F.3d at 795-98; Appendix A at 9a-21a.

Further, this Court has made it clear that "the sufficiency of the evidence review authorized by *Jackson* is limited to 'record evidence.' *Jackson* does not extend to non-record evidence, including newly discovered evidence." *Herrera v. Collins*, 506 U.S. 390, 402 (1993) (citation omitted). Both the federal district court and Court of Appeals relied exclusively on non-record evidence to find the DNA evidence presented at trial in this case unreliable.

B. The Court of Appeals' decision conflicts with United States Supreme Court precedent by expanding the record with newly discovered evidence.

The Court of Appeals found that Brown presented a comprehensive discussion of the DNA evidence before the Nevada Supreme Court. *Brown*, 525 F.3d at 793-94; Appendix A at 12a. This finding was based on the "numerous challenges to the DNA evidence raised in Troy's state court briefs." *Id.* Therefore, reasoned the Court of Appeals, Brown's attempts were reasonable and therefore diligent. In support, the

Court of Appeals cited *Williams v. Taylor*, 529 U.S. 420, 435 (2000). As *Williams* makes clear, however:

> Diligence for purposes of the opening clause depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue ***claims*** in state court; ...

Id at 435 (emphasis added). However, Brown, who was represented by counsel, never raised a *claim* that the DNA evidence was unreliable. Brown raised a claim that he was entitled to a hearing before such scientific evidence could be admitted. Appendix I at 112a-113a; 116a; 120a; 121a. Further, Brown only argued about the DNA statistical evidence at the time of his sentencing. He argued that evidence made his sentencing improper. Appendix J at 125a-128a. Thus, any claim that Brown exercised due diligence in presenting this evidence in support of a reliability of the evidence claim state court is refuted by the record. As a result, the Court of Appeals' opinion is in conflict with 28 U.S.C. §2254(e)(2), *Holland v. Jackson*, 542 U.S. 649, 652-54 (2004); and *Williams v. Taylor*, 529 U.S. 420 (2000).

C. The Court of Appeals' decision conflicts with United States Supreme Court precedent because it found the Nevada Supreme Court applied an incorrect standard for determining sufficiency of the evidence.

Review under *Jackson* asks "whether, after viewing the evidence in the light most favorable to the

prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 318.

The Nevada Supreme Court reviewed the claim citing to *Kazalyn v. State*, 825 P.2d 578, 581 (Nev. 1992), *Kazalyn* asks "whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt. *Id.* at 581 (citations omitted). Without citation or explanation, the Court of Appeals found a distinction between a "reasonable" juror and a "rational" juror. *Brown*, 525 F.3d at 794-95. Appendix A at 13a-14a. The two terms are synonymous and any such distinction is contrary to usage by the United States Supreme Court, *Schlup v. Delo*, 513 U.S. 298, 327 (1995), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); contrary to usage by the Ninth Circuit *Juan H. v. Allen*, 408 F.3d 1262, 1275 (9th Cir. 2005) ("In our Circuit, we have held that a writ of habeas corpus should have been granted to a petitioner who demonstrated that no *reasonable* jury could have found that false statements given under oath were material to an underlying court case, an element essential to sustaining his conviction for perjury.") (emphasis added); contrary to usage by the Fifth Circuit in *Dupuy v. Cain*, 201 F.3d 582, 589 (5th Cir. 2000) ("Obviously, the evidence is sufficient for a *reasonable* juror to find, beyond a reasonable doubt, that Dupuy intended to kill Normand.") (emphasis added), and *U.S. v. Marek*, 238 F.3d 310, 314 (5th Cir. 2001) ("A panel of this Court concluded that *a reasonable* jury could have found that (1) the fortune teller had participated in international telephone calls as Cisneros's agent, and (2) those calls were sufficiently connected to be 'in furtherance' of

that crime.") (emphasis added); the Tenth Circuit in *Berryhill v. Calpone*, 168 Fed.Appx. 253, 255 (10th Cir. 2006) ("Based on the record, we agree with the District Court and the OCCA that a *reasonable* juror could have found proof beyond a reasonable doubt that Berryhill manufactured methamphetamine.") (emphasis added); and the Eleventh Circuit in *Davis v. Kemp*, 829 F.2d 1522, 1532 (11th Cir. 1987) ("Although this may be true, a *reasonable* juror could have found beyond a reasonable doubt that the victim was raped.") (emphasis added); and contrary to the usage in Black's Law Dictionary, Sixth Edition, The American Heritage Dictionary, Second College Edition, and Webster's Dictionary and Thesaurus, 2002 Edition, all of which use the terms synonymously.

Similarly, the Court of Appeals found a distinction between *Jackson's* "trier of fact could have found the essential elements of the crime beyond a reasonable doubt" requirement and the Nevada Supreme Court's "could have been convinced of the defendant's guilt beyond a reasonable doubt." State court judges are presumed to know and follow the law. *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). Federal judges must presume that a state judge applied the appropriate legal standards. *Townsend v. Sain*, 372 U.S. 293, 314-15 (1963), overruled on other grounds by *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992).

Brown cannot reasonably argue that the Nevada Supreme Court did not realize that a finding of guilt beyond a reasonable doubt necessarily requires a finding of each element of the offense beyond a reasonable doubt.

AEDPA does not require express citation to federal law and the Nevada Supreme Court complied with the standard as set forth in *Jackson*. Because the standard employed by the Nevada Supreme Court was identical to that employed in *Jackson*, except as to exact verbiage, the Court of Appeals' opinion is contrary to *Early v. Packer*, 537 U.S. 3, 8-11 (2002), and 28 U.S.C. § 2254(d).

D. The Court of Appeals' decision conflicts with United States Supreme Court precedent when it found that on appeal of the District Court's grant of habeas relief, "However, it is Respondents' burden to establish guilt beyond a reasonable doubt for each and every element of the offense, a burden that Respondents not carried here." *Brown v. Farwell*, 525 F.3d 787, 797 (9th Cir. 2008)

Federal habeas actions are not retrials and do not impose the same burden on the state. *Williams v. Taylor*, 529 U.S. 362, 375-90 (2000). In its opinion, the Court of Appeals stated:

> On appeal, Respondents argue that there is much evidence to support the conviction. However, it is Respondents' burden to establish guilt beyond a reasonable doubt for each and every element of the offense, a burden that Respondents have not carried here.

Brown, 525 F.3d at 797; Appendix A at 19a.

This new standard imposed by the Court of Appeals is contrary to the clear language of 28 U.S.C. §2254, *Williams v. Taylor*, 529 U.S. 362, 375-90 (2000); *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); and the very purposes for which AEDPA was enacted.

The purpose of AEDPA's habeas corpus reforms was to place "more, rather than fewer, limits on the power of federal courts to grant writs of habeas corpus to state prisoners." *Miller-el v. Cockrell*, 537 U.S. 322, 337 (2003). *See Woodford v. Garceau*, 538 U.S. 202, 206-07 (2003); *Duncan v. Walker*, 533 U.S. 167, 178 (2001); and 28 U.S.C. §2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Further, 28 U.S.C. § 2254(e)(1) provides:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody

> pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

The Court of Appeals has shifted the burden to the Warden to establish guilt beyond a reasonable doubt for each and every element of the offense in a federal habeas action. No known authority supports the Court of Appeals' conclusion that the Warden has the same burden on federal habeas review that it undeniably has at trial. Thus the Court of Appeals' opinion is contrary to AEDPA and the numerous Supreme Court opinions interpreting AEDPA.

E. The Court of Appeals' decision conflicts with United States Supreme Court precedent because it mixed and matched legal theories and factual allegations presented in the state courts to find exhausted a claim and factual basis that were never presented to the state courts.

The requirements for exhaustion are clear. A federal court cannot entertain a petition for a writ of habeas corpus unless the petitioner has exhausted available and adequate state court remedies with respect to each of the claims contained in the petition. 28 U.S.C. §§ 2254(b), (c); *Rose v. Lundy*, 455 U.S. 509, 510 (1982). Exhaustion requires a petitioner to present both a factual basis *and* underlying theory in order to satisfy the requirements for exhaustion. *Gray*

v. Netherland, 518 U.S. 152, 162-163 (1996); *Picard v. Connor*, 404 U.S. 270, 275-278 (1971).

On direct appeal, Brown did not present the factual basis and underlying theory for the sufficiency of the evidence claim that he presents in federal court. In his opening brief on direct appeal, the full extent of Brown's sufficiency of the evidence argument was:

> Given the plethora of evidence that the assailant was not Troy Brown, including the hair which did not match, the coat which was different, the lack of watch and zipper, the fact that Megan repeatedly named Trent every time the police brought up Troy to her, the lack of blood on Troy when he first came back home at 1:32 a.m., the absence of scratches or bites from Megan on Troy's body and the total failure of the DNA evidence to be established as trustworthy and reliable in this particular case, Appellant submits that there was insufficient evidence to convict Troy Brown of these crimes.

Appendix I at 120a. The claim clearly possesses no factual support for Brown's reliability claim. Even when examining the other claims, it is clear that Brown did not complain of the reliability of the DNA evidence as he did in federal court. In fact, it was not the nature of the evidence at all that Brown complained about. On direct appeal, Brown made a procedural argument that a hearing should have been conducted before the DNA evidence was admitted. Appendix I at 112a-120a. This is the claim that the Nevada Supreme Court addressed: "Troy claims on appeal that ...(2) the DNA evidence was improperly

admitted because no evidentiary hearing was held." Appendix F at 82a.

No claim was ever presented, and the Nevada Supreme Court never considered whether the DNA evidence was unreliable.

To the extent Brown argued in the Nevada Supreme Court any statistical error in the presentation of the DNA evidence due to the presence of his brothers, it was in footnote 1 of his reply brief on direct appeal. Appendix J at 127a. However, this failed to exhaust Brown's claim. First, reply briefs are limited to answering any new matters set forth in the opposing brief. N.R.A.P. 28(c). Reply briefs may not present new issues and such issues are not considered by the Nevada Supreme Court. *State v. Bennett*, 81 P.3d 1, 13 (Nev. 2003). Second, the only issue this evidence was presented to support was Brown's *claim that the sentencing was improper*. Brown never presented this evidence to the Nevada Supreme Court to support a *claim that the DNA evidence was unreliable*.

Thus, Brown never presented both a factual basis *and* underlying theory in order to satisfy the requirements for exhaustion.

Respectfully Submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 07-15592

[Filed May 5, 2008]
As Amended July 21, 2008

Troy Don BROWN,	)
	)
Petitioner-Appellee,	)
	)
v.	)
	)
Craig FARWELL, Warden, and The Attorney General of The State of Nevada,	)
	)
Respondents-Appellants.	)
	)

Appeal from the United States District Court
for the District of Nevada
Philip M. Pro, District Judge, Presiding

Argued and Submitted
August 16, 2007 – San Francisco, California

Filed May 5, 2008
As Amended July 21, 2008

Before: Diarmuid F. O'Scannlain, Michael Daly, Hawkins, and Kim McLane Wardlaw, Circuit Judges.

COUNSEL

Catherine Cortez Masto, Attorney General, Erik A. Levin, Deputy Attorney General, Criminal Justice Division, Carson City, NV, for the respondent-appellant.

Franny Forsman, Federal Public Defender, Paul G. Turner, Assistant Federal Public Defender, Las Vegas, NV, for the petitioner-appellee.

ORDER

The Opinion filed May 5, 2008 and published at 525 F.3d 787 (9th Cir. 2008) is hereby AMENDED as follows: Page 790, Footnote 1: Remove "Though counsel for Respondents sought to distance himself from this concession at oral argument before us, Respondents are judicially estopped from disavowing their prior representations to the courts. *See Helfand v. Gerson*, 105 F.3d 530, 534-36 (9th Cir. 1997); *Russell v. Rolfs*, 893 F.2d 1033, 1037-39 (9th Cir. 1990)."

The petition for rehearing and suggestion for rehearing en banc are still pending.

OPINION

WARDLAW, Circuit Judge:

At Petitioner Troy Brown's trial for sexual assault, the Warden and State's ("Respondents")

deoxyribonucleic acid ("DNA") expert provided critical testimony that was later proved to be inaccurate and misleading. Respondents have conceded at least twice that, absent this faulty DNA testimony, there was not sufficient evidence to sustain Troy's conviction.[1] In light of these extraordinary circumstances, we agree with District Judge Philip M. Pro's conclusions that Troy was denied due process, and we affirm the district court's grant of Troy's petition for writ of habeas corpus.

I. FACTUAL AND PROCEDURAL BACKGROUND[2]

A. The Crime

In the early morning of January 29, 1994, Jane Doe,[3] a nine-year-old girl, was sexually assaulted in the bedroom of her trailer home in Carlin, Nevada. At the time, Jane was home alone with her four-year-old sister while their mother, Pam, was drinking at a bar and their step-father, Wayne Henle, was working the

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[1] Respondents conceded this point at least twice in the state post-conviction proceedings, both in their written papers and during oral argument.

[2] The Nevada Supreme Court ably set forth the facts underlying this appeal. We repeat them here only as necessary. *See Brown v. State*, 113 Nev. 275, 934 P.2d 235, 237-40 (Nev.1997); *see also Sumner v. Mata*, 449 U.S. 539, 547, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981) (stating that federal courts on habeas must presume correct state court finding of facts).

[3] "Jane Doe" has been substituted for the victim's real name to protect her identity.

night shift. Troy was arrested, tried, and convicted for this crime.

Earlier that night, Pam received a phone call from Raquel Brown, who is married to Troy's brother, Trent, inviting Pam to join her and Trent for a drink at the local bar, CG's, and asking if Jane could babysit Raquel's children while they were at the bar. At 6:30 p.m., Pam took Jane and her sister to Raquel's house, which is located across the street; Pam and Raquel left to meet Trent at CG's. Raquel and Trent left CG's at 7:30 p.m., and Pam remained at the bar. Raquel and Trent returned home and found Jane and her sister watching a movie. When the movie concluded at 9:30 p.m., Raquel took the children home. Jane, wanting to let Pam know they arrived home safely, first called CG's, where the line was busy. Jane then called Peacock Bar, where Troy answered the phone and stated that Pam was at CG's but that he would deliver the message. By the time Troy arrived at CG's, Pam was on the phone with Jane.

When the conversation ended, Pam accompanied Troy to Peacock Bar where they had a drink. Troy was clearly drunk, but "he behaved like a gentleman and made no sexual advances toward" Pam. Pam stated that the last time she saw Troy was between 11 p.m. and midnight. However, one bartender stated that Troy left the bar no later than 12:20 a.m., and another bartender stated that she believed she saw Troy at the bar at 1:30 a.m. Between midnight and 12:30 a.m.,[4]

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[4] The bartender on duty indicated that the call came just before 1 a.m.

Jane called Pam at the bar and explained that some man was at the trailer looking for Pam and had hurt her. When Pam arrived home, she found Jane covered in blood from the waist down and called 911. A police officer and the paramedics responded. Jane stated to the paramedic that she felt pain in her vaginal area, and Pam responded that her ex-husband had done this because he threatened to "f--- [Pam's] daughter in order to get back at [Pam]."

Later at the hospital, vaginal and anal penetration were confirmed. Jane had bruises on her neck and scratches on her face. A vaginal smear was taken because sperm was present. Debris was collected from her teeth because she stated she had bitten the assailant's hands.

Jane described the assailant to the police that night as follows:

> [H]e did not wear a hat and had blonde or sandy-colored hair which was curly at the bottom and thinning on top; she thought he had a small moustache; he was wearing dark jeans, a black jacket with "a zipper for sure," a western type shirt, boots, and a watch which scraped her face.... [She] stated that the assailant smelled like cologne but that it was an "awful smell" ... [like] "beer or puke or something."

That night, Troy was wearing a cowboy hat, dark jeans, a black satin jacket with an orange and yellow CG's logo on the back, and boots. Two witnesses testified that, at 1:05 a.m. that morning, they saw near

Jane's trailer a man wearing a cowboy hat, dark jeans, and a black satin jacket with a bright green emblem on the back that looked like a skull or bandit.

Troy stated that he had been drinking steadily that night and, while walking home to his trailer located ten trailers away from Jane's, had vomited several times, soiling his pants and shirt. When he arrived home, Troy's brother, Travis, awoke from sleeping on the couch. Travis stated that it was 1:32 a.m. when he awoke and that he did not see any traces of blood in the house. Troy washed his clothes as soon as he returned home because he was leaving that day to go to Utah for a week and all of his clothes were already packed. When a police officer arrived at 5 a.m. to question Troy, he saw no blood on Troy or his boots; he also checked Troy's hands, which did not have any evidence of bite marks.

Jane also stated that she fell asleep with a night light on, but that the man who assaulted her must have turned it off because it was off when the man left. Troy's fingerprints were not found anywhere in Jane's trailer, and the one fingerprint found on the night light did not match Troy's.

When the police pressed Jane to tell them who the assailant reminded her of, Jane stated "Troy," and when the police responded "Who?," Jane stated "Trent. Yes, Trent." Jane explained that Trent was Raquel's husband. Jane also stated that the assailant's hair looked like Troy's but then changed her mind and said it looked like Trent's hair. A number of days after the assault, Jane witnessed a television report of Troy's arrest and stated that "she knew that the man on

television was her assailant." Jane also told the police officers that the man she had seen on television had sent her flowers. The card that came with the flowers was signed by Raquel and Trent, not Troy. When the police showed Jane pictures that included Troy's picture and other people that she did not know, Jane was unable to identify Troy as her attacker.

After Troy left for Utah, he contacted the Carlin police to inquire whether he was wanted for arrest, but he was told that he was not. Knowing that he was under suspicion, Troy requested a full-body examination to be conducted by a nurse in order to record his physical condition. On or about February 7, 1994, Troy voluntarily surrendered to the police and was arrested. During the interrogation and throughout all proceedings, Troy has repeatedly denied involvement in the crime.

B. State Court Proceedings

At trial, Respondents presented the testimony of DNA expert Renee Romero of the Washoe County Sheriff's Office Crime Lab. Romero testified that, among other things, there was a 99.99967 percent chance that Troy was the assailant.

The jury found Troy guilty of two counts of sexual assault on a child under the age of fourteen, in violation of Nevada Revised Statutes 200.366, and one count of abuse or neglect of a child resulting in substantial bodily harm, in violation of Nevada Revised Statutes sections 200.508, 432B.020, and 432B.070. Troy appealed to the Nevada Supreme Court, claiming, *inter alia*, the district court abused its

discretion when sentencing him, the bar against double jeopardy was violated by the duplicative convictions for sexual assault and abuse or neglect of a child, the DNA evidence was improperly admitted, and the evidence was insufficient to sustain his conviction. The Nevada Supreme Court vacated the third charge and remanded for resentencing on the second sexual assault count. The trial court resentenced Troy to life with the possibility of parole after ten years on both sexual assault counts, to run consecutively. Troy again appealed to the Nevada Supreme Court, which rejected his appeal. Troy next filed a state petition for post-conviction relief, and, after holding an evidentiary hearing, the state courts denied relief.

C. Federal Court Proceedings

On February 6, 2004, Troy filed his federal petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, arguing, *inter alia,* violations of due process and ineffective assistance of counsel. Judge Pro permitted Troy to expand the record, admitting, among other things, an uncontested report discrediting Romero's testimony by Dr. Laurence Mueller (the "Mueller Report"), a professor of Ecology and Evolutionary Biology at the University of California, Irvine.

The district court granted Troy's petition. First, the district court concluded that, in light of the Mueller Report, Romero's testimony was unreliable. Absent that testimony, no rational trier of fact could conclude beyond a reasonable doubt that Troy was guilty of each and every element of the offenses with which he was charged. The district court also concluded that Troy's

attorney's failure to diligently defend against Respondents' DNA testimony, as well as his failure to investigate the alibi of Henle, a potential suspect, amounted to ineffective assistance of counsel. Respondents timely appealed.

II. STANDARD OF REVIEW

Because Troy filed his petition after April 24, 1996, it is governed by the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d). Section (d)(1) of that provision provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

A decision is "contrary to ... clearly established" Supreme Court precedent "if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases or if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [the Supreme Court's] precedent." *Lockyer v. Andrade*, 538 U.S. 63, 73, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003) (internal quotation marks omitted). A

decision is an "unreasonable application of ... clearly established" Supreme Court precedent "if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 75, 123 S.Ct. 1166 (internal quotation marks omitted). Under the latter inquiry, "[t]he state court's application of clearly established law must be objectively unreasonable." *Id.*

We review a district court's decision to grant or deny a habeas petition under 28 U.S.C. § 2254 de novo. *Bean v. Calderon,* 163 F.3d 1073, 1077 (9th Cir. 1998).

III. DISCUSSION

Troy asserts that there was insufficient evidence to convict him. His argument rests on the admission of Romero's later discredited testimony regarding the DNA evidence, which was introduced without rebuttal at trial. Respondents have conceded that absent introduction of Romero's DNA evidence, the remaining evidence is insufficient to sustain Troy's conviction. Having reviewed the record ourselves, we affirm the district court's conclusion that, had Romero's inaccurate and unreliable testimony on the DNA evidence been excluded, there would have been insufficient evidence to convict Troy on each essential element of the offenses beyond a reasonable doubt. We further agree with the district court's conclusion that the Nevada Supreme Court's decision was both "contrary to" and an "unreasonable application of" established United States Supreme Court precedent.

A. Exhaustion

Respondents erroneously contend that Troy failed to exhaust his insufficiency claim in the Nevada courts. Troy in fact raised this claim on direct appeal, and the Nevada Supreme Court concluded that the totality of the evidence-considering both the DNA and non-DNA evidence together-was sufficient to uphold the conviction. *Brown v. State,* 113 Nev. 275, 934 P.2d 235, 240-42 (Nev.1997); *see also O'Sullivan v. Boerckel,* 526 U.S. 838, 845, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999) ("[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process.").

B. Motion to Supplement the Record

Respondents argue that the district court erred by granting Troy's request to supplement the record with the Mueller Report. Whether we apply the de novo or abuse of discretion standard of review to a district court's expansion of the record in support of a claim of insufficient evidence is an open question. *See Cooper-Smith v. Palmateer,* 397 F.3d 1236, 1241 n. 12 (9th Cir. 2005). However, applying either standard of review, the district court's decision to expand the record here was legally proper.

Under 28 U.S.C. § 2254(e)(2), a claimant who "failed to develop the factual basis of a claim in State court proceedings" will not be permitted to supplement the record in federal court unless the claim relies on (1) "a new rule of constitutional law," made retroactive to cases on collateral review by the Supreme Court,

that was previously unavailable; or "a factual predicate that could not have been previously discovered through the exercise of due diligence"; and (2) "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." Although none of these conditions is met here, "[a]n exception to this general rule exists if a Petitioner exercised diligence in his efforts to develop the factual basis of his claims in state court proceedings." *Cooper-Smith*, 397 F.3d at 1241.

The district court correctly found that Troy "presented a comprehensive discussion of the DNA evidence" before the Nevada Supreme Court. This finding is supported by numerous challenges to the DNA evidence raised in Troy's state court briefs. Troy's attempts were "reasonable" and therefore "diligent." *See Williams v. Taylor*, 529 U.S. 420, 435, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000) ("Diligence for purposes of [§ 2254(e)(2)] depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court."). Moreover, as the district court found, the Mueller Report merely clarifies, rather than fundamentally alters, the DNA evidence and expert testimony that was already before the Nevada courts. *See Vasquez v. Hillery*, 474 U.S. 254, 260, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) ("We hold merely that the supplemental evidence presented by respondent did not fundamentally alter the legal claim already considered by the state courts, and, therefore, did not require that respondent be remitted to state court for consideration of that evidence."). Therefore, the

district court did not err by admitting the Mueller Report.

C. Merits

We agree with the district court that the Nevada Supreme Court's decision was both "contrary to" and "an unreasonable application of" *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). In *Jackson*, the Supreme Court held that a conviction must be upheld if, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319, 99 S.Ct. 2781. "[T]he standard must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law." *Id.* at 324 n. 16, 99 S.Ct. 2781; *see also Chein v. Shumsky*, 373 F.3d 978, 983 (9th Cir. 2004) (en banc).

1. "Contrary to"

When addressing Troy's insufficiency claim, the Nevada Supreme Court stated that "[t]he standard of review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt." *Brown*, 934 P.2d at 241 (citing *Kazalyn v. State*, 108 Nev. 67, 825 P.2d 578 (Nev.1992)). It then compiled-in one paragraph-the facts that supported its conclusion. *Id.* at 241-42.

We agree with the district court that the Nevada Supreme Court's decision was "contrary to" *Jackson*, as the Nevada Supreme Court did not apply the

Jackson standard. Though the Nevada Supreme Court in previous cases had applied the *Jackson* standard, *see, e.g., Wilson v. State*, 99 Nev. 362, 664 P.2d 328, 336 (Nev.1983), here, the state court applied the standard set forth in *Kazalyn v. State. Brown*, 934 P.2d at 241. As the district court pointed out, "[t]he *Kazalyn* standard only requires a reasonable jury-not a rational one." Moreover, under *Kazalyn*, a reviewing court assesses whether the jury could have been "convinced of the defendant's guilt"; the *Jackson* standard is different, requiring the reviewing court to assess "the essential elements of the crime." The Nevada Supreme Court failed to analyze each of the essential elements of the substantive state crime. Instead, it merely recited all of the facts cumulatively without analyzing whether each or any of those facts established an essential element of the counts of conviction beyond a reasonable doubt, and that a rational juror could have so found. *See Chein*, 373 F.3d at 983-93 (analyzing materiality and falsity of statements made in three separate perjury counts to hold that no rational juror could have found the defendant guilty of each element of perjury beyond a reasonable doubt). Therefore, the Nevada Supreme Court's decision was contrary to *Jackson*. In fact, as demonstrated, *infra*, once the unreliable DNA testimony is excluded, a proper application of the *Jackson* standard leads to the conclusion that not all of the essential elements of the crime were in fact proven beyond a reasonable doubt.

2. "Unreasonable application of"

The district court also correctly concluded that the Nevada Supreme Court's decision was "an

unreasonable application of" *Jackson* because, in light of the Mueller Report, no rational trier of fact could have found Troy guilty beyond a reasonable doubt on the evidence presented at trial. The validity and accuracy of the Mueller Report went unchallenged by Respondents, and the district court found it to be credible. We review this finding for clear error, and conclude the district court did not clearly err. *See Buckley v. Terhune*, 441 F.3d 688, 694 (9th Cir. 2006) (en banc).

The Mueller Report indicates that Romero's testimony was unreliable for two main reasons. First, Romero testified that there was a 99.99967 percent chance that Troy's DNA was the same as the DNA discovered in Jane's underwear-or, in other words, that the science demonstrated a near 100 percent chance of Troy's guilt. This assertion was incorrect, as it falls directly into what has become known as the "prosecutor's fallacy." The prosecutor's fallacy occurs when the prosecutor elicits testimony that confuses source probability with random match probability. Put another way, a prosecutor errs when he "presents statistical evidence to suggest that the [DNA] evidence indicates the likelihood of the defendant's guilt rather than the odds of the evidence having been found in a randomly selected sample." *United States v. Shonubi*, 895 F.Supp. 460, 516 (E.D.N.Y.1995) (internal quotation marks and citation omitted), *vacated on other grounds*, 103 F.3d 1085 (2d Cir. 1997); *see also United States v. Chischilly*, 30 F.3d 1144, 1157 (9th Cir. 1994) ("To illustrate, suppose the ... evidence establishes that there is a one in 10,000 chance of a random match. The jury might equate this likelihood with source probability by believing that there is a one

in 10,000 chance that the evidentiary sample did not come from the defendant. This equation of random match probability with source probability is known as the prosecutor's fallacy."); Richard Lempert, *Some Caveats Concerning DNA as Criminal Identification Evidence*, 13 CARDOZO L. REV. 303, 305-06 (1991). Such a fallacy is dangerous, as the probability of finding a random match can be much higher than the probability of matching one individual, given the weight of the non-DNA evidence. *See* William C. Thompson and Edward L. Schumann, *Interpretation of Statistical Evidence in Criminal Trials*, 11 L. AND HUM. BEHAV.. 167, 170-71 (1987) (noting that the prosecutor's fallacy "could lead to serious error, particularly where the other evidence in the case is weak and therefore the prior probability of guilt is low").

Here, Romero initially testified that Troy's DNA matched the DNA found in Jane's underwear, and that 1 in 3,000,000 people randomly selected from the population would also match the DNA found in Jane's underwear (random match probability). After the prosecutor pressed her to put this another way, Romero testified that there was a 99.99967 percent chance that the DNA found in Jane's underwear was from Troy's blood (source probability). This testimony was misleading, as it improperly conflated random match probability with source probability. In fact, the former testimony (1 in 3,000,000) is the probability of a match between an innocent person selected randomly from the population; this is not the same as the probability that Troy's DNA was the same as the DNA found in Jane's underwear, which would prove his guilt. Statistically, the probability of guilt given a

DNA match is based on a complicated formula known as Bayes's Theorem, *see id.* at 170-71 n. 2, and the 1 in 3,000,000 probability described by Romero is but one of the factors in this formula. Significantly, another factor is the strength of the non-DNA evidence. Here, Romero improperly conflated random match and source probability, an error that is especially profound given the weakness of the remaining evidence against Troy. In sum, Romero's testimony that Troy was 99.99967 percent likely to be guilty was based on her scientifically flawed DNA analysis, which means that Troy was most probably convicted based on the jury's consideration of false, but highly persuasive, evidence.

Second, Romero inaccurately minimized the likelihood that Troy's DNA would match one of his four brothers' DNA, thus underestimating the likelihood that one of Troy's brothers could have been the perpetrator. She testified that there was a 25 percent chance of two brothers sharing both alleles at one locus, and, using that figure, a 1/6500 chance that one of Troy's brothers would match Troy's DNA at all five loci.[5] The Mueller Report indicated that Romero's

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[5] As the district court pointed out, "The science of human DNA is highly complex and difficult to understand, even for the well educated and patient student. It involves the matching of human genome materials or alleles and a statistical calculation of how often that match might occur in a chosen population." We have previously described the science of DNA testing as follows:

> An allele is any alternative form of a gene that can occupy a particular chromosomal locus. In humans and other diploid organisms there are two alleles, one on each chromosome of a homologous pair. Forensic DNA tests compare allele combinations at loci where the alleles tend

calculation was incorrect, as the correct figure is 1/1024. More importantly, Romero's testimony is misleading because it presented the narrowest interpretation of the DNA evidence. Had Romero accounted for Troy's four brothers, two of whom lived in Carlin and two of whom lived in neighboring Utah, the chance that Troy's DNA would match at least one of his four brothers' DNA can increase to 1/66-almost one hundred times the probability asserted by Romero. This omission was especially egregious given that the victim, Jane, had twice identified Troy's brother, Trent, as the assailant. Again, Respondents introduced nothing to contradict the findings of the Mueller Report.

A federal court on habeas may exclude evidence admitted in the state court if the evidence "rendered[the] trial so fundamentally unfair as to violate federal due process." *Butcher v. Marquez*, 758 F.2d 373, 378 (9th Cir. 1985). We agree with the district court that Romero's testimony was unreliable, as it was inaccurate and ignored logical implications about Troy's four brothers, each of whom lived in the

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> to be highly variable across individuals and ethnic groups. If there is no match between the alleles from the evidence DNA and the potential suspect's DNA, the suspect is generally ruled out as the source of the evidence, unless the failure is attributable to inadequate test conditions or contaminated samples. If there is a match, analysts use the frequency of the alleles' appearance in the relevant population to calculate the probability that another person could have the same pattern of allele pairs.

Chischilly, 30 F.3d at 1153 n. 7 (internal quotation marks and citations omitted).

general vicinity. Admission of this unreliable testimony most certainly rendered the trial fundamentally unfair, as even Respondents concede that "[t]here was insufficient evidence to convict the Defendant unless the DNA evidence established his guilt." Thus, the admission of Romero's unreliable and misleading testimony violated Troy's due process rights, and the district court did not err in excluding it. *See United States v. Scheffer*, 523 U.S. 303, 309, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998) ("State and Federal Governments unquestionably have a legitimate interest in ensuring that reliable evidence is presented to the trier of fact in a criminal trial. Indeed, the exclusion of unreliable evidence is a principal objective of many evidentiary rules.").

After excluding Romero's testimony, the district court weighed the sufficiency of the remaining evidence in the light most favorable to the prosecution, *Jackson*, 443 U.S. at 319, 99 S.Ct. 2781, and concluded that "there [is] sufficient conflicting testimony to raise a reasonable doubt in the mind of any rational trier of fact." On appeal, Respondents argue that there is much evidence to support the conviction. However, it is Respondents' burden to establish guilt beyond a reasonable doubt for each and every element of the offense, a burden that Respondents have not carried here.

The district court thoroughly catalogued the numerous inconsistencies that would raise a reasonable doubt as to Troy's guilt in the mind of any rational juror. Three witnesses disagreed about the time at which Troy left CG's to return home. Notably, one witness testified that Troy remained at the bar at

1:30 a.m., thirty to ninety minutes after the assault occurred. Moreover, although Jane at times identified Troy as her attacker, twice she identified Trent as the assailant. There is also considerable conflict between Jane's description of her attacker and Troy's clothing and appearance that night. For example, Troy's jacket was zipperless, but Jane testified that her assailant's jacket had "a zipper for sure."

The prosecution's theory is also undermined by the testimony of Troy's brother and roommate, Travis, who testified that he did not see blood on Troy's boots or notice anything unusual about Troy when he arrived home at 1:32 a.m. Furthermore, early the next morning, when an officer examined Troy, he found no evidence of marks on Troy's hands or blood on Troy's clothing, which would have been consistent with Troy being the attacker. That Troy laundered his clothing, though plausibly consistent with him being the assailant, is also consistent with his testimony that he vomited on himself on the walk home, and that he wanted to clean his clothes before his trip to Utah the following day.

The manner in which the forensic evidence at the scene was collected and examined raises doubt as well. Troy's fingerprints did not match the fingerprint on the night light in Jane's room, which Jane testified her attacker turned off before waking her up. Moreover, neither Jane's bedding nor the pubic hairs discovered in a jacket in Jane's bedroom were tested for DNA samples.

At all times, Troy has denied involvement in the crime. He also took actions inconsistent with having

something to hide. While in Utah, he called the Carlin police to inquire whether he was wanted for arrest. Knowing that he was under suspicion, he voluntarily submitted to a full-body examination to record that he had no markings consistent with Jane's description of the attack.

The conflicts in the evidence are simply too stark for any rational trier of fact to believe that Troy was the assailant beyond a reasonable doubt, an essential element of any sexual assault charge. This conclusion is confirmed by Respondents' own concessions. Therefore, the Nevada Supreme Court's decision was "an unreasonable application of" *Jackson*.

IV. CONCLUSION

Because we affirm the district court's grant of Troy Brown's habeas petition on due process grounds, we need not reach his arguments regarding ineffective assistance of counsel. The district court's grant of Troy's petition for writ of habeas corpus and reversal of his conviction is **AFFIRMED.** Respondents shall retry Troy within 180 days or shall release him from custody.

AFFIRMED.

O'SCANNLAIN, Circuit Judge, dissenting:

Because I am persuaded that the Nevada Supreme Court did not misapply federal law with respect to sufficiency of the evidence review, I must respectfully dissent.

I

A habeas petitioner "is entitled to habeas corpus relief if it is found that upon the record evidence *adduced at the trial* no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S.Ct. 2781, 61 L.Ed.2d 560 (emphasis added).[1]

> After *Winship* the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to "ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt."

Id. at 318-19, 99 S.Ct. 2781. In conducting the sufficiency of the evidence inquiry, a reviewing court must "view[ ] the evidence in the light most favorable to the prosecution." *Id.* at 319.

AEDPA adds deference to such inquiry. In *Sarausad v. Porter*, 479 F.3d 671, 677 (9th Cir. 2007), we wrote:

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[1] The district court acknowledged this standard. *See* District Court Order on Merits, pg. 5. (hereinafter "Order") ("It is the evidence actually presented at trial, not evidence that should have or might have been presented, which is reviewed by the court.").

> [28 U.S.C.] § 2254(d)(1) plainly applies to *Jackson* cases. A state court must decide under *Jackson* whether the evidence viewed in the light most favorable to the prosecution, would allow any rational trier of fact to find the defendant guilty beyond a reasonable doubt.

Id. Thus, AEDPA permits habeas relief only if "a state court determination that the evidence was sufficient to support a conviction was an "objectively unreasonable" application of *Jackson*." *Id.*

With respect, I am persuaded that the Nevada Supreme Court complied with this standard. Although the state court did not cite *Jackson*, it noted that "[t]he standard of review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt." *Brown*, 934 P.2d at 241. That standard mirrors the *Jackson* approach, and AEDPA does not require express citation to federal law. *See Early v. Packer*, 537 U.S. 3, 8, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002) (per curiam). The Nevada Supreme Court then reviewed the record and concluded that "a jury, acting reasonably, could have been convinced of Troy's guilt beyond a reasonable doubt":

> Testimony indicated that Troy left the bar around 12:15 a.m., that Troy lived relatively close to the bar, and that Troy lived very close to Jane Doe. Troy had enough time to get from the bar to Jane Doe's house and to assault Jane Doe before she made the telephone call to her mother at approximately 1:00 a.m. While Jane Doe could not identify her assailant, her

> description of his clothing was similar to what Troy was wearing; she also said that her assailant smelled like beer or vomit and testimony indicated that Troy had been drinking beer and had vomited several times that night. Furthermore, testimony indicated that Troy got home at approximately 1:30 a.m., which gave him enough time to assault Jane Doe. Additionally, the Dokes testified that they saw someone resembling Troy in a black jacket and black hat stumbling in the road near Jane Doe's house at 1:05 a.m. Troy also washed his pants and shirt when he got home, arguably to remove the blood evidence from his clothes. Finally, the DNA evidence indicated that semen collected from Jane Doe's underwear matched Troy's and that only 1 in 3,000,000 other people had matching DNA (the second DNA test indicated that 1 in 10,000 people had matching DNA).

Brown, 934 P.2d at 241-42.

In reviewing the Nevada Supreme Court's decision, the district court failed to view the evidence in the light most favorable to the prosecution. Unlike in *Sarausad*, the district court parsed the conflicts in the trial testimony and found several inconsistencies that it considered to be of "grave concern." Order, pg. 9. For example, the court cited to evidence *first added* to the record on *federal habeas*, that the prosecution's DNA expert "incorrectly calculated" the DNA matching probability and misleadingly stated "the lowest probability possible among siblings."Order, pg. 8. It also stated that "there was conflicting testimony about

the time that Petitioner actually left the bar and headed home" and "[t]here is also conflict between the victim's description of her assailant and Petitioner's apparel and appearance."Order, pg. 9. But under *Jackson,* these disputed facts simply should have been viewed in the light most favorable to the government.

In contrast, the Nevada Supreme Court viewed the facts in a manner that accorded with the *Jackson* standard. For example, it stated that Jane Doe had called her mother around 1:00 a.m., although the evidence conflicted as to whether Jane Doe placed the call at about midnight or around 1:00 a.m. Because the latter testimony gave Troy more time to assault Jane Doe, the Nevada Supreme Court correctly assumed that the jury had accepted that version of the facts. Furthermore, the Court did not mention conflicting points in the testimony, such as statements that the emblem on Troy's jacket was yellow and orange and other statements that it was bright green. *See Sarausad,* 479 F.3d at 683 ("We have considered the evidence in the light most favorable to the prosecution. We have not considered (or described here) the evidence that contradicted or minimized the importance of the evidence favoring the prosecution.").

Again, with respect, I am not persuaded by the district court's view that the Nevada Supreme Court's description of the facts was a series of "factual *determinations,*" Order, pg. 9 (emphasis added); rather, it was not making factual findings but simply reading the evidence in the light that most supported a finding of guilt.

But even more problematic than the district court's focus on the testimonial conflicts is its, and the majority's, failure to give *any* weight to the DNA evidence. *See id.* at 17-20. The district court stated: "[A]bsent the DNA testimony and even after weighing the evidence in favor of the prosecution, there are [*sic*] sufficient conflicting testimony to raise a reasonable doubt in the mind of any rational trier of fact." *Id.* at 9. *Jackson* does not permit a federal court to resolve a sufficiency-of-the-evidence claim by imagining a different state trial in which evidence actually presented would have been excluded-especially not on the basis of reports added to the record during federal habeas review.

Even if one accepts Dr. Mueller's estimate that "the chance of a single sibling matching Troy Brown's DNA profile is 1 in 263,"[2] "the chance that among two brothers, one or more would match is 1/132," and the chance of "four brothers [matching would be] 1 in 66," no rational trier of fact would have changed its mind. First, the DNA still would have suggested that the rape was committed by Brown or one of his brothers. And the likelihood that one of his brothers would have such DNA was very slim: if not 1/6500, then at most 1/132. Thus, it was extremely unlikely that a random person committed the crime, and of the brothers, it was extremely unlikely that the specimen DNA would

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[2] The numbers, as estimated by the district court and various experts, differ. I cannot say which are right, but they all suggest that a proper calculation would have taken into greater account the probability of sibling allele identity.

match not only Troy-as it did-but another brother.[3] These probabilities put together still constitute overwhelming DNA evidence against Troy which the jury was entitled to consider.

Moreover, there was considerable circumstantial evidence to focus the jury's attention on Troy and to remove any reasonable doubt as to whether one of his brothers committed the crime. As noted above, two of Troy's brothers were not even in the state at the time, and one of those was only 13. Another brother (Travis) was present in the area but had an uncontested alibi that he had been sleeping at or shortly after the time of the crime. The fifth brother (Trent) was present at the time and warranted greater suspicion because Jane Doe had stated at one point that she thought he was her attacker.

The likelihood that the jury would have had a reasonable doubt based on Trent's being in the picture was negligible. Trent already played a visible and non-incriminating role in the events. He and his wife Raquel had met Pam at the bar that night and had been at their house thereafter; no evidence suggested that he went over to Jane Doe's trailer. Moreover, the jury had overwhelming grounds to conclude that between the two brothers, the rapist was Troy. The attacker smelled like vomit, and Troy had gotten drunk by having twenty drinks over the course of the night and had vomited. In contrast, the evidence was

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[3] Such reasoning does not commit the "prosecutor's fallacy" because the set of persons in my data pool is specified (whether it contains the three brothers in the area or all five brothers).

that Trent had spent 30 minutes at the bar and was home with his wife and children thereafter. Furthermore, the Dokes saw someone staggering along the road by Jane Doe's trailer around the time of the crime, wearing clothes they described as closely resembling those that Troy was wearing the night of the crime. In contrast, no evidence suggested that Trent was wearing similar clothes (and Brown does not contend so now). The timing and the circumstantial evidence all pointed toward Troy, not Trent.

The Nevada Supreme Court properly considered the evidence, including the DNA evidence, as it was presented by the prosecution at trial. The compelling force of the DNA evidence, coupled with the strong circumstantial evidence and inferences supported by the totality of the evidence, firmly grounded the Nevada Supreme Court's decision. *See Sarausad*, 479 F.3d at 678 ("In performing a *Jackson* analysis, '[c]ircumstantial evidence and inferences drawn from [the record] may be sufficient to sustain a conviction.' ") (citation omitted).

II

In sum, in light of the standard of review prescribed by AEDPA, I would reverse the district court's order granting the petition for habeas relief. Therefore, I must respectfully dissent from the majority's decision to affirm.

APPENDIX B

UNITED STATES DISTRICT COURT
******* DISTRICT OF NEVADA**

CASE NUMBER: 3:03-cv-00712-PMP-VPC

[Filed December 15, 2006]

TROY BROWN,	)
	)
Petitioner,	)
	)
V.	)
	)
CRAIG FARWELL, Warden, and	)
THE ATTORNEY GENERAL OF THE	)
STATE OF NEVADA,	)
	)
Respondents.	)
	)

JUDGMENT IN A CIVIL CASE

* * *

X **Decision by Court.** This action came to be considered before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the First Amended Petition for Writ of Habeas Corpus (docket #19) is GRANTED. IT IS FURTHER ORDERED that the conviction is REVERSED as being in violation of the Constitution of the United States. Respondents shall retry Brown within 180 days or shall release him from custody.

December 15, 2006 **LANCE S. WILSON**
Clerk

Daniel R. Morgan
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

No. 3:03-cv-00712-PMP-VPC

[Filed December 14, 2006]

TROY BROWN,	)
	)
Petitioner,	)
	)
v.	)
	)
CRAIG FARWELL, Warden, and THE ATTORNEY GENERAL OF THE STATE OF NEVADA,	)
	)
Respondents.	)

ORDER ON MERITS

This action is a Petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, by Troy Brown, a prisoner at the Lovelock Correctional Center. The matter is before the Court on the merits of the claims presented.

I. Procedural History

Petitioner was arrested and charged with Sexual Assault on a Child under the Age of 14 Years, Resulting in Substantial Bodily Harm (Count I), Sexual Assault on a Child under the Age of 14 Years (Count II), Attempted Murder (Count III), and Abuse or Neglect of a Child less than Eighteen Years of Age Resulting in Substantial Mental Harm (Count IV). Exhibit 21.[1] Following a jury trial, Petitioner was found guilty on all but the attempted murder charge. Exhibits 35 an 36. He was sentenced by the jury to life in prison with the possibility of parole after ten years on Count I. *Id.* The Court later sentenced Petitioner to life with the possibility of parole after ten years on Counts II and twenty years on Count IV, all to run consecutively. Exhibit 58, p. 20.

Petitioner appealed the conviction and sentence. Exhibits 62 and 65. The Nevada Supreme Court remanded the matter to the trial court for a new sentencing hearing, based on the finding the district judge abused his discretion during the sentencing phase of the trial. . . ." Exhibit 70, pp 4-5, *see also Brown v. State*, 113 Nev. 275, 934 P.2d 235 (1997). The Supreme Court also vacated the child abuse/sexual assault conviction (Count IV) as a violation of double jeopardy. *Id.*

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[1] The exhibits referenced in this order are those filed by Petitioner in support of his first amended petition. The exhibits are found in the Court's record at docket ## 20-24.

Petitioner then filed a motion for a new trial and motion to vacate and continue sentencing. Exhibit 86. The motions were denied. Exhibit 87. Petitioner was resentenced, receiving life with the possibility of parole after 10 years on Count II, to run consecutive to the sentence imposed for Count I. The amended judgment of conviction was filed on March 18, 1998. Exhibit 92.

Petitioner filed timely notices of appeal addressing the denial of his motions for a new trial and to vacate sentencing and the amended judgment of conviction. Exhibit 93. The appeals were consolidated on Petitioner's motion. Exhibits 142 and 146. The Nevada Supreme Court dismissed the appeals on September 8, 2000.

Petitioner next filed a state petition for post-conviction relief. Exhibit 158. An evidentiary hearing on the petition was held and the court denied relief. Exhibits 163 and 164. Petitioner once again appealed and the Nevada Supreme Court affirmed the denial through its order dated November 21, 2003. Exhibit 172.

Petitioner submitted a *pro se* petition for writ of habeas corpus to this Court on December 16, 2003 (docket #6). Petitioner was appointed counsel (docket #10) and then filed a First Amended Petition (docket #19) on November 12, 2004.

Respondents filed a Motion to Dismiss the First Amended Petition (docket #30) arguing that Ground One of the petition is unexhausted. The motion was denied (docket #33). Respondents have now filed an Answer (docket #42) to which Petitioner replied

(docket #47) filing a contemporaneous motion to supplement the record (docket #48). The motion to supplement the record was granted after full briefing. Respondents moved to reconsider and alternatively sought to supplement their answer. Reconsideration was denied, but the Court allowed the brief as a supplement to the Answer.

Habeas Corpus Standards

28 U.S.C. § 2254(d), a provision of the Antiterrorism and Effective Death Penalty Act (AEDPA), provides the legal standards for this Court's consideration of the petition in this case:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). These standards of review "reflect the ... general requirement that federal courts not disturb state court determinations unless the state

court has failed to follow the law as explicated by the Supreme Court." *Davis v. Kramer*, 167 F.3d 494, 500 (9th Cir. 1999).

A state court decision is contrary to clearly established Supreme Court precedent, within the meaning of 28 U.S.C. § 2254, "if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [the Supreme Court's] precedent." *Lockyer v. Andrade*, 538 U.S. 63 (2003) (*quoting Williams v. Taylor*, 529 U.S. 362, 405-06 (2000), and *citing Bell v. Cone*, 535 U.S. 685, 694 (2002).

A state court decision is an unreasonable application of clearly established Supreme Court precedent, within the meaning of 28 U.S.C. § 2254(d), "if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Andrade*, 538 U.S. at 74 (*quoting Williams*, 529 U.S. at 413). The "unreasonable application" clause requires the state court decision to be more than incorrect or erroneous; the state court's application of clearly established law must be objectively unreasonable. *Id.* (*quoting Williams*, 529 U.S. at 409).

In determining whether a state court decision is contrary to federal law, this court looks to the state courts' last reasoned decision. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Shackleford v. Hubbard*,

234 F.3d 1072, 1079 n.2 (9th Cir. 2000), *cert. denied*, 534 U.S. 944 (2001). Furthermore, "a determination of a factual issue made by a State court shall be presumed to be correct," and the petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

The Amended Petition raises four grounds for relief:

1. Insufficient evidence to convict in violation of Petitioner's rights to due process, guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

2. Ineffective assistance of counsel at trial in violation of the Sixth and Fourteenth Amendments to the United States Constitution, in failing to enforce a stipulated DNA testing protocol and in failing to object to the DNA evidence admitted at trial.

3. Ineffective assistance of counsel at trial in violation of the Sixth and Fourteenth Amendments to the United States Constitution in failing to properly investigate the case, in particular by failing to present evidence that the victim's stepfather was an alcoholic prone to attack women when drunk, that he had been charged with felony sexual assault in Utah

and was involved in a similar matter in Carlin, Nevada.

4. Ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendment guarantees in failing to move for a mistrial because Petitioner was exposed to jurors while wearing shackles and jail garb.

5. Ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendment guarantees in failing to move to dismiss the case because of the State's loss of teeth scrapings that would have excluded Petitioner as the Assailant.

First Amended Petition (docket #19).

Ground One

Petitioner claims that there was insufficient evidence to convict him on the sexual assault charges, claiming that (a) the State mishandled the evidence; (b) that Renee Romero, of the Washoe County Sheriff's Office Crime Lab incorrectly testified that her DNA analysis showed a 99.9967 percent "likelihood" of a match between the perpetrator and Petitioner and a .02 percent likelihood of brothers having the same DNA upon which testimony the prosecutor then argued that the jury could be 99.9967 percent sure that Petitioner committed the crime; (c) that the State violated a court-ordered DNA testing protocol; (d) and, that the State's DNA expert (Romero) was improperly qualified as an expert at a time when DNA analysis was "in its infancy" at the Washoe County Crime Lab,

the trial court failed to conduct a pre-trial hearing about the admissibility of the evidence, and there was no defense expert brought to test the validity of the State's DNA evidence.

Under federal law, there is sufficient evidence presented at trial if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319 (1979). It is the evidence actually presented at trial, not evidence that should have or might have been presented, which is reviewed by the court. *Id.* However, if the evidence is not reliable, then due process requires it be excluded. *See e.g., United States v. Scheffer,* 523 U.S. 303, 309 (1998) ("State and Federal Governments unquestionably have a legitimate interest in ensuring that reliable evidence is presented to the trier of fact in a criminal trial. Indeed, the exclusion of unreliable evidence is a principal objective of many evidentiary rules."); *Idaho v. Wright,* 497 U.S. 805 (1990) (hearsay testimony not admissible because it is unreliable); *Lee v. Illinois,* 476 U.S. 530 (1986) (codefendant's confession was presumptively unreliable to overcome the presumption against admission of such uncross-examined evidence); *Marshall v. Lonberger,* 459 U.S. 422, 440 (1983) (evidence of prior conviction not admissible if conviction unreliable).

In seeking relief from this Court, Petitioner argues that the physical evidence was mishandled by police, that the testimony related to the DNA evidence was unreliable and that, absent that testimony, there was insufficient evidence to convict him of sexual assault.

Petitioner focuses his argument on the DNA evidence, claiming that Romero was insufficiently vetted as to her expertise, that she mischaracterized the general population DNA Random Match Probability and misstated the probability of a DNA match among siblings, and as a result the jury fell victim to what has become known as the "prosecutor's fallacy."

The science of human DNA is highly complex and difficult to understand, even for the well educated and patient student. It involves the matching of human genome materials or alleles and a statistical calculation of how often that match might occur in a chosen population. An allele is "any alternative form of a gene that can occupy a particular chromosomal locus. In humans and other diploid organisms there are two alleles, one on each chromosome of a homologous pair." Dorland's *Illustrated Medical Dictionary* 48 (27th ed. 1988). Forensic DNA tests compare allele combinations at loci where the alleles tend to be highly variable across individuals and ethnic groups. If there is no match between the alleles from the evidence DNA and the potential suspect's DNA, the suspect is generally ruled out as the source of the evidence, unless the failure is attributable to inadequate test conditions or contaminated samples. If there is a match, analysts use the frequency of the alleles' appearance in the relevant population to calculate the probability that another person could have the same pattern of allele pairs. *See* Georgia Sargeant, *DNA Evidence Finding Stricter Scrutiny, New Uses, Trial*, Apr. 1993, at 15. Under the product rule the probabilities of finding a match at each given locus on the samples satisfying statistical criteria for a match are multiplied together to calculate the random probability that the trace DNA

found at the crime scene could have come from another member of the population represented by the defendant." *U.S. v. Chischilly* 30 F.3d 1144, 1155 n. 14 (9th Cir. 1994).

"The prosecutor's fallacy' occurs when a prosecutor presents statistical evidence to suggest that the [DNA] evidence indicates the likelihood of the defendant's guilt rather than the odds of the evidence having been found in a randomly selected samples." *United States v. Shonubi,* 895 F.Supp. 460, 516 (E.D.N.Y. 1995). The prosecutor's fallacy is present when the jury accepts the DNA evidence as a statement of source probability (i.e., the likelihood that the defendant is the source of the evidentiary sample). *See Chischilly* 30 F.3d at 1155-1157 (9th Cir. 1994), *citing* Lempert, *Caveats Concerning DNA*, 13 Cardozo L.Rev. 303, 306 (1991) (positing that "[u]nfortunately, the careless presentation of evidence ··· may make it look as if the question of the rareness of the evidence DNA profile and the probability that the defendant's matching DNA is the source of the evidence profile are identical"), and Koehler, *Error and Exaggeration in the Presentation of DNA Evidence at Trial*, 34 Jurimetrics 21, 27 n. 24 (documenting instances where courts, commentators and expert witnesses have committed such source probability errors).

In this instance, according to the report prepared by Laurence Dochez Mueller, a professor in Ecology and Evolutionary Biology at the University of California, Irvine, the .000033 percent likelihood that the perpetrator was not Troy Brown, as testified to by Ms. Romero, falls directly into the prosecutor's fallacy.

See Exhibit 197.[2] However, this misstatement is not the only one made by Romero, according to Petitioner.[3] The most egregious misstatement relates to the probability of the DNA evidence coming from one of Petitioner's four brothers, two of which were in Carlin, Nevada at the time of the assault and two of which were within the region, residing in Loa, Utah. *See* Exhibit 198, Affidavit of Ed Heddy.

At trial, Romero testified that there is a 25 percent chance that two brothers "shar[e] both alleles at a single locus in common," which she calculated as a 1 in 6500 chance that these two brothers' DNA would match at five loci. Exhibit 31, p. 343. According to the report prepared by Mueller, this statistical probability represented the lowest probability possible among siblings, assumes that the parents are heterozygotes, sharing only one allele in common, and is incorrectly calculated. *See* Exhibit 197, p. 1. Furthermore, if the parents are not heterozygotes, and no evidence was presented at trial as to Petitioner's parents' DNA, the probability of two siblings matching could be 50% or 100%. *Id.* Significantly, Romero's calculations did not take into account that Petitioner had four brothers living in the general vicinity at the time of the attack. Given this fact, Mueller opines that even taking the

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[2] Mueller's report admitted to supplement the record in these proceedings, was not presented to the Nevada Supreme Court during Petitioner's post-conviction proceedings. However, the thesis of the report was argued during post-conviction and the report was accepted on the basis.

[3] Respondents present no scientific evidence or information to counter Mueller's conclusions.

least likely chance for a match, 25%, the chance that one or more brothers would match at a single loci on the DNA chain is 1 in 256, not 1 in 6500. *Id.*

Applying a formula provided by the second National Research Council report on DNA typing, and using the FBI Caucasian database, Mueller calculates that the chance of a single sibling matching Troy Brown's DNA profile is 1 in 263 and the chance that among two brothers, one or more would match is 1 in 132. Applying the formula to four brothers, the chance increases to 1 in 66. *Id.*, p. 2. A 1 in 66 probability is significantly different than a 1 in 6500 probability.

Romero's testimony was inaccurate and, therefore, unreliable. Taking into account the State's own admission that absent the DNA evidence, there was insufficient evidence to convict Petitioner, the state court's factual determinations are called into question.[4] Moreover, the state court's application of law to the facts also presents grave concern.

In considering Petitioner's claims on direct appeal, the Nevada Supreme Court set out a lengthy and detailed finding of facts. *See* Opinion and Order, Exhibit 70, pp. 2-11. Because of their detail, the facts will not be repeated in their entirety here. However, absent the DNA testimony and even after weighing the evidence in favor of the prosecution, there are sufficient conflicting testimony to raise a reasonable doubt in the mind of any rational trier of fact. For example, there was conflicting testimony about the

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[4] *See* Exhibit 161, p. 13.

time that Petitioner actually left the bar and headed home. *See e.g.* Exhibit 70, testimony of the victim's mother, and compare the testimony of the two bartenders at CG;s Bar, pp. 3, 5, and 6.

There is also conflict between the victim's description of her assailant and Petitioner's apparel and appearance. The victim testified that her assailant wore a watch that scratched her face and that his jacket definitely had a zipper. *Id.* p. 5. She testified her attacker did not wear a hat, might have had a small moustache, and had longish sandy blond hair that was curly at the ends and thinning on top. *Id.* When asked, the victim told police that the attacker reminded her of Petitioner, but then said it was Trent Brown, who is Petitioner's brother. She told police at least two times that her attacker was Trent Brown and she could not identify Petitioner Tony Brown as her attacker in a photo lineup. *See id.*, pp. 5, 7. Other evidence showed that Petitioner did not own a watch and his jacket, although similar in some respects to the victim's description, did not have a zipper.

Petitioner's other brother and roommate, Travis, testified that he was awakened by Petitioner's return home at 1:32 a.m. on the night of the attack. He testified that he did not see anything unusual about Petitioner and that he did not see any blood on Petitioner or anywhere in the house. *Id.*, p. 6. Officer Terry testified that at five a.m. the morning after the attack, when he awakened Petitioner to question him, he did not observe any evidence of bite marks on Petitioner's hands and observed no blood on his body or on his boots. *Id.* The officer had an opportunity to

view much of Petitioner's body, as he was sleeping in only a pair of boxer shorts. *Id.*

According to his own testimony, Petitioner had laundered the shirt and jeans that he was wearing the night of the attack because he was leaving for a week in Utah early the next morning and needed all of his clothes for the trip. *Id.* He testified the shirt and jeans were soiled because he was so drunk that night that he had vomited several times during his walk from the bar to his house. *Id.*[5]

While in Utah, Petitioner called the Carlin police to see if he was wanted for arrest, being told no. *Id.* While in Utah, Petitioner also went to a nurse for a full body examination because the victim reported that she had bitten and scratched her attacker and Petitioner wanted a record of his condition. *Id.*

None of Petitioner's fingerprints were found in the victim's home and he surrendered his jacket and cowboy hat to the police for their examination. He repeatedly denied any involvement in the crime, including at the time of sentencing even though the judge made it very clear that, unless Petitioner accepting responsibility for the attack, the sentence would be very severe. *Id.*, pp. 7, 10-11.

The police took Petitioner's bedding when they executed a search warrant for his residence. However,

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[5] Testimony indicated that Petitioner had consumed at least twenty alcoholic beverages at the various bars he visited that night.

the bedding was never tested for DNA evidence. Police found no evidence of blood on Petitioner's boots and did not process pubic hairs found in a fleece jacket recovered from the victim's bedroom. A single fingerprint found on the nightlight in the victim's bedroom was not Petitioner's. *Id.*, pp. 8-9. At trial, Rene Romero of the Washoe Crime Lab testified that she identified Petitioner's DNA in the victim's underwear. *Id.* However, there was no inquiry about how the DNA might have gotten into the underwear, considering that the victim testified the attacker had removed her underwear prior to the sexual assault. Moreover, at the preliminary hearing, Romero had testified that there was insufficient stain sample in the panties to do the RFLP type testing. *See* Exhibit 19, pp. 172-176. Then, shortly before trial, the RFLP testing was done. At trial, Romero testified that she had found sufficient sample in the panties to conduct the testing. The defense did not call it's own expert to testify about the DNA evidence.

In its decision on direct appeal, the Nevada Supreme Court applied an incorrect standard for sufficiency of the evidence, although in the past it had recognized the federal standard set out in *Jackson*. *See, e.g. Wilson v. State,* 99 Nev. 362, 374-375, 664 P.2d 328,336 (1983). The standard cited by the court on Petitioner's appeal was "whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt." The state court cited to *Kazalyn v. State,* 108 Nev. 67, 71, 825 P.2d 578, (1992). This standard, while similar to the *Jackson* standard, is sufficiently different to require a closer comparison. The *Kazalyn* standard only requires a reasonable jury - not a rational one.

Moreover, it does not require that the jury find all essential elements beyond a reasonable doubt. It merely requires the jury be convinced the defendant is guilty beyond a reasonable doubt. These two standards are not the same, and in fact, the standard applied by the Nevada Supreme Court in this instance was contrary to clearly established federal law as set out in *Jackson v. Virginia* in 1979.

Based on the foregoing, the Court finds that the Nevada Supreme Court's determination of the sufficiency of the evidence claim involved an objectively unreasonable factual finding as well as a legal determination that was contrary to clearly established federal law. Setting aside the unreliable DNA testimony, this Court finds that a reasonable doubt would exist in the mind of any rational trier of fact, preventing them from finding each and every element of the crimes for which Petitioner presently stands convicted. Petitioner is entitled to relief on this Ground.

Ground Two

In Ground Two of the Petition, Petitioner claims that he was denied effective assistance of counsel when his attorney failed to enforce the stipulated DNA RFLP testing protocol and did not object to the DNA evidence admitted at trial.

In *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970), the Supreme Court declared that "the right to counsel is the right to the effective assistance of counsel." In *Strickland v. Washington*, 466 U.S. 668 (1984), the Court established the standards by which

claims of ineffective counsel are to be measured. In *Strickland*, the Court propounded a two prong test; a petitioner claiming ineffective assistance of counsel must demonstrate (1) that the defense attorney's representation "fell below an objective standard of reasonableness," and (2) that the attorney's deficient performance prejudiced the defendant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688, 694.

As the discussion of Ground One demonstrates, the DNA evidence and expert testimony admitted at trial was unreliable. Moreover, the defense was granted funding to engage its own DNA expert, but still failed to present an expert at trial in order to effectively counter the validity of the State's DNA evidence. In fact, although a stipulation and order was entered requiring that all DNA testing be conducted in the presence of both the state and defense experts, counsel did not ensure that his expert was present for the testing. *See* Exhibit 163, pp. 45-47. Had an effective defense expert participated in the testing and appeared at trial to counter the unreliable information, it is more likely than not that the outcome of the trial would have been different.

Counsel has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. More specifically, "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's

judgments." *Id.* As it is, Petitioner stands convicted on evidence that misrepresented to an untrained and perhaps unsophisticated jury that the likelihood of a random occurrence of matching DNA in a particular population is the same thing as the probability that the DNA at the crime scene was Petitioner's. *See* Exhibit 197, p. 2. The uncontradicted expert testimony left the jury with false information that was highly prejudicial and which could have been and should have been challenged by the defense's own expert.

The Washoe County Crime Lab's very limited experience with DNA testing in 1994, combined with counsel's absolute failure to challenge the expertise of the State's purported DNA expert, shows counsel's performance to have fallen below an objective standard of performance. Counsel apparently failed to investigate the science of DNA, failed to present an independent DNA expert at trial, and permitted the State to argue the prosecutor's fallacy in its misrepresentation of the likelihood of a random match in a population as the same as a percentage of accuracy in identifying Petitioner as the attacker. The record adduced persuades this court that had counsel properly educated himself and made use of his DNA expert, Petitioner would likely not have been convicted.

At the post-conviction evidentiary hearing, Petitioner established that his counsel failed to object to the evidence admitted at trial on the basis of possible mishandling, including the loss of teeth scrapings taken from the victim on the night of the attack but never processed or produced at trial, the transfer by police of certain items of evidence from one

evidence bag to another resulting in possible contamination of the evidence, despite petitioner's family's concerns. Exhibit 163, p. 71. Testimony showed that counsel also failed to highlight the importance of the unidentified fingerprint found on the victim's night light, a light she reported her attacker turned off before she was awakened and failed to move for a mistrial on the basis of this missing evidence. *Id.*

The evidentiary hearing also highlighted counsel's failure to ensure that the defense expert had a chance to review and consider the results of the RFLP testing, which was completed less than one week prior to trial. *Id.*, p. 213-216. Counsel did not seek a delay of the trial to permit the defense expert this opportunity. *Id.* Counsel did not obtain independent testing of the DNA material or receive a written report from the defense expert until after the completion of the trial. *Id.* This course of action was deficient, considering that it was counsel's intention at trial to attack the original testing and the absence of sufficient material to do the RFLP testing. *Id.*, pp. 202-203, 222.

The failure to make the necessary and thorough investigation of the concerns noted above cannot be attributed to an strategic decision on the part of the attorney. In fact, for the most part, counsel admitted as much during the evidentiary hearing. *See Id.*, p. 233, 235.

Petitioner's second claim is meritorious and the Nevada Supreme Court's handling of it on post-conviction appeal resulted in an objectively unreasonable factual determination. Aside from the above facts, the Supreme Court also mistakenly

indicated that the defense DNA expert, Jennifer Mihalovich "testified" that she was satisfied with the DNA collection. However, Mihalovich did not testify, either at trial or at the post-conviction evidentiary hearing. The representations of Mihalovich's satisfaction with the DNA procedures were offered by defense counsel.

Ground 3

Petitioner claims that he was denied the effective assistance of counsel at trial because counsel failed to present evidence at that the victim's stepfather, Wayne Henle, was an alcoholic prone to attack women when drunk, and who had been charged with felony sexual assault in Utah and Nevada prior to the attack on his step-daughter.

Counsel has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland,* 466 U.S. at 691. More specifically, "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.*

At the evidentiary hearing, testimony established that counsel did nothing to investigate certain information related to another potential suspect, Wayne Henle. Testimony in the evidentiary hearing indicated that, although counsel was advised of a time gap in the other suspect's work schedule for the night of the attack, counsel did not followup or investigate

that time discrepancy to confirm that suspect's alibi.[6] *See* Exhibit 163, pp. 28-31. Counsel was also advised that this individual had been arrested for a separate sexual assault in Utah and was suspected in a similar incident in Carlin, Nevada – the location of the attack in this matter. *See id.*, pp. 59-64. According to the testimony, defense counsel did not investigate the activities of the other potential suspect, did not speak to the victim of the other attack, and neither he or his investigator speak to many of the other persons who had seen Petitioner on the night of the attack. *Id.*, pp. 65-69, 231. Counsel did interview Henle's other alleged victim and did nothing to investigate the questions raised as to his alibi for the night of the attack. Counsel testified that he felt he would have had to prove to the jury that Henle was the actual attacker. *Id.*, pp. 230-231. He did not believe that it would be sufficient to use the evidence to raise a reasonable doubt in the minds of the jury. *Id.*

As with Ground 2, the Nevada Supreme Court's handling of this claim resulted from an unreasonable determination of the facts. In this instance, the court found that the decision not to investigate Henle as an alternative suspect was founded on 'tactical' reasoning. However, that reasoning was faulty. The defense has no burden of proof and counsel's mistaken belief that he would have to prove that Henle was guilty before Petitioner would be acquitted is unreasonable. *Strickland*, 466 U.S. at 691.

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[6] The other suspect was the victim's step-father, who was identified by the victim's mother on the night of the attack as someone who had threatened to rape the victim in order to get back at her mother.

Ground 4

Next, Petitioner claims that he was denied the effective assistance of counsel at trial because counsel failed to move for a mistrial when he was exposed to jurors in his jail garb. This claim lacks merit.

Although there was testimony that Petitioner was brought into the courthouse in jail clothes, the testimony was equivocal that jurors were actually present to observe his movement. Moreover, counsel testified that he was never informed of any such occurrence and assured the court that if he had been given such information, he would have immediately made the appropriate motion. The Nevada Supreme Court's handling of this particular claim was correct.

Ground 5

Ground 5 claims ineffective assistance of counsel in that trial counsel failed to move for a mistrial despite the loss by the State of the victim's teeth scrapings which would have excluded Petitioner as the assailant.

According to a police report, at the hospital following the sexual assault, the victim told police that she had bitten her attacker and there appeared to be blood on her teeth. Exhibit 194. According to the Petition, at that time, a nurse scraped the victim's teeth in order to gather any biological matter that might have come from the attacker. That evidence was never produced at trial.

Petitioner claims the evidence was exculpatory, in that he had no bite marks on him immediately

following the attack and the DNA evidence taken from the scrapings would have proven conclusively that the assailant did suffer a bite wound. Petitioner also notes that Henle, the victim's stepfather, did have such a bite wound immediately after the attack. *See* Exhibit 177. Thus, he claims that because the evidence was not processed and available at trial, he was prejudiced in his defense. He claims that the absence of the evidence also entitled him to a presumption that the evidence would have been unfavorable to the prosecution.

Under Nevada law, the loss of the evidence would justify a reversal of the conviction only if the loss was due to bad faith actions by the State or the loss was prejudicial to the defendant. *Leonard v. State*, 114 Nev. 1196, 1206 969 P.2d 175, 179 (1998); *see* Exhibit 172, p. 5. Applying that standard, the Nevada Supreme Court concluded that the only evidence that the scrapings ever existed was testimony from Petitioner's mother at the post-conviction hearing. She testified that she remembered the scrapings had been lost. However, the court then went on to note that trial counsel admitted he had considered such a motion, but concluded it was not justified under the law. *Id.*, p. 6. Apparently, counsel's acknowledgment that the evidence was missing did nothing to convince the court of the evidence's existence.

In his reply to the answer of the petition, Petitioner changes his position somewhat, suggesting that the police did not collect the evidence, rather than that it was collected but not produced. *See* Reply, p. 12. This shift in theory does not change the claim. Nonetheless, Petitioner has not demonstrated that the state court's determination of this claim was unreasonable in its

factual determinations or misapplied clearly established federal law. Ground 5 does not warrant relief.

Conclusion

Petitioner has presented five grounds for relief, three of which are meritorious. These claims: Ground One - Insufficiency of the Evidence; and Grounds Two and Three- Ineffective Assistance of Counsel related to the DNA evidence and investigation in preparation for trial, were decided by the Nevada Supreme Court after unreasonably determining the facts in light of the record, or after misapplying clearly established federal law. The Writ shall issue as to those grounds for relief.

IT IS THEREFORE ORDERED that the First Amended Petition for Writ of Habeas Corpus (docket #19) is **GRANTED**.

IT IS FURTHER ORDERED that the conviction is **REVERSED** as being obtained in violation of the Constitution of the United States. Respondents shall retry Brown within 180 days or shall release him from custody. The Clerk shall enter judgment accordingly.

DATED: December 14, 2006

/s/ Philip M. Pro
PHILIP M. PRO
Chief United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

No. CV-N-03-0712-HDM(VPC)

[Filed July 22, 2005]

TROY BROWN,	)
	)
Petitioner,	)
	)
vs.	)
	)
CRAIG FARWELL, *et al.*,	)
Respondents.	)
	)

ORDER

This action is a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, by Troy Brown, a prisoner at the Lovelock Correctional Center. The matter is before the Court on respondents' Motion to Dismiss (docket #30)

I. Procedural History

Petitioner was arrested and charged with Sexual Assault on a Child under the Age of 14 Years, Resulting in Substantial Bodily Harm (Count I),

Sexual Assault on a Child under the Age of 14 Years Count II), Attempted Murder (Count III) , and Abuse or Neglect of a Child less than Eighteen (18) Years of Age Resulting in Substantial Mental Harm (Count IV). Exhibit 21.[1] Following a jury trial, petitioner was found guilty on all but the attempted murder charge. Exhibits 35 an 36. He was sentenced by the jury to life in prison with the possibility of parole after ten years on Count I. *Id.* The Court later sentenced petitioner to life with the possibility of parole after ten years on Counts II and twenty years on Count IV, all to run consecutively. Exhibit 58, p. 20.

Petitioner appealed the conviction and sentence. Exhibit: 62 and 65. The Nevada Supreme Court remanded the matter to the trial court for a new sentencing hearing, based on the finding the district judge abused his discretion during the sentencing phase of the trial. . . ." Exhibit 70, pp 4-5, *see also Brown v. State*, 113 Nev. 275, 934 P.2d 235 (1997). The supreme court also vacated the child/abuse/sexual assault conviction (Count IV) as a violation of the prohibition against double jeopardy. *Id.*

Petitioner then filed a motion for a new trial and motion to vacate and continue sentencing. Exhibit 86. The motions were denied. Exhibit 87. Petitioner was resentenced, receiving life with the possibility of parole after 10 years on Count II, to run consecutive to the

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[1] The exhibits referenced in this order are those filed by petitioner in support of his first amended petition. The exhibits are found in the court's record at docket ## 20-24.

sentence imposed for Count I. The amended judgment of conviction was filed on March 18, 1998. Exhibit 92.

Petitioner filed timely notices of appeal, addressing the denial of his motions for a new trial and to vacate sentencing and the amended judgment of conviction. Exhibit 93. The appeals were consolidated. on petitioner's motion. Exhibits 142 and 146. The Nevada Supreme Court dismissed the appeals on September 8, 2000.

Petitioner next filed a state petition for post-conviction relief. Exhibit 158. An evidentiary hearing on the petition was held and the court entered its decision. Exhibits 163 and 164. Petitioner once again appealed and the Nevada Supreme Court affirmed the denial through its order dated November 21, 2003. Exhibit 172.

Petitioner submitted a *pro se* petition for writ of habeas corpus to this Court on December 16, 2003 (docket #6) . Petitioner was appointed counsel (docket #10) and then filed a First Amended Petition (docket #19) on November 12, 2004.

Respondents filed a Motion to Dismiss the First Amended Petition (docket #30) arguing that Ground One of the petition is unexhausted. Petitioner has opposed the motion (docket #31) and has supplemented the opposition with additional legal authority (docket #32) Respondents have not replied. The Motion to Dismiss is now before the Court.

II. Exhaustion and Procedural Default

Respondents assert that Ground One in the First Amended Petition has not been exhausted in state court.

A. Legal Standards Governing Exhaustion of State-Court Remedies

Exhaustion of state-court remedies is a prerequisite to a federal court's consideration of a petition for a writ of habeas corpus. 28 U.S.C. § 2254(b). The exhaustion doctrine is based on the policy of federal-state comity, and is designed to give state courts the initial opportunity to correct alleged constitutional deprivations. *See Picard v. Conner*, 404 U.S. 270, 275 (1971).

To exhaust a ground for relief, a petitioner must fairly present that ground for relief to the State's highest court, and must give that court the opportunity to address and resolve it. *See Duncan v. Henry*, 513 U.S. 364, 365 (1995) (per curiam); *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992). The "fair presentation" requirement is satisfied when the claim has been presented to the highest state court by describing the operative facts and the legal theory which are the basis for the federal claim. *See Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Batchelor v. Cupp*, 693 F.2d 859, 862 (9th Cir. 1982), *cert. denied*, 463 U.S. 1212 (1983).

To fairly present a federal claim to the state court, the petitioner must alert the court to the fact that he asserts a claim under the United States Constitution.

Hiivala v. Wood, 195 F.3d 1098, 1106 (9th Cir. 1999), *cert. denied*, 529 U.S. 1009 (2000), *citing Duncan*, 513 U.S. at 365-66. The petitioner must make the federal nature of the claim "explicit either by citing federal law or the decisions of the federal courts." *Lyons v. Crawford*, 232 F.3d 666, 668 (9th Cir. 2000), *amended*, 247 F.3d 904 (9th Cir. 2001). The mere similarity of claims of state and federal error is insufficient to establish exhaustion. *Hiivala*, 195 F.3d at 1106, *citing Duncan*, 513 U.S. at 366; *see also Lyons*, 232 F.3d at 668-69; *Shumway v. Payne*, 223 F.3d 982, 987 (9th Cir. 2000). "[G]eneral appeals to broad constitutional principles, such as due process, equal protection, and the right to a. fair trial, are insufficient to establish exhaustion. *Hiivala*, 195 F.3d at 1106, *citing Gray v. Netherland*, 518 U.S. 152 162-63 (1996); *see also Shumway*, 223 F. 3d at 987. However, the Ninth Circuit Court: of Appeals has found that state remedies may be exhausted by citation to state case law "analyzing a federal constitutional issue." *See Peterson v. Lampert*, 319 F.3d 1153, 115 (9th Cir. 2003).

B. Ground 1

In Ground 1 of his First Amended Petition, petitioner asserts that

> Brown was denied his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution because there was insufficient evidence presented at trial to support a finding of guilty of the sexual assault crimes beyond a reasonable doubt.

First Amended Petition, p.11. Petitioner alleges in his First Amended Petition that he presented this claim to the Nevada Supreme Court on his direct appeal and in his motion for new trial. *Id.* at 11.

Respondents argue in their Motion to Dismiss that petitioner did not fairly present this ground for relief to the Nevada Supreme Court, because petitioner did not alert that court of a federal basis for the claim and because petitioner changed the factual basis for the claim.

Petitioner contends that it is unnecessary for petitioner to have identified the federal legal basis of his claim of insufficient evidence in his appeal to the state courts, because the Nevada state test on such a claim is the exact test as set out in *Jackson v. Virginia*, 443 U. S. 307 (1979) . He point out that since the early 1980s, Nevada has consistently applied the *Jackson v. Virginia* test for due process claims based on sufficiency of evidence. He cites *Wilkins v. State*, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980), *Hern v. State*, 97 Nev. 529, 531, 635 P. 2d 278, 279 (1981), and *Wilson v. State*, 99 Nev. 362, 374-75, 664 P.2d 328, 336 (1983), among others, as evidence that the federal standard and the state standard are identical.

Petitioner analogizes his situation to that presented in *Sanders v. Ryder*, 342 F.3d 991, 1000 (9th Cir. 2003), wherein the Ninth Circuit held that "Sanders presented his federal ineffective assistance of counsel claims to the Washington Supreme Court in such a manner that the court has a 'fair opportunity' to address his claim" because Washington state courts refer to 'ineffective assistance of counsel' claims, and

analyzes them under the federal *Strickland* test without specifying whether they are analyzing a state or federal right. *Id.*, at 1001.

In a supplemental response, petitioner notes that the Second Circuit Court of Appeals recently held that "assertion of [a] claim in terms so particular as to call to mind a specific right protected by the Constitution [or] allegation of a pattern of facts that is well within the mainstream of constitutional litigation" fairly presents and exhausts that claim before the state court. *Jackson v. Edwards*, 404 F. 3d 612, 618 (2nd Cir. 2005).[2]

Petitioner also points out that he did cite to *Jackson v. Virginia*, in his Motion for New Trial, the denial of which was appealed to the Nevada Supreme Court. *See* Exhibit 86, p. 3; *see also* Exhibits 100 and 107.

In response to the contention that the facts presented to this Court are different than those presented to the state courts, Petitioner asserts that the claim's factual support was fairly presented to the Nevada Supreme Court. He provides a lengthy sample

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[2] This same issue was presented to the United States Supreme Court in *Baldwin v. Reese*, 541 U. S . 27 (2004) . However, the Court declined to address the argument because it was raised for the first time on appeal. *Id.* at 33-34. Justice Stevens, dissenting, acknowledged that he would consider the argument and find the claim exhausted, "[b]ecause petitioner had satisfactorily demonstrated that there was 'no significant difference between' the state and federal standards for ineffective assistance and it was 'clear that the state courts did have a fair opportunity to assess respondent's federal claim.'" *Id.* at 34.

of that presentation. He acknowledges that there are some additional facts presented to this Court.

New factual allegations do not render a claim unexhausted unless they "fundamentally alter the legal claim already considered by the state courts." Vasquez v. Hillery, 474 U.S. 254, 260, 106 S.Ct. 617, 622, 88 L.Ed.2d 598 (1986). In this instance, the discussion of the DNA evidence was so in-depth and expansive that it cannot be said that the Nevada Supreme Court did not have an opportunity to address the claim. Any new facts or arguments presented here merely enhance the presentation, clarifying, rather than changing the nature of the legal claim.

Ground One of the petition has been fairly presented to the Nevada Supreme Court and is exhausted. The motion to dismiss shall be denied.

IT IS THEREFORE ORDERED that respondents' Motion to Dismiss (docket #30) is DENIED.

IT IS FURTHER ORDERED that respondents shall file an answer to the grounds for relief within forty-five (45) days from entry of this Order. Petitioner shall have thirty (30) days following service of respondents' Answer to file his Reply.

Dated this 22nd day of July, 2005.

/s/
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

No. 5833

Dept. No. 1

[Filed March 18, 1998]

THE STATE OF NEVADA, PLAINTIFF,	)
v.	)
TROY DON BROWN, DEFENDANT.	)

AMENDED JUDGMENT OF CONVICTION
(Jury Verdict - Incarceration)

This Amended Judgment or Conviction is being filed after the re-sentencing of the defendant in compliance with the decision issued by the Nevada Supreme Court.

On the 30th day of September, 1994, the above named defendant, TROY DON BROWN, [who is further described as follows: Social Security Number

[REDACTED] 7693; Date of birth: 09/21/71; (age 26); Place of birth Gunnison, Utah] was found guilty by a jury of the crime(s) described below and as more fully set forth in the criminal information filed herein. Legal counsel present at the defendant's trial were, David B. Lockie, Esq., representing the defendant, and Marshall S. Smith, Elko County District Attorney, representing the state.

DESCRIPTION OF CONVICTIONS

COUNT 1: SEXUAL ASSAULT ON A CHILD UNDER THE AGE OF 14 YEARS RESULTING IN SUBSTANTIAL BODILY HARM, A FELONY AS DEFINED BY NRS 200.366

COUNT 2: SEXUAL ASSAULT ON A CHILD UNDER THE AGE OF 14 YEARS, A FELONY AS DEFINED BY NRS 200.366

The defendant was originally sentenced in this case on the 23rd day of July, 1995. Thereafter, the defendant appealed and the Nevada Supreme Court remanded for a new sentencing.

On the 13th day of March, 1998, the above-named defendant appeared before this Court for the purpose of sentencing and entry of a final judgment of conviction in this matter. This Court, the state and the defense counsel had previously received a Pre-Sentence Report which had been prepared by the Division of Parole and Probation. The above-named defendant was personally present at the sentencing. Legal counsel present at the defendant's sentencing

were Dennis E. Widdis, Esq., representing the defendant, and Gary D. Woodbury, Elko County District Attorney, representing the state. Also present was Arthur Tjaden, representing the Division of Parole and Probation. During sentencing the Court considered the standards adopted pursuant to NRS 213.10988 and the recommendations of the Division of Parole and Probation.

After hearing from all parties and allowing the defendant an opportunity to personally address the Court, this Court finds that the appropriate judgment in this case is and shall be as follows:

SENTENCE TERMS

For the conviction of Count 1, pursuant to the verdict and sentence of the jury, the defendant is sentenced to serve a period of life in the Nevada Department of Prisons with the possibility of parole after serving 10 years. The defendant is credited with 1,352 days heretofore served as computed to and including the date of this sentencing (the 13th day of March, 1998).

For the conviction of Count 2, the defendant is sentenced to serve a period of life in the Nevada Department of Prison with the possibility of parole after serving 10 years. This sentence shall be consecutive to the sentence for Count 1.

Said sentence shall run consecutively with all prior convictions against the defendant, regardless of degree, and regardless of whether or not said prior convictions were imposed

against the defendant within this state or by another state.

FINANCIAL AND RESTITUTION REQUIREMENTS

The defendant is ordered to pay the administrative fee in the amount of $25.00 for each count as required by NRS 176.062, Said amount shall be deducted from any cash bail monies posted by the defendant before any remainder is returned upon the exoneration of bail. It is further ordered that if the defendant has any monies in the possession of the Elko County Jail, that said monies shall be delivered directly to the Elko County Clerk and applied to this fee.

The defendant is ordered to pay restitution to the victim(s) in the amount(s) set forth in the following table:

Amount	Name of Victim
$25,266.48	University of Utah Neuro Psychiatric Hospital/Western Institute Inpatient Psychiatric Facility
$3,100.39	Elko Sheriff's Office for hospital bills for the defendant while incarcerated.
$359.00	Elko General Hospital for care of the defendant.

$61.35	Medicare for victim care.
$532.00	Elko Regional Clinic for victim care.
$288.00	Nevada State Mental Health Program for outpatient counseling of victim

BAIL

IT IS HEREBY ORDERED that any bail bond previously posted for said defendant shall be exonerated. Any cash bail posted for said defendant shall be applied first to administrative fees, fines or restitution due pursuant to his judgment and any amount remaining shall be returned by the clerk to the person who posted said cash bail. *See* NRS 178.528.

ENTRY OF JUDGMENT

IT IS FURTHER ORDERED that the clerk of the above-entitlted Court entered this JUDGMENT OF CONVICTION as part of the record in the above-entitled matter.

SO ORDERED this 17th day of March, 1998.

/s/ J. Michael Memeo
J. MICHAEL MEMEO
DISTRICT JUDGE – DEPARTMENT 1

APPENDIX F

SUPREME COURT OF NEVADA

No. 27426

[Filed February 26, 1997]

Troy Don BROWN,	)
	)
Appellant,	)
	)
v.	)
	)
The STATE of Nevada,	)
	)
Respondent.	)
	)

Dennis E. Widdis, Reno, for Appellant.

Frankie Sue Del Papa, Attorney General, Carson City; Gary D. Woodbury, District Attorney, and John S. McGimsey and Robert J. Lowe, Deputy District Attorneys, Elko County, for Respondent.

OPINION

PER CURIAM:

Appellant Troy Brown was tried and convicted of sexually assaulting Jane Doe, a nine-year-old girl.[1] Troy was convicted of two counts of sexual assault of a child under fourteen years of age, and one count of child abuse by sexual abuse. He was acquitted of one count of attempted murder. Troy claims on appeal that (1) he was improperly denied bail; (2) the DNA evidence was improperly admitted because no evidentiary hearing was held; (3) sufficient evidence did not exist to support his conviction; (4) double jeopardy barred his convictions for both sexual assault and child abuse by sexual abuse; and (5) the district judge abused his discretion during the sentencing phase of the trial.

We conclude that the district judge properly denied bail for Troy, that the DNA evidence was properly admitted at trial, and that sufficient evidence existed to support Troy's conviction. However, we conclude that Troy's conviction for both sexual assault and child abuse by sexual abuse violated the double jeopardy provision of the Constitution and that the conviction for child abuse must be vacated. Finally, we conclude that the district judge abused his discretion during the sentencing phase of the trial and the case must be remanded to the district court for a new sentencing hearing on the remaining sexual assault conviction.

FACTS

In the early morning hours of January 29, 1994, Jane Doe was sexually assaulted in the bedroom of her

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[1] The victim's real name has been changed to protect her identity.

trailer home at 1637 Pruett Street in Carlin. Jane Doe and her four-year-old sister were home alone while their mother, Pam, was drinking at a bar, and their step-father, Wayne, was working the night shift at his job. Troy was arrested, tried, and convicted for the crime.

On January 28, 1994, before Wayne went to work, Pam received a telephone call from Raquel Brown. Raquel was married to Trent Brown, Troy's brother. Raquel wanted to know if Pam would like to join Raquel and Trent at a local bar named "CG's" for a drink and also to know if Jane Doe could babysit her children for the approximately one-half hour they expected to stay at the bar. Pam agreed that Jane Doe could babysit the children for that short amount of time and at approximately 6:30 p.m. Pam took Jane Doe and her sister over to Raquel's house ocated across the street at 1709 Pruett Street. Pam and Raquel then went to CG's to meet Trent.

Raquel and Trent stayed at CG's for a very short time and returned home at approximately 7:30 p.m. Pam, however, remained at the bar. When Raquel and Trent returned home, all of the children were watching a movie; when the movie ended at approximately 9:30 p.m., Raquel took Jane Doe and her sister back to their trailer. When Jane Doe got back to the trailer, she attempted to call her mother at CG's to tell her that she and her sister were home, but the telephone line at CG's was busy. Jane Doe then called the Peacock Bar to see if Pam was there; Troy, who was drinking at the Peacock Bar, answered the phone. Jane Doe asked Troy if Pam was there, and Troy stated that he thought that she was at CG's. Jane Doe said that she

was trying to find Pam in order to tell her that she and her sister were home safely, and Troy said that he would go to CG's to deliver Jane Doe's message. Troy then went to CG's, but when he arrived, Pam was already talking to Jane Doe on the telephone. Jane Doe had already informed Pam that she and her sister were home safely.

Pam stated that after she finished talking to Jane Doe, she and Troy went to the Peacock Bar where they had a drink and played a game of pool. Pam stated that Troy was drunk but that he behaved like a gentleman and made no sexual advances toward her. Pam stated that the last time she saw Troy was sometime between 11:00 p.m. and midnight. Pam stated that at approximately midnight or 12:30 a.m. she received a call at the Peacock Bar from Jane Doe[2] who told Pam that some man was at the trailer looking for Pam and that the man had hurt her. Pam immediately left the bar and drove home, which was a short distance away, where she found Jane Doe covered in blood from the waist down.

Pam called 911, and police officer Michael Terry and the paramedics responded to the scene at approximately 1:15 a.m. Michael Skinner, an emergency medical technician, assessed Jane Doe's injuries, and Jane Doe told Skinner that she felt pain in her vaginal area. While the police and the paramedics were present, Pam stated that her ex-husband had done this because he had threatened

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[2] The bartender on duty stated that the call actually came just before 1:00 a.m.

to "f--- [Pam's] daughter in order to get back at [Pam]." Trial testimony indicated that the police attempted to locate Pam's ex-husband, but the results of their efforts were not admissible at trial because of the hearsay rules.[3]

Jane Doe was taken to the hospital where it was confirmed that she had been penetrated both vaginally and anally. Jane Doe had lost about fifteen percent of her blood and required a vaginal reconstruction. She also had bruises on her neck and had scratches on her face. A "sexual assault kit" was taken at the hospital, which included a vaginal smear (because sperm was present) and a blood sample. Debris was also collected from Jane Doe's teeth because she stated that she had bitten her assailant.

Jane Doe described to Connie Walker, a police officer specialized in questioning child victims, what had happened in the trailer. The interview took place in the early morning hours of January 29, 1994, shortly after the sexual assault had occurred, and a second interview took place on February 1, 1994. Jane Doe stated that she fell asleep with a night light on, but that the man who assaulted her must have turned it off because it was off when the man left. Jane Doe said that the man touched her "butt" and then put his "thingy" into her vagina. She also stated that the man placed his fingers into "the front and back" of her. Jane Doe described the assailant as follows: he did not wear

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[3] The implication from the permitted testimony was that the police had determined that the ex-husband had a credible alibi and was not involved in the assault.

a hat and had blonde or sandy-colored hair which was curly at the bottom and thinning on top; she thought he had a small moustache; he was wearing dark jeans, a black jacket with "a zipper for sure," a western type shirt, boots, and a watch which scraped her face. At the trial, Jane Doe had difficulty remembering the details of what had happened and stated that what she had told Walker at the interviews was probably correct.

When pressed by police to tell who the assailant reminded her of, Jane Doe stated "Troy," and when the police said, "Who?," Jane Doe said, "Trent. Yes, Trent." Jane Doe stated that Trent was Raquel's husband, Trent Brown. Jane Doe also stated that the assailant's hair looked like Troy's but then changed her mind and said that the hair looked like Trent's hair. Finally, Jane Doe stated that the assailant smelled like cologne but that it was an "awful smell," and that it was "gross smelling ... [like] beer or puke or something." Jane Doe was shortly thereafter admitted to a hospital where she stayed for twelve days and was diagnosed with post-traumatic stress disorder.

By the late hours of January 28, 1994, Troy was very intoxicated. He testified that he had been drinking steadily at several different bars and had consumed ten shots of hard liquor, each followed by a beer chaser-a total of twenty drinks. Testimony indicated that on the night in question, Troy was wearing dark jeans, a cowboy hat, a black satin jacket with a CG's logo on the back, and boots. Troy stated that he did not wear a watch and therefore did not know what time he had left the Peacock Bar. The bartender on duty stated that Troy left the bar no later

than 12:20 a.m. However, another bartender, whose shift had ended but who was still at the Peacock Bar, stated that she believed that she had seen Troy at the bar at approximately 1:30 a.m.

Troy stated that he had left the bar and walked to his trailer on 1717 Pruett Street, approximately ten trailers away from Jane Doe's. Troy stated that because he was so intoxicated, he vomited several times on his way home and some of the vomit got on his pants and shirt. He also stated that because he was going on a one week trip to Utah later in the day on January 29, 1994, he needed all of his clothes which, other than the ones he was wearing, were packed. He washed the pants and shirt he was wearing when he got home because he had vomited on them. Travis Brown, Troy's younger brother, testified that he was sleeping on the couch at Troy's trailer and woke up when Troy got home. Travis stated that he then looked at his digital clock, and it read 1:32 a.m. Travis stated that he saw no traces of blood anywhere in the house.

At 5:00 a.m. on January 29, 1994, Officer Terry went to Troy's home to question him about the sexual assault. Terry awoke and questioned Troy, who was wearing only boxer shorts. Officer Terry stated that he saw no blood on Troy. He also stated that he checked Troy's hands because Jane Doe had told him that she had bitten her assailant's hand, but he found no evidence of any bite marks. Terry also stated that he looked at Troy's boots and saw no blood. After Troy left to go to Utah, the police went back with a search warrant and took Troy's bedding. Troy called the Carlin police to see if he was wanted for arrest, and he was told that he was not. While in Utah, Troy went to

a nurse to get a full body examination because Jane Doe had stated that she had bitten and scratched her assailant, and Troy wanted a record of his condition.

Dave Prescott, another of Troy's friends living in Troy's trailer, testified that he had asked Troy on January 29, 1994, whether Troy was involved with the crime and that Troy had answered that he wished that he could remember what had happened. Troy testified that he had told Prescott that he wished that he could remember what time he got home.

Because rumors persisted about Troy's involvement in Jane Doe's assault, Troy voluntarily went in for questioning at the Carlin Police Department on February 3, 1994. Troy gave the police the black satin coat and black cowboy hat that he was wearing on the night of the crime. Troy repeatedly denied involvement in the crime, even though the interrogating officers implied that they had found Troy's fingerprints in Jane Doe's bedroom. In actuality, Troy's fingerprints were not found anywhere in Jane Doe's trailer, and the one fingerprint that was located on the night light in Jane Doe's room did not match Troy's.

While in a foster home several days after the assault, Jane Doe saw a television report of Troy's arrest and stated that she knew that the man on television was her assailant. Walker and police officer Roy Ladd went to the foster home; Jane Doe told Walker that the man on television had attacked her and had also sent her flowers. However, the card attached to the flowers was signed by Trent and Raquel, not Troy. Additionally, Ladd showed Jane Doe a photo lineup which included Troy's picture and

several other people Jane Doe did not know; Jane Doe was unable to identify her assailant from the pictures Ladd showed her.

At trial, the defense called Madonna and Jay Doke as witnesses. They testified that at 1:05 a.m. on January 29, 1994, they were picking up their children from the babysitter's house on Pruett street near Jane Doe's trailer. Madonna stated that as they neared the babysitter's house, she saw a man wearing a black cowboy hat, a black satin jacket, and dark jeans staggering down the middle of the road. She also stated that the man's jacket had a fluorescent green emblem on the back that looked like a skull or bandit. Jay testified that the man wore the same clothes that Madonna had described and also stated that the emblem on the back of the man's jacket was bright green. Testimony indicated that Troy's CG's jacket had an orange and yellow emblem on the back.

Troy voluntarily surrendered to the police and was arrested on or about February 7, 1994. On February 28, 1994, Troy stipulated to his commitment to the Lakes Crossing facility for a psychiatric evaluation. After approximately two months, Troy was found competent to stand trial and was returned for trial. Bail had not been set prior to Troy being sent to Lakes Crossing, and after he returned from Lakes Crossing, bail was set at $200,000. Troy's bail was later reduced to $100,000. Troy was charged with one count of sexual assault on a child under the age of fourteen resulting in substantial bodily harm by placing his penis into Jane Doe's vagina (Count I), one count of sexual assault on a child under the age of fourteen by placing his penis into Jane Doe's rectum (Count II), one count

of attempted murder for trying to strangle or choke Jane Doe (Count III), and one count of abuse or neglect of a child less than eighteen years old resulting in substantial bodily harm by forcibly penetrating Jane Doe's vagina and/or rectum (Count IV). Troy's trial commenced on September 27, 1994.

Marie Fassett, a criminalist in the Washoe County Sheriff's Office, examined evidence collected by the police for the presence of bodily fluids, including blood and semen, and stated that she found semen on Jane Doe's underwear and in the contents of the sexual assault kit. She also examined Troy's boots and found no blood on the boots. However, Fassett stated that she did not examine pubic hairs found in a fleece jacket recovered from Jane Doe's room because her laboratory conducted hair exams only if there was an absence of biological evidence, which she said was not the situation in this case. She also stated that she did not examine Troy's bedding for the presence of hair, fiber, or bodily fluids because she was informed that Troy never went to bed the night of the assault; however, Terry stated that Troy was still in bed when he woke Troy at 5:00 a.m. on January 29, 1994. Fassett stated that she did not examine the bedding and other evidence because the DNA evidence against Troy was overwhelming.

At trial, Renee Romero testified that she had conducted a DNA test on stains found on Jane Doe's underwear. Romero explained in detail what DNA is and how it is tested. Romero testified that the DNA sample tested from Jane Doe's underwear matched Troy's and that only 1 in 3,000,000 people had the same DNA code as the one tested. Troy's counsel

cross-examined Romero regarding how she conducted the tests, the amount of DNA required to run the tests, and the databases against which the DNA tests were compared to determine the statistical probability that others would have the same DNA code. However, Troy's counsel did not call his own expert DNA witness even though the court provided funds for such a witness.

At the conclusion of trial, Troy was found guilty of Counts I, II, and IV and was acquitted of Count III, the attempted murder charge. The jury sentenced Troy to life in prison with the possibility of parole (after serving ten years) for Count I. The district judge imposed sentences for Counts II and IV.[4]

At the sentencing hearing, the district judge stated that he was going to make a record of the events so that everyone would know exactly what transpired during the proceeding. While making the record, the district judge specifically stated that he was going to consider Troy's psychiatric reports from Lakes

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[4] In 1994, NRS 200.366(3) stated:

> The trier of fact in a trial for sexual assault shall determine whether substantial bodily harm has been inflicted on the victim in connection with or as part of the sexual assault, and if so, the sentence to be imposed upon the perpetrator.

Because the jury determined that Brown was guilty of Count I-sexual abuse resulting in substantial bodily harm-it was authorized to impose a sentence for that count. However, the district judge retained the authority to sentence Brown for Counts II and IV.

Crossing. The district judge stated that he was reviewing the reports because Troy and his family felt that Troy was wrongfully convicted and that they were the victims in the case. The district judge then mentioned certain portions of the report which highlighted the dysfunctionality of Troy and his family.

Before sentencing Troy on Counts II and IV, the district judge informed Troy that it was going to make a "big difference" in the length of the sentence whether Troy was finally going to admit his guilt or if he was going to maintain his innocence. Furthermore, the district judge considered additional DNA testing performed after Troy was found guilty; apparently, Troy's family was not convinced of Troy's guilt and had more DNA tests performed with the district judge's permission. The results of the second DNA test showed that the semen taken from Jane Doe's vaginal swab matched Troy's and that only 1 in 10,000 people had similar DNA. The district judge stated that the additional results confirmed what he already knew from the trial-that Troy was guilty. After Troy again maintained his innocence, the district judge sentenced Troy to the maximum penalty, which was life in prison with the possibility of parole after ten years for Count II and twenty years in prison for Count IV. All of Troy's sentences were imposed consecutively.

Troy now appeals his conviction and sentence.

DISCUSSION

The district court's denial of Troy's bail did not warrant reversal of the convictions.

Troy was held without bail from February 7, 1994, until May 2, 1994, because the justice of the peace, following the district attorney's recommendation, refused to set bail. The State has acknowledged that the justice of the peace erred by not setting bail immediately.

In *State v. Teeter,* 65 Nev. 584, 200 P.2d 657 (1948), this court addressed the issue of erroneously holding a defendant without bail. In *Teeter,* the defendant was held without bail for the entire proceedings, and this court concluded that the denial of bail substantially affected the validity of the judgment because:

> 1. It operated to curtail and restrict, as counsel for defendant has urged, the opportunity of defendant to prepare properly for trial.
>
> 2. A defendant, if he appears for trial as a prisoner in the custody of officers, is in a less favorable position than a defendant on bail. He is not only handicapped by embarrassment and humiliation, but there is some probability, at least, that that sort of appearance may make an unfavorable impression upon the jurors, to which risk one clearly entitled to bail, as was defendant here, should not be required to be subjected, until his guilt has been proved.

> 3. There is also the probability that denial of bail, published in the newspapers as was done in the instant case, may make upon the public mind generally an impression that the state's case against defendant is strong, or bail would have been allowed-that is, that the proof must be evident and the presumption great of his guilt-and that such impression may infiltrate into the mental consciousness of jurors.

Id. at 609, 200 P.2d at 670.

Applying the *Teeter* factors, we conclude that Troy's being held without bail did not substantially affect the judgment such that reversal of the convictions is warranted. First, from February 28 to May 2, which comprised most of the time that Troy was held without bail, Troy was confined to Lakes Crossing for a psychiatric evaluation. Therefore, if bail had been granted, Troy still would have had to stay in Lakes Crossing; Troy even admits that during his time at Lakes Crossing he was not prejudiced by his lack of bail setting. Furthermore, Troy did not allege any substantial interference with the preparation of his defense while he was being held without bail, other than the fact that his attorney did not engage in trial preparation during Troy's stay at Lakes Crossing. However, this lack of preparation cannot be attributed to Troy's being held without bail. Second, Troy was granted bail before the trial began and therefore did not appear before the jury while in custody. Finally, Troy presented no evidence that his being held without bail was published in the media such that it may have infiltrated into the consciousness of the jurors.

Therefore, we conclude that the district judge's denial of bail did not substantially affect the judgment such that reversal of the convictions is warranted.

The district court did not err in admitting DNA evidence.

Troy argues that the district judge erred in not conducting a pretrial hearing to determine whether the DNA results were trustworthy and reliable. However, Troy made no objection to either the lack of a pretrial evidentiary hearing or to qualifying Romero as an expert witness on DNA evidence. Failure to object in the district court precludes consideration of the issues on appeal; however, this court may address plain error *sua sponte*. *Sterling v. State,* 108 Nev. 391, 394, 834 P.2d 400, 402 (1992). Because we conclude that the failure to conduct an evidentiary hearing was not plain error, we will not consider this issue.

Sufficient evidence existed to convict Troy.

The standard of review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt. *Kazalyn v. State,* 108 Nev. 67, 71, 825 P.2d 578, 581 (1992). We conclude that a jury, acting reasonably, could have been convinced of Troy's guilt beyond a reasonable doubt.

Testimony indicated that Troy left the bar around 12:15 a.m., that Troy lived relatively close to the bar, and that Troy lived very close to Jane Doe. Troy had enough time to get from the bar to Jane Doe's house

and to assault Jane Doe before she made the telephone call to her mother at approximately 1:00 a.m. While Jane Doe could not identify her assailant, her description of his clothing was similar to what Troy was wearing; she also said that her assailant smelled like beer or vomit and testimony indicated that Troy had been drinking beer and had vomited several times that night. Furthermore, testimony indicated that Troy got home at approximately 1:30 a.m., which gave him enough time to assault Jane Doe. Additionally, the Dokes testified that they saw someone resembling Troy in a black jacket and black hat stumbling in the road near Jane Doe's house at 1:05 a.m. Troy also washed his pants and shirt when he got home, arguably to remove the blood evidence from his clothes. Finally, the DNA evidence indicated that semen collected from Jane Doe's underwear matched Troy's and that only 1 in 3,000,000 other people had matching DNA (the second DNA test indicated that 1 in 10,000 people had matching DNA).

The district court erred in separately sentencing Troy for sexual assault of a child and child abuse by sexual abuse because such sentences violate the constitution's double jeopardy clause.

Troy was convicted of Counts I and II, which were for sexual assault on a child under fourteen years of age, pursuant to NRS 200.366. According to NRS 200.366, sexual assault on a child under fourteen years of age is defined as follows:

> A person who subjects another person [under the age of fourteen] to sexual penetration ... against the victim's will or under conditions in

> which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his conduct, is guilty of sexual assault.

NRS 200.366(1). Separate penalty enhancements exist dependent upon whether the sexual assault causes substantial bodily harm or not. NRS 200.366(2)(a) and (b).

Child abuse is defined as follows in NRS 200.508:

> 1. A person who:
>
> (a) Willfully causes a child who is less than 18 years of age to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect ...
>
> is guilty of a gross misdemeanor unless a more severe penalty is prescribed by law for an act or omission which brings about the abuse, neglect or danger.
>
> ....
>
> 3. As used in this section:
>
> (a) "Abuse or neglect" means physical or mental injury of a non-accidental nature, sexual abuse, sexual exploitation....

NRS 432B.100 states that "sexual abuse" includes acts upon a child constituting:

1. Incest under NRS 201.180;

2. Lewdness with a child under NRS 201.230;

3. Annoyance or molestation of a child under NRS 207.260;

4. Sado-masochistic abuse under NRS 201.262;

5. *Sexual assault under NRS 200.366;*

6. Statutory sexual seduction under NRS 200.368; and

7. Open or gross lewdness under NRS 201.210.

(Emphasis added.)

The prosecution's charging document claimed that Troy had committed child abuse in that he had caused Jane Doe to suffer mental and physical pain by virtue of his sexual abuse, to wit: he forcibly penetrated Jane Doe's vagina and/or anus. Therefore, the prosecution actually charged Troy with child abuse pursuant to NRS 200.508 by virtue of his sexual assault as defined by NRS 200.366. Given the definition of "sexual abuse" in NRS 432B.100, this is the only reasonable interpretation of what the prosecutor claimed constituted the "sexual abuse."

To determine whether Troy's convictions for sexual assault and child abuse by sexual abuse/sexual assault are barred by the double jeopardy provisions of the state and federal constitutions, this court must apply the test from *Blockburger v. United States*, 284 U.S.

299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932), which states: "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."[5]

Applying the *Blockburger* test, we conclude that Troy's conviction for both sexual assault and child abuse by sexual abuse/sexual assault was improper. As charged in this case, child abuse by sexual abuse requires a sexual assault pursuant to NRS 200.366, plus resultant physical pain or mental suffering; sexual assault requires only those elements present in NRS 200.366. Therefore, a conviction for sexual assault does not require proof of a fact other than or additional to any facts necessary to prove child abuse by sexual abuse/sexual assault. In every case such as this one, the child abuse by sexual abuse/sexual assault cannot occur without the sexual assault, and therefore, the sexual assault becomes an element of child abuse by sexual assault. Given this analysis, *Blockburger* mandates that Troy cannot be convicted of both child abuse by sexual abuse/sexual assault and

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[5] We have earlier stated that we must also consider the statute's legislative history to see if the legislature intended for the defendant to receive separate sentences for the same conduct. *Talancon v. State*, 102 Nev. 294, 298-99, 721 P.2d 764, 767 (1986) (citing *Missouri v. Hunter*, 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983)). The legislative history of the statutes at issue gives no indication of whether the legislature authorized separate sentences for sexual assault and child abuse by sexual abuse arising from the same conduct.

sexual assault. *See also Meador v. State*, 101 Nev. 765, 771, 711 P.2d 852, 856 (1985) (applying *Blockburger* and concluding that double jeopardy barred appellant's convictions for both lewd acts with a child and sexual assault because proof of a lewd act did not require proof of a fact distinct from the elements of sexual assault since a lewd act necessarily occurred during the sexual assault).

Double jeopardy bars one of the convictions, and we therefore vacate the conviction for child abuse and maintain the convictions for sexual assault. The underlying crime at issue was the sexual assault, and while the child abuse count required proof of an extra element, i.e., that the sexual assault caused physical pain and mental suffering, the extra element did not transform the child abuse charge into the greater crime at issue.

The district court abused its discretion in sentencing appellant.

We conclude that the district court abused its discretion in sentencing Troy by (1) using the Lakes Crossing psychological reports as a basis for the sentence and (2) imposing a harsher sentence because Troy maintained his innocence and refused to admit his guilt. However, we conclude that the district court did not abuse its discretion in referring to the post-guilt-phase DNA testing and results.

"A sentencing judge is allowed wide discretion in imposing a sentence; absent an abuse of discretion, the district court's determination will not be disturbed on appeal." *Randell v. State*, 109 Nev. 5, 8, 846 P.2d 278,

280 (1993). "[I]f the judge relies upon prejudicial matters, such reliance constitutes an abuse of discretion that necessitates a resentencing hearing before a different judge." *Castillo v. State,* 110 Nev. 535, 545, 874 P.2d 1252, 1259 (1994).

The district court's consideration of the Lakes Crossing psychological report was an abuse of discretion.

On February 28, 1994, Troy stipulated to his commitment to Lakes Crossing for psychological evaluation. The court ordered Troy committed to Lakes Crossing to determine whether he was competent to stand trial, was of sufficient mentality to be able to aid and assist in his defense, and was legally sane at the time of the alleged crime.

At the sentencing hearing, the district judge reviewed Troy's psychological reports generated at Lakes Crossing and stated that he was going to consider those reports during sentencing. Based on the Lakes Crossing psychological reports, the district judge stated the following: he believed that Troy was a victim, not because he was falsely accused, but because his parents subjected him to abuse and neglect all of his life; Troy had been convicted of driving under the influence of alcohol two times, and Troy believed the sheriff was trying to pick on him and make an example out of him; Troy was taken for psychological evaluations years earlier because his parents were concerned about his violent behavior when he was intoxicated; according to the psychological test administered at Lakes Crossing, Troy was defensive and unwilling to acknowledge psychological problems, was "immature, egocentric, moody, and insecure," had

a "poor self-concept" and a "lack of self-confidence," and was likely to act out sexually; Troy grew up in a dysfunctional family in which "alcoholism, domestic violence, and child abuse were present."

We conclude that the district court's consideration of the Lakes Crossing psychological reports was an abuse of discretion. In *Estelle v. Smith,* 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), the United States Supreme Court concluded that the testimony of a psychiatrist who evaluated a criminal defendant for purposes of competency was improperly used during the penalty phase of a trial. During the penalty phase, the psychiatrist testified regarding information he learned through the psychological examination, stating among other things that the defendant was a sociopath whose condition would only get worse, that the defendant would continue his behavior, and that the defendant had no regard for other human beings' lives. *Id.* at 459, 101 S.Ct. at 1871.

The jury imposed the death penalty, but the United States Supreme Court reversed the sentence on the grounds that the defendant was entitled to the protection of the Fifth Amendment at the court ordered psychiatric interview and was not apprised of his right to remain silent. *Id.* at 462, 101 S.Ct. at 1872. This protection existed even though the psychiatrist's testimony was used only for purposes of punishment and not guilt, because

> [a]ny effort by the State to compel respondent to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment. Yet the State's attempt to establish

> respondent's future dangerousness by relying on the unwarned statements he made to [the psychiatrist] similarly infringes Fifth Amendment values.

Id. at 463, 101 S.Ct. at 1873 (footnote omitted).

Nevada cases have utilized a similar analysis. In *Esquivel v. State,* 96 Nev. 777, 617 P.2d 587 (1980), this court stated that it was improper for the prosecution to impeach a defendant with statements the defendant made during a court ordered mental examination. *Id.* at 778, 617 P.2d at 587. A defendant should feel free in a clinical climate to discuss all relevant facts without fear that those statements may be used against him later; "[f]air play dictates nothing less." *Id.*

In *McKenna v. State,* 98 Nev. 38, 639 P.2d 557 (1982), this court reversed McKenna's sentence when the prosecutor presented substantive evidence from a psychiatrist who testified that McKenna had admitted during a court ordered psychological examination that he had murdered the victim. This court, citing *Esquivel,* reversed the conviction, stating that it was unfair for the State to appoint a psychiatrist to examine an accused and then employ the confidential contents of that psychiatric interview to obtain a conviction. *Id.* at 39, 639 P.2d at 558; *see also Winiarz v. State,* 104 Nev. 43, 752 P.2d 761 (1988).

Even though these Nevada cases only address the use of a court ordered psychiatrist's testimony in the guilt phase, the United States Supreme Court has stated that it could "discern no basis to distinguish

between the guilt and penalty phases of ... trial so far as the protection of the Fifth Amendment privilege is concerned" and that it is improper to use such psychiatric testimony at either the guilt phase or the penalty phase. *Estelle,* 451 U.S. at 462-63, 101 S.Ct. at 1872-73. We realize that *Estelle, Esquivel,* and *McKenna* all concerned the use of the psychological reports in the penalty phase of a first degree murder case and that the instant case concerns the use of such reports in the sentencing hearing of a non-first-degree-murder case; however the rationale from those cases applies here. *See Pens v. Bail* 902 F.2d 1464, 1466 (9th Cir. 1990) (in a rape case, unwarned statements given in a psychiatric evaluation about other offenses could not be used to enhance a sentence); *State v. Valera,* 74 Haw. 424, 848 P.2d 376, 382 (1993) ("the use at sentencing of statements previously obtained in violation of a defendant's privilege against self-incrimination violates that defendant's privilege against self-incrimination"). Pursuant to this case law, we conclude that the district judge abused his discretion and that Troy is entitled to a new sentencing hearing. The district judge ordered the psychological examination of Troy and then relied on the conclusions of that exam, including his unwarned statements to the psychiatrist, to determine that Troy was likely to act out sexually and that he was not falsely convicted. Such consideration of the reports violates the "fair play" rules set forth in *Esquivel* and *McKenna* and the Fifth Amendment concerns set forth in *Estelle,* and constitutes reversible error.

The district court's imposition of a harsher sentence because Troy maintained his innocence and refused to admit his guilt was an abuse of discretion.

During the sentencing hearing, the district judge informed Troy that he was convinced of his guilt and that he believed that Troy's continual declaration of innocence merely enabled Troy to face his parents. The district judge stated that he could show Troy no mercy if Troy continued to profess his innocence and also implied that he was going to give Troy consecutive sentences if Troy did not state that he was guilty and explain his involvement in the events on January 29, 1994. The district judge stated that he was going to take a thirty minute recess so that Troy's counsel could "explain [to Troy] the significance" of what the district judge was trying to convey, and concluded by stating:

> If you are going to continue this status as a victim, if you are not man enough now, and this is not just going to hurt you, it's going to hurt the lives of your brothers, your two brothers' families, your other siblings, and your parents, particularly your mother, who I think has been a victim of a lot of things, like you have, too....
>
> I'm offering you the opportunity to be a man, and to explain exactly what happened that night, and to get it off your shoulders morally, spiritually, and every other way, and to take the burden off your parents' shoulders. I will show you pity if you do that. But if you're going to be-if you show no remorse, if you are unable to be reformed because of your attitude, then I cannot show you any pity.

The court then took a thirty minute recess. When the court reconvened, the district judge asked Troy if he was guilty of the crime, and Troy stated, "No sir, I'm not." After hearing testimony from Troy's mother, the district judge asked Troy if he had anything to say to the court, and Troy responded:

> Just that I know that I'm not guilty. I know there was evidence presented that-that convinced 12 honest people of this community that I was, and all I'd like to say is I-I'm not guilty.

The district judge then sentenced Troy to the maximum penalty on Counts II and IV and ordered those sentences to run consecutively.

In *Bushnell v. State,* 97 Nev. 591, 637 P.2d 529 (1981), the district judge based his sentence on the fact that the appellant maintained his innocence. In overturning appellant's sentence, this court stated:

> [Appellant] had not waived his right to remain silent. A defendant retains his Fifth Amendment rights after a jury verdict because the appellate process is still open to him. Imposition of a harsher sentence based upon the defendant's exercise of his constitutional rights is an abuse of discretion and the sentence cannot stand.

Id. at 593, 637 P.2d at 531 (citations omitted); *see also Thomas v. State,* 99 Nev. 757, 758, 670 P.2d 111, 112 (1983) (citing *Bushnell* and concluding that in relying on the fact that the appellant had refused to admit his

guilt, the district court abused its discretion in determining a sentence).

The Fifth Amendment states that no person "shall be compelled in any criminal case to be a witness against himself." The district court violated Troy's Fifth Amendment rights by considering his "lack of remorse" when he still had a constitutional right to maintain his innocence and by threatening to impose a harsher sentence if Troy refused to admit his guilt. Troy was unable to express remorse sufficient to satisfy the judge without foregoing his right to not incriminate himself, and the fact that he took the stand at trial does not change this analysis because Troy maintained his innocence. As such, requiring Troy to either express remorse or receive a harsher sentence violated Troy's Fifth Amendment rights and constituted an abuse of discretion. *See Bushnell,* 97 Nev. at 593, 637 P.2d at 531 (stating that "[i]mposition of a harsher sentence based on the defendant's exercise of his constitutional rights is an abuse of discretion").

Therefore, we conclude that the district judge abused his discretion in relying on the fact that Troy refused to admit his guilt when it imposed Troy's sentence, and that Troy should receive a new sentencing hearing.

The district court's reference to the post trial DNA testing was not an abuse of discretion.

After the trial but before the sentencing hearing, defense counsel approached the court with a request to allow additional independent DNA testing to give

Troy's parents peace of mind about the results of the trial. After discussing the matter with the prosecution and the defense, the district judge appropriated funds for the additional testing. The additional DNA test confirmed that the fluids taken from Jane Doe's underwear matched Troy's DNA and further showed that only 1 in 10,000 people had DNA matching that present in the tested fluids (the DNA test at trial indicated that only 1 in 3,000,000 people had matching DNA). The district judge stated that the result of this additional test was "simply just further proof of what we already knew from the first DNA testing, that this vicious crime was committed by Troy Don Brown."

In *Goodson v. State*, 98 Nev. 493, 495-96, 654 P.2d 1006, 1007 (1982), this court stated that "an abuse of discretion will be found when the defendant's sentence is prejudiced from consideration of information or accusations founded on impalpable or highly suspect evidence." We conclude that the district court did not abuse its discretion in considering the additional DNA tests. Troy's counsel requested the DNA tests and even picked the laboratory which performed the test. Troy now contends that the tests were considered without any evidentiary scrutiny, laying of foundation, or establishment of methods of reliability. However, Troy placed the evidence before the court, had an opportunity to make all of the above-mentioned arguments, and failed to do so. Furthermore, it does not appear that the district judge gave much weight to the test results because he stated that the results only confirmed what he already knew, i.e., that Troy was guilty. Based on these reasons, we conclude that it was not an abuse of discretion for the district judge to

consider the additional DNA test results at the sentencing hearing.

CONCLUSION

The district court's failure to set bail immediately was not so prejudicial to Troy that it constituted reversible error. Furthermore, the DNA evidence was properly admitted at trial, and sufficient evidence existed to convict Troy. However, the double jeopardy clause precluded Troy from being convicted of both sexual assault and child abuse by sexual abuse/sexual assault, and Troy's conviction for child abuse must be vacated. Finally, we conclude that the district judge abused his discretion during the sentencing phase of the trial and the case must be remanded to the district court for a new sentencing hearing on the remaining sexual assault conviction (Count II).[6]

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[6] The Honorable A. William Maupin, Justice, did not participate in the decision of this appeal.

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 07-15592

[Filed July 30, 2008]

TROY DON BROWN,	)
	)
Petitioner-Appellee,	)
	)
v.	)
	)
CRAIG FARWELL; et al.,	)
	)
Respondents-Appellants.	)
	)

Before: O'SCANNLAIN, HAWKINS, and WARDLAW, Circuit Judges.

Judges Hawkins and Wardlaw vote to deny the petition for rehearing and petition for rehearing en banc. Judge O'Scannlain votes to grant the petitions.

The full court has been advised of the petition for rehearing en banc, and no judge of the court requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and petition for rehearing en banc are **DENIED**.

APPENDIX H

28 U.S.C. § 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C.A. § 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment

of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable

factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of

counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

N.R.S. 200.366. Sexual assault: Definition; penalties

1. A person who subjects another person to sexual penetration, or who forces another person to make a sexual penetration on himself or another, or on a beast, against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his conduct, is guilty of sexual assault.

2. Except as otherwise provided in subsections 3 and 4, a person who commits a sexual assault is guilty of a category A felony and shall be punished:

(a) If substantial bodily harm to the victim results from the actions of the defendant committed in connection with or as a part of the sexual assault, by imprisonment in the state prison:

(1) For life without the possibility of parole; or

(2) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 15 years has been served.

(b) If no substantial bodily harm to the victim results, by imprisonment in the state prison for life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served.

3. Except as otherwise provided in subsection 4, a person who commits a sexual assault against a child under the age of 16 years is guilty of a category A felony and shall be punished:

(a) If the crime results in substantial bodily harm to the child, by imprisonment in the state prison for life without the possibility of parole.

(b) Except as otherwise provided in paragraph (c), if the crime does not result in substantial bodily harm to the child, by imprisonment in the state prison for life with the possibility of parole, with eligibility for parole beginning when a minimum of 25 years has been served.

(c) If the crime is committed against a child under the age of 14 years and does not result in substantial bodily harm to the child, by imprisonment in the state prison for life with the possibility of parole, with eligibility for parole beginning when a minimum of 35 years has been served.

4. A person who commits a sexual assault against a child under the age of 16 years and who has been previously convicted of:

(a) A sexual assault pursuant to this section or any other sexual offense against a child; or

(b) An offense committed in another jurisdiction that, if committed in this State, would constitute a sexual assault pursuant to this section or any other sexual offense against a child, is guilty of a category A felony and shall be punished by imprisonment in the state prison for life without the possibility of parole.

5. For the purpose of this section, "other sexual offense against a child" means any act committed by an adult upon a child constituting:

(a) Incest pursuant to NRS 201.180;

(b) Lewdness with a child pursuant to NRS 201.230;

(c) Sado-masochistic abuse pursuant to NRS 201.262; or

(d) Luring a child using a computer, system or network pursuant to NRS 201.560, if punished as a felony.

N.R.S. 200.508. Abuse, neglect or endangerment of child: Penalties; definitions

1. A person who willfully causes a child who is less than 18 years of age to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect or to be placed in a situation where the child may suffer physical pain or mental suffering as the result of abuse or neglect:

(a) If substantial bodily or mental harm results to the child:

(1) If the child is less than 14 years of age and the harm is the result of sexual abuse or exploitation, is guilty of a category A felony and shall be punished by imprisonment in the state prison for life with the possibility of parole, with eligibility for parole beginning when a minimum of 15 years has been served; or

(2) In all other such cases to which subparagraph (1) does not apply, is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 20 years; or

(b) If substantial bodily or mental harm does not result to the child:

(1) If the person has not previously been convicted of a violation of this section or of a violation of the law of any other jurisdiction that prohibits the same or similar conduct, is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years; or

(2) If the person has previously been convicted of a violation of this section or of a violation of the law of any other jurisdiction that prohibits the same or similar conduct, is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 2 years and a

maximum term of not more than 15 years, unless a more severe penalty is prescribed by law for an act or omission that brings about the abuse or neglect.

2. A person who is responsible for the safety or welfare of a child and who permits or allows that child to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect or to be placed in a situation where the child may suffer physical pain or mental suffering as the result of abuse or neglect:

(a) If substantial bodily or mental harm results to the child:

(1) If the child is less than 14 years of age and the harm is the result of sexual abuse or exploitation, is guilty of a category A felony and shall be punished by imprisonment in the state prison for life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served; or

(2) In all other such cases to which subparagraph (1) does not apply, is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 20 years; or

(b) If substantial bodily or mental harm does not result to the child:

(1) If the person has not previously been convicted of a violation of this section or of a violation of the law of any other jurisdiction that prohibits the

same or similar conduct, is guilty of a gross misdemeanor; or

(2) If the person has previously been convicted of a violation of this section or of a violation of the law of any other jurisdiction that prohibits the same or similar conduct, is guilty of a category C felony and shall be punished as provided in NRS 193.130, unless a more severe penalty is prescribed by law for an act or omission that brings about the abuse or neglect.

3. A person does not commit a violation of subsection 1 or 2 by virtue of the sole fact that he delivers or allows the delivery of a child to a provider of emergency services pursuant to NRS 432B.630.

4. As used in this section:

(a) "Abuse or neglect" means physical or mental injury of a nonaccidental nature, sexual abuse, sexual exploitation, negligent treatment or maltreatment of a child under the age of 18 years, as set forth in paragraph (d) and NRS 432B.070, 432B.100, 432B.110, 432B.140 and 432B.150, under circumstances which indicate that the child's health or welfare is harmed or threatened with harm.

(b) "Allow" means to do nothing to prevent or stop the abuse or neglect of a child in circumstances where the person knows or has reason to know that the child is abused or neglected.

(c) "Permit" means permission that a reasonable person would not grant and which amounts to a

neglect of responsibility attending the care, custody and control of a minor child.

(d) "Physical injury" means:

(1) Permanent or temporary disfigurement; or
(2) Impairment of any bodily function or organ of the body.

(e) "Substantial mental harm" means an injury to the intellectual or psychological capacity or the emotional condition of a child as evidenced by an observable and substantial impairment of the ability of the child to function within his normal range of performance or behavior.

N.R.S. 432B.020. "Abuse or neglect of a child" defined

1. "Abuse or neglect of a child" means, except as otherwise provided in subsection 2:

(a) Physical or mental injury of a nonaccidental nature;

(b) Sexual abuse or sexual exploitation; or

(c) Negligent treatment or maltreatment as set forth in NRS 432B.140, of a child caused or allowed by a person responsible for his welfare under circumstances which indicate that the child's health or welfare is harmed or threatened with harm.

2. A child is not abused or neglected, nor is his health or welfare harmed or threatened for the sole reason that his:

(a) Parent delivers the child to a provider of emergency services pursuant to NRS 432B.630, if the parent complies with the requirements of paragraph (a) of subsection 3 of that section; or

(b) Parent or guardian, in good faith, selects and depends upon nonmedical remedial treatment for such child, if such treatment is recognized and permitted under the laws of this State in lieu of medical treatment. This paragraph does not limit the court in ensuring that a child receive a medical examination and treatment pursuant to NRS 62E.280.

3. As used in this section, "allow" means to do nothing to prevent or stop the abuse or neglect of a child in circumstances where the person knows or has reason to know that a child is abused or neglected.

N.R.S. 432B.070. "Mental injury" defined

"Mental injury" means an injury to the intellectual or psychological capacity or the emotional condition of a child as evidenced by an observable and substantial impairment of his ability to function within his normal range of performance or behavior.

APPENDIX I

IN THE SUPREME COURT
OF THE STATE OF NEVADA

No. 27426

[Filed November 20, 1995]

TROY DON BROWN, Appellant	)
vs.	)
STATE OF NEVADA, Respondent.	)

APPELLANT'S OPENING BRIEF

Appealed From Judgment of Conviction In
The Fourth Judicial District Court
County of Elko
Case No. 5833

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* * *

[p.25]

the separately charged crime of sexual assault of a child, and the penalty for the sexual assault of a child is greater than that of the child abuse, the child abuse must merge allowing only one conviction and one penalty to arise from the single transaction. To allow a conviction for both, and impose a separate sentence for both, is to sanction a violation of the Double Jeopardy Clauses of both the United States and Nevada Constitutions. Therefore, Troy Brown's separate conviction and sentence for NRS 200.508, Count IV, must fall, as it is necessarily included in either of the other sexual assault of a child under age 14 counts.

4. WAS THE DNA EVIDENCE IMPROPERLY ADMITTED INTO EVIDENCE?

Deoxyribonucleic acid (DNA) evidence was admitted in this case, both at the Preliminary Hearing (ROA 3, 526-758, TR 152- 178), and at the trial (ROA

5, 1053-1246, TR 268-345). Clearly Nevada law allows blood evidence to be admitted for purposes of identity, in a criminal action. N.R.S. 56.020. In determining the admissibility of scientific evidence, and later the value of an expert's testimony about that evidence, preliminary reviews are necessary.

While much of the nation followed the "general scientific acceptance" test of Frye v. United States, 293 F 1013 (D.C. Cir. 1932) for the last 63 years, Nevada has always looked to a scientific test's trustworthiness and reliability in deciding the acceptance of new forms of scientific evidence. Santillanes v. State, 104 Nev. 699, 765 P.2d 1147 (1988). Once trustworthiness and reliability are established, relevance and prejudice vs. probative value (NRS 48.025, 48.035) must also be considered. After admissibility is determined by the court, the weight to be accorded the evidence is a jury determination. Deeds v State, 97 Nev. 216, 626 P.2d. 271 (1981).

The United States Supreme Court caught up with Nevada's approach in 1993 in the case of Daubert v. Merrell Dow Pharmaceuticals, Inc., ___ U.S. ___, 113 S. Ct. 2786, 125 L.Ed 2d. 469, when the Frye test was held to have been superseded by Federal Rule of Evidence 702 which occupied the field. That rule, is identical to the language of N.R.S. 50.275 which says:

> If scientific, technical or other specialized knowledge will assist the trier of act to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or

education may testify to matters within the scope of such knowledge."

While Nevada cases have variously dealt with different kinds of scientific evidence and tests, such as polygraph, serological electrophoresis of blood, and other areas of forensic technology in criminal investigation, no definitive DNA rulings have yet emanated from this court. Appellant asserts that the facts of this case provide the vehicle for a legal analysis and definitive rule with regard to the methods for handling DNA evidence in a criminal trial.

Because Daubert is identical in spirit and intent with Nevada's long-standing approach to analyzing scientific evidence and expert testimony about it, we assert that Nevada should formally adopt the Daubert test insofar as it requires that a pretrial determination of admissibility be made by the trial court with regard to DNA evidence specifically. Although the Oklahoma Court of Appeals recently ruled that its state courts need not conduct pretrial admissibility hearings on DNA evidence, it did so only after doing a comprehensive analysis of the entire development of DNA forensics and population genetics, and based upon a record in which extensive information was presented to the court in the context of the case being considered. Taylor v State, 889 P.2d. 319 (Okla 1995). That is not the situation in the present case and it is exactly those failings that makes the admissibility of DNA evidence, and "frequency of population" testimony so prejudicial to Troy Brown.

At the Preliminary Hearing held July 6, 1994, Washoe County Crime Lab DNA specialist Renee

Romero testified that her lab had just begun doing DQ Alpha testing in October, 1993, (ROA 3,526-758, TR 162-163) and had only started reporting PCR DNA test results two months earlier and they were still evaluating the system and completing proficiency tests. (TR 163). She further testified that the national technical working group (TWG-DAM) which is working on DNA analysis methods, is trying to set standards for quality control or quality assurance in the area of DNA testing and reporting, but that so far, they've only issued non-mandatory guidelines. (TR 164). She further testified that the population database used by her lab was the FBI's Roche Molecular Systems database, which was not yet even published as of that date. ("I have a pre-publication and it will be published in the Journal of Forensic Science in July." TR 166).

Romero acknowledged that there are several different population databases in the field and that she was using the FBI's and would be looking at additional information at the end of the month. (TR 168). In discussing polymarker acceptance, Romero admitted she had not yet had polymarker evidence admitted in court (TR 177) and, to her knowledge, it had only been accepted in evidence a few times. (TR 178) .She then testified that the frequency of Troy Brown's PCR polymarker in the Caucasian population base 1 in 22. With the DQ Alpha test she placed it at 1 in 18,900 for the Caucasian population; 1 in 2,460,000 for the Black population; and 1 in 4,800 for the Hispanic population. (TR 179).

Finally, Romero testified that she did not think she had enough vaginal stain sample in the panties to do an RFLP type DNA test, (TR 172-176), although, by

the time of trial, sufficient stain sample had materialized casting suspicion on the entire process. (ROA 5,1053-1246, TR 299-345).

While some databases have gained acceptance in DNA work, the FBI database has been criticized compared to that of other specialized agencies like Cellmark and Lifecodes, and their DNA results have even been declared inadmissible. State v. Anderson, 853 P.2d 135, 142 (N. M. 1993); State v. Vandebogart, 616 A.2d. 482,494 (N.H. 1992). Population frequency statistics generated by the "product" or "unmodified product" method have been found inadmissible, as have statistical calculations determined under the "fixed bin" method. State v Streich, 638 A.2d. 38 (Vt. 1995). Georgia disallowed Lifecodes population database as insufficiently reliable and unacceptable. Caldwell v. State, 393 S.E.2d. 436 (1990). Other courts that have not allowed population frequency statistics because of the many different methods or differing levels of acceptance in the scientific community include State v. Bible, 858 P.2d 1152, 1185 Ariz 1993); People v. Barney, 10 Cal Rptr 2d. 731; Commonwealth v. Lannigan, 596 N. E. 2d 311.

Clearly Romero's Preliminary Hearing testimony alone established the infancy of the Washoe Crime Lab in conducting DNA work and that, alone, should have prompted the defense counsel to seek, and the trial court to require, a pretrial hearing on DNA before admittiing the evidence at trial in this case. But not only was that not done, Romero's own credentials were barely discussed and instead, her curriculum vita was simply introduced into evidence with little or no discussion.

Some courts have found that the testimony of a single expert on DNA and pooulation genetics is insufficient to pass muster for scientific acceptance. People v. Pizarro, 10 Cal.App 4th 57 (1993). Romero was the only witness to testify on DNA methods or statistics, and the defense, even though it had been provided with funds for a DNA expert at trial (ROA 2, 285-295), produced no expert to challenge anything at trial and virtually no cross-examination about population genetics or statistics took place, even though this is the single biggest area of substantial controversy in this field.

Forensics use of DNA evidence is a very recent development; the first use was less than 10 years ago. State v. Bloom, 516 N. W.2d 159, 163 (Minn. 1994). No actual resolution of the controversy in population database statistics has really been achieved yet. Rather, when the Committee on DNA Technlogy in Forensic Sciences was formed at the National Research Council, its purpose was to negotiate some kind of compromise that would allow population genetics use to go forward while the NRC continued its search for a final solution to the problems. The 1992 report which resulted in todays "interim ceiling method" for estimating random match probabilities (which was what Renee Romero used by the time of trial to increase Troy Brown's frequency to 1 in 3 million of the White, Black and Hispanic male and female population) simply accepted the validity of the challenge and changed their minimum standards to come up with a more conservative population range.

In Bloom, the court noted that "the NCR Report has not put an end to the controversy, noting that the FBI

had agreed to fund a new study by the NCR to end the "crisis" in competing population statistics methods. Given todays "trial by mathematics" mentality, a man's freedom should not depend upon nor await a meeting of the minds of the world's statistical geniuses. Even though the conservative ceiling method has gained broader acceptance, a DNA specialist should not be allowed to testify to it, and even to her methodology, until the court has conducted a thorough pre-trial admissibility hearing on the DNA methodology used, which database is being relied upon, what is the current state of acceptance of various techniques in the courts, and finally, the specific application of this technology to the case at bar. None of that was done in this case. A reading of the entire direct and crosss examination of Renee Romero at the trial (ROA 5, 1053-1246, TR 299-345) reveals that neither the court, the prosecutor nor the defense attorney in this case seemed to sufficiently understand DNA. Certainly, the defense counsel's closing argument, wherein he simply questioned "did you understand it?" attests to his lack of understanding.

Additionally, courts that have admitted DNA evidence, have nevertheless restricted the manner of presentation of the comparison testimony, holding that the expert cannot talk about "matching" DNA, State v. Cauthron, 846 P.2d 502 (Wash. 1993) or give his or her opinion about the strength of the DNA evidence. In this case, Washoe Lab serologist Maria Fassett did just that at trial when she commented upon the fact that other trace evidence examinations were not done for the reason that "the DNA was so overwhelming (ROA 5, TR 295).

Fassett also testified that in this case, the Carlin police appeared to lack knowledge on evidence labeling for lab work. She said she was told that the suspect never went back to his own bed after the attack, thus there was no point in examining the bedding taken from Troy's bedroom. Of course, the evidence from Troy, Travis, Dave Prescott and Officer Terry all disproved that statement. There was also testimony about the "lost" teeth scrapings from Megan, who claimed to have bitten her assailant. Given these kinds of evidentiary problems with this particular case, it is incomprehensible that no pre-trial evidentiary hearings were held to establish the integrity of the evidence gathering, the lab techniques, and the overall scientific process, before the court would allow the jury to hear expert testimony. There was a poor showing of expertise, a total lack of appropriate foundation and virtually a non-existent cross-examination of the experts and evidence custodians in this case. That was prejudicial to Troy Brown, and in the face of the other evidence which strongly indicated Troy was not the assailant and that there were other likely suspects, the effect of these evidentiary failing was fatal to Troy.

The prejudice to Troy from the lack of challenge to the DNA evidence is evident in comparing the earliest DNA testimony at Preliminary Hearing, and the later, more developed theories and results and methods used by the time of trial. Either the lab was incredibly inexpert and deficient in July, 1994, or it drastically changed its methods and databases, and perhaps techniques, by the time of trial. That change alone should have been thoroughly explored but instead was virtually ignored.

Thus, Troy Brown urges this Court to require a full examinaion of the status of DNA technology to determine standards of acceptance for the courts in Nevada by way of mandatory pretrial evidentiary hearings to insure the evidence collection methods, the expertise of experts and foundation for their testimony, and the reliability of population genetics statistics before DNA evidence can be presented to a jury in a trial. Because of the absence of such in this case, Troy Brown's convictions should be reversed and he should be awarded a new trial.

5. IS THE EVIDENCE SUFFICIENT TO CONVICT TROY BROWN?

Given the plethora of evidence that the assailant was not Troy Brown, including the hair which did not match, the coat which was different, the lack of watch and zipper, the fact that Megan repeatedly named Trent every time the police brought up Troy to her, the lack of blood on Troy when he first came back home at 1:32 a.m., the absence of scratches or bites from Megan on Troy's body and the total failure of the DNA evidence to be established as trustworthy and reliable in this particular case, Appellant submits that there was insufficient evidence to convict Troy Brown of these crimes.

CONCLUSIONS

1. Troy Brown was unconstitutionally denied bail.

2. Troy Brown should be re-sentenced by a different judge who does not seek to punish him for

maintaining his innocence, and who will not consider prejudicial material.

3. Troy Brown's conviction for Child Abuse by means of sexual assault should be set aside and his sentence for that crime should be reversed.

4. Because of the inadequacies in the DNA admission process, and the presentation of the evidence, Troy Brown should be granted a new trial with instructions for the trial court to conduct a mandatory pre-trial admissibility hearing to establish the integrity of the techniques used and the trustworthiness and reliability of the DNA evidence in this case.

Respectfully submittedtthis 9th day of November, 1995

/s/Dorothy Nash Holmes
DOROTHY NASH HOLMES

APPENDIX J

IN THE SUPREME COURT
OF THE STATE OF NEVADA

No. 27426

[Filed March 4, 1996]

TROY DON BROWN, Appellant,	)
vs.	)
THE STATE OF NEVADA, Respondent.	)

APPELLANT'S REPLY BRIEF

Appeal from Judgment of Conviction in
the Fourth Judicial District Court
Elko County, Nevada
Case No. 5833

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* * *

[p.8]

show, however, is whether that was reported in the media. This Court can take judicial notice that this was perhaps the most notorious and heinous crime at the time in Eastern Nevada, but Defense Counsel made no motions with regard to publicity. Thus we are unable to tell if he appeared to the jury to be in custody, Grooms v. State, 96 Nev. 142 (1980), or if the revoked bail was telegraphed to potential jurors, but the inference is likely.

II. THE SENTENCING WAS IMPROPER

Respondent admits Troy Brown is serving more time for failing to show remorse, (Answering Brief p 13), but asserts that is proper "character evidence" for the Court to consider in sentencing. His citations to State v. Wilson, 105 Nev. 110 (1989) and Cole v. State, 101 Nev. 585 (1985) are inapposite. Wilson provides that when a young defendant, sentenced to death, has

exhibited genuine remorse and has other mitigating evidence, it is improper for his counsel not to put that evidence forward. Cole involved a serial killer who admitted 13 murders and rape and said he'd do it again if he could, and who asked to die. Neither of those cases gives the Court any authority to punish a defendant more severely because he maintains his innocence, as was done here. The State hasn't produced any justifying legal authority because what the judge did in this case cannot be justified.

Contrary to Respondent's claim, the law in Nevada is not unclear on this issue. Bushnell v. State, 97 Nev. 591 (1981) and Thomas v. State, 99 Nev. 757 (1983) both provide that a defendant cannot be punished for maintaining his innocence. That is true whether or not he chooses to testify. The argument that allowing a judge to hammer a man at sentencing if he doesn't confess and show remorse prevents defendants from falsely testifying is specious. In a criminal trial the defendant has the right to choose to testify or not. If an accused is innocent, and maintains that stance throughout his trial, he might surely be afraid to testify knowing the judge will "max out" his sentence if he doesn't like what he says or how he says it. Face-to-face testimony, with a jury observing demeanor and determining credibility, is sometimes all a defendant has, and sometimes it is enough. Respondent says the reasoning in cases like Thomas and Bushnell, (supra) and U.S. Rodriguez, 498 F.2d 302 (5th Cir. 1974), Thomas v. United States, 368 F.2d 941 (5th Cir 1966), North Carolina v. Pearce, 395 U.S. 711 (1969) and In Re Lewallen, 590 P.2d. 383 (Ca. 1979) should not apply to Troy because he did testify but the Court didn't believe him. However, turning the right to testify into

a potential "penalty enhancement" is tantamount to denying the right to defend oneself.

The very words of the court, recounted at pages 15-16 of our Opening Brief, show the invective and hatred this judge held for Troy because he would not admit guilt. He specifically said he would give him a harsher sentence if he didn't "act like a man" and confess. The facts of this case overwhelmingly support a finding of abuse of discretion and the need for a resentencing before a different judge.

This Court should also examine the text of the sentencing judge's colloquy regarding Troy's parents and family life. While Respondent claims not to see what the problem is, the record speaks for itself. The Court clearly sentenced Troy more harshly because of his father' s drinking, his mother's abuse, and the dysfunctional family he is a part of. We are all products of our upbringing but a man should be sentenced only for the crime he is convicted of, not the immorality of his parents.

The consideration of the post-trial DNA letter from Forensic Science Associates was improper and prejudicial for a number of reasons. First, contrary to Respondent's assertion, Troy Brown did not introduce it into evidence at the sentencing by virtue of the fact that his parents asked for additional DNA testing. They sought it because the Defense Counsel had failed to challenge the DNA before or during the trial, had failed to use the money the court granted for the DNA expert, stated in his own Final Argument that he could not understand it (TR 521-528) and thus they could not reconcile themselves to the jury's verdict without

more exploration of this most critical issue. The Court granted their request to help give them peace of mind. The results of the post-trial DNA work were reported to the Court and the DA, as well as the Defense Counsel.

But as the sentencing transcript shows, Troy Brown was never given the chance to properly present Exhibit A, to delve into the foundation for the report or the credentials of the lab technician or to even present testimony about it. As Exhibit A shows, the new lab was not even able to do DNA testing on some of the items submitted:

> "No attempt was made to conduct this analysis at this time. " (See page 3, paragraph 1);
>
> "No attempt was made to remove cells from this slide for DNA analysis." (See page 3, paragraph 2);
>
> "No attempt was made to extract DNA from the second swab [B] due to the paucity of cells from this sample." (See page 3, paragraph 3);
>
> "No further analysis was conducted on this specimen." (see page 4, paragraph 1).

Rather, all the new lab was able to do was identify and confirm the previously identified genes and confirm gene traits identified by the Washoe County technician Renee Romero. That is akin to confirming that a red car is indeed red. That in no way addresses the DNA issues raised in this trial (and discussed in detail in Section IV below.) There is no indication that

Forensic Associates was told of the evidence collection problems cited by Maria Fassett as concerning her. (TR 280). In fact, the first paragraph of the letter indicates to the contrary. There is no indication the new lab was told that Romero at first could not find sufficient sample to do an RFLP analysis, but somehow came up with it 6 months later. (TR 172-176, 299-345). There is no indication Forensic Associates was told that Troy's brothers might be in the suspect population.[1]

There is no indication the new lab was told that Romero was new at testifying, her lab had not yet completed proficiency testing, and that she was just learning new DNA techniques, all of which Romero testified to at trial. All of these are factors that effect the reliability of the actual testing done, and impact on the efficacy of the results achieved. The very consideration of the May 31, 1995 letter in isolation compounded the DNA evidence problems from the trial and further prejudiced Troy. It was like a second tarring with the same batch of feathers.

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[1] The impact of brothers in the suspect population is an important consideration that bears on the Random Match Probabilities (RMP). "But the probability that the suspect and his biological brother will share a set of alleles on each of the three probe sites is approximately (1/4)3 = 1/64." See Jonathan J. Koehler, DNA Matches and Statistics: Important Questions, Surprising Answers, 76 Judicature 222 (1993). In the present case, that factor is critically important, not only because the victim constantly referred to "Trent" instead of "Troy", but also because Renee Romero, the States's DNA "expert" quoted the odds of two brothers sharing the same alleles as **1 in 6,500!** (TR 344).

Nor is it accurate for the Court or Respondent to say that the post-trial DNA merely confirmed the results of the Washoe County lab. Forensic Associates said they could "not eliminate [Troy Brown] as a potential source of sperm from the Allred vaginal swab [Item 2-1A]" (see page 7, numbered paragraph 4 of May 31, 1995 letter, Exhibit A hereto) which is very different from saying there is a 1 in 3 million chance the offender was someone other than Troy Brown (TR 320, 515) or "the chances that the DNA in the panties and blood is not Troy's is .000033" (TR 338). The random match probability (RMP) found by Forensic Associates (1 in 10,000 for this specific genotype) (see page 7, first line of Exhibit A) was even different that Romero' s who testified at Preliminary Hearing to nearly double that, or 1 in 18,900. (Prelim. TR 179). The fact that both the Court and the DA assert that Forensic Associates confirmed Romero further demonstrates their lack of understanding of the whole DNA process and technology, something the Court readily admits. (Sentencing TR 11-12).

The prejudice created to Troy Brown in sentencing cannot simply be ignored nor erased. The cumulative effect was to land him in prison for more than the rest of his natural life. The magnitude of these problems requires that Troy receive a new sentencing from a different judge. Because of the consideration of prejudicial material and abuse of discretion, a new sentencing is required. Castillo v. State, 110 Nev. 535 (1994) and Goodson v. State, 98 Nev. 493 (1988).

III. DOUBLE JEOPARDY OCCURRED WITH THE DUAL SENTENCES

Respondent has produced no legal authority to support its argument that Sexual Assault of a Child Under 14 and Child Abuse by Sexual Assault are two distinct crimes. The legislative history cited in Appellant's Opening Brief demonstrates that the Legislature saw them as having the identical elements; they simply imported Sexual Assault of a Child into the child abuse statutes in toto. Rather than finding any legal authority for

* * *

APPENDIX K

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

No. CV-N-03-0712-HDM(VPC)

[Filed November 12, 2004]

TROY BROWN, Petitioner,	)
vs.	)
CRAIG FARWELL, et al., Respondents.	)

FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY PURSUANT TO 28 U.S.C. § 2254

Petitioner, Troy Brown ("Brown"), by and through his attorney, Paul G. Turner, Assistant Federal Public Defender, hereby files this First Amended Petition for Writ of Habeas Corpus by a Person in State Custody Pursuant to 28 U.S.C. § 2254.[1]

[1] Petitioner's exhibits referenced in this petition are identified as numerical Exhibits 1-195.

FIRST AMENDED PETITION[2]

I.

PROCEDURAL BACKGROUND

1. On March 18,1998, the Clerk of the Fourth Judicial District Court, Elko County, Nevada, entered an Amended Judgment of Conviction under the case entitled State of *Nevada v. Troy Don Brown*, Case No. 5833. (Ex. 92.)

2. Mr. Brown was convicted of Sexual Assault on a Child Under the Age of 14 Years, Resulting in Substantial Bodily Harm (Count I) and Sexual Assault on a Child Under the Age of 14 Years (Count II), and was sentenced to a term of life in prison with the possibility of parole after serving 10 years on each count. The sentence imposed in Count II is to run consecutive to the sentence imposed in Count I. (Id.) Mr. Brown is serving out his sentence at the Lovelock Correctional Center in Lovelock, Nevada.

3. A Preliminary Hearing was held on July 6, 1994, before the Honorable Barbara Nethery in the Justice Court of Elko Township, County of Elko, State of Nevada, in Case No. CR-94-0160. Mr. Brown was present and represented by attorney David B. Lockie. (Ex. 19.)

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[2] Counsel has sent Petitioner a Verification and Acknowledgment of the First Amended Petition for Petitioner's signature and will file that pleading with this Court upon receipt from Petitioner.

4. On July 20, 1994, the State filed an Information in the Fourth Judicial District Court in and for Elko County, Nevada, charging Brown with the following crimes: Sexual Assault on a Child Under the Age of 14 Years, Resulting in Substantial Bodily Harm, a felony as defined by NRS 200.366 (Count I), Sexual Assault on a Child Under the Age of 14 Years, a felony as defined by NRS 200.366 (Count II), Attempted Murder, a felony as defined by NRS 193.330, 200.010 and 200.020 (Count III), and Abuse of Neglect of a Child Less Than Eighteen (18) Years of Age, Resulting in Substantial Mental Harm, a felony as defined by NRS 200.508, 432B.020 and 432B.070 (Count IV). (Ex. 21.)

5. On August 1, 1994, Brown, represented by attorney Lockie, appeared for arraignment in front of the Honorable Thomas L. Stringfield and entered a plea of not guilty to the charges as listed in the Information. (Ex. 22.)

6. The case proceeded to trial on September 27, 1994, and continued through September 30, 1994, in Department One of the Fourth Judicial District Court with the Honorable Thomas L. Stringfield presiding. Brown was present throughout and represented by attorney Lockie. (Exs. 29, 30, 31, & 34.)

7. On September 30, 1994, the jury found Brown guilty of Counts I, II and IV as listed in the Information. (Ex. 35 & 36.) The jury imposed a sentence of life with the possibility of parole after ten years has been served as to Count I, Sexual Assault on a Child Under the Age of 14 Years, Causing Substantial Bodily Harm. (Ex. 35-36, TAB 79.) Sentencing on Counts II and IV was to be held on

December 12, 1994. (Ex. 34 at p. 559.) The jury acquitted Brown of the attempted murder charge (Count III).

8. On December 9, 1994, the district court entered an Order Allowing DNA Testing by Defendant. (Ex. 44.) The order further stated that the December 12, 1994 sentencing hearing, "shall be continued indefinitely until the results of this additional testing are obtained." (Id. at 4.)

9. The sentencing hearing took place on June 23, 1995, before the Honorable Thomas L. Stringfield. (Ex. 58.) Mr. Brown was present with attorney Lockie. The court sentenced Mr. Brown to life with the possibility of parole after ten years on Count 11, and twenty years on Count IV. Each sentence was ran consecutive to the other. (Id. at 20.)

10. The Judgment of Conviction was filed on June 28, 1995. (Ex. 60.)

DIRECT APPEAL

11. Brown, through counsel Donald K. Coppa, filed a timely Notice of Appeal on July 21, 1995. (Ex. 62.) The Nevada Supreme Court docketed this appeal as Case No. 27426.

12. Brown, by and through counsel Dorothy Nash Holmes, filed his Opening Brief (Case No. 27426) on November 20, 1995, and raised the following assignments of error:

I. WAS IT ERROR TO DENY TROY BROWN BAIL IN A NON-CAPITAL CASE?

II. SHOULD TROY BROWN BE RE-SENTENCED?

III. IS IT DOUBLE JEOPARDY FOR TROY DON BROWN TO BE CONVICTED AND SENTENCED FOR BOTH SEXUAL ASSAULT OF A CHILD AND CHILD ABUSE BY MEANS OF SEXUAL ASSAULT?

IV. WAS THE DNA EVIDENCE IMPROPERLY ADMITTED INTO EVIDENCE?

V. IS THE EVIDENCE SUFFICIENT TO CONVICT TROY BROWN? (Ex. 65.)

13. On November 4, 1996, attorney Dennis E. Widdis substituted in as counsel for Brown in the place and stead of Dorothy Nash Holmes. (Ex. 68.)

14. On December 2, 1996, Brown, through counsel Widdis, filed Appellant's Supplemental Points and Authorities raising the additional claim for relief:

THE TRIAL COURT'S CONSIDERATION AT SENTENCING OF MR. BROWN'S COURT-ORDERED COMPETENCY EVALUATION WAS IMPROPER, AND ITSELF REQUIRES THAT MR. BROWN'S SENTENCES BE VACATED, AND THIS

MATTER BE REMANDED FOR SENTENCING BEFORE ANOTHER JUDGE.

Ex. 69.)

15. The Nevada Supreme Court filed its Opinion on February 26, 1997. (Ex. 70.) The court found "the double jeopardy clause precluded Troy from being convicted of both sexual assault and child abuse by sexual abuse/sexual assault, and Troy's conviction for child abuse must be vacated." (Id. at 24.) The court also found "that the district judge abused his discretion during the sentencing phase of the trial and the case must be remanded to the district court for a new sentencing hearing on the remaining sexual assault conviction (Count II)." (Id.) Remittitur issued on March 18, 1997. (Ex. 72.)

16. On May 30, 1997, Brown, through counsel Widdis, filed an Affidavit and Certificate re Disqualification of Judge (Ex. 77). The Recusal Hearing was held on December 2, 1997, before the Honorable Richard A. Wagner. (Ex. 80.) Brown was present with counsel Widdis. After hearing counsel's arguments, the court denied the motion to disqualify Judge Memeo. (Id. at 58.) The written Order was filed on December 29, 1997. (Ex. 81.)

RESENTENCING HEARING & MOTION FOR A NEW TRIAL

17. On March 6,1998, Brown, through counsel Widdis, filed Defendant's Motion for a New Trial and Motion to Vacate and Continue Sentencing. (Ex. 86.)

The Order Denying Motions was filed on March 9, 1998. (Ex. 87.)

18. The Resentencing Hearing was held on March 13,1998, before the Honorable J. Michael Memeo. (Ex. 90.) Brown was present with counsel Widdis. Widdis argued for leniency and asked the court to join with the Division of Parole and Probation's recommendation for concurrent sentences. "Whether it be the life ten to the board, or I would suggest the 20 year, five to the board. I'd just as you, Your Honor. To run that concurrent." at 103.)

19. Brown briefly addressed the court concerning his proper person Pre-Sentencing Motion for a New Trial With Alternative Requests. (Id. at 104.) The court filed his motion in open court. In his motion he argued that his "current counsel (and all prior counsel) would only pursue certain arguments and would not research other matters that this defendant has in the past, and still wishes to, bring to the attention of this Court, as he could not do such at any time prior, due to similar conflicts and/or problems with all prior counsel." (Ex. 89 at 1-2.)

20. Brown went on to make his statement of allocution wherein he again stated that he did not commit this crime, he was innocent, and he was sorry it happened to her. (Ex. 90 at 105-107.) The district court sentenced Brown to a term of life in prison with the possibility of parole after 10 years on Count II. This sentence was ran consecutive to the sentence in count one. (Id. at 108.)

21. The Amended Judgment of Conviction was filed on March 18,1998. (Ex. 92.)

22. On March 20,1998, Brown, through counsel Widdis, filed a timely Notice of Appeal (Ex. 93) concerning the following: (1) Order Denying Motions for a New Trial, Production to the Defendant of the Entire State's File, and to Vacate and Continue Sentencing, said Order being filed March 9,1998 (Ex. 87); (2) denial of Defendant's Motion to Set Aside Verdict, as decided by the court at the March 13, 1998, proceedings; (3) denial of the Defendant's Motion for Proper Determination of Restitution (Ex. 87), and the lower court's improper imposition of same; and (5) entry of judgment and imposition of sentence on March 13, 1998. (Ex. 90.) The Nevada Supreme Court docketed this appeal as Case No. 32025.

23. On March 23, 1998, the district court entered an Order Appointing Attorney Matthew J. Stermitz as counsel of record for Brown. (Ex. 96.) Mr. Stermitz filed a Motion to Withdraw in both the Fourth Judicial District Court (Ex. 99) and the Nevada Supreme Court (Ex. 101) explaining that he had a conflict of interest related to this case. The Nevada Supreme Court granted Stermitz's motion on May 5, 1998. (Ex. 102.)

24. On May 12, 1998, the district court appointed attorney Jeffrey J. Kump to represent Brown in all matters currently pending, including the appeal. (Ex. 103.)

25. On July 1, 1998, the parties entered into a Stipulation to Continue Hearing on Defendant's Motion for New Trial and Order. (Ex. 108.)

26. Shortly thereafter, August 26, 1998 and August 28, 1998, attorney Kump filed a Motion to Withdraw as Counsel in both the Fourth Judicial District Court and the Nevada Supreme Court (Ex's. 111 & 112) arguing that the attorney-client relationship between himself and Mr. Brown had become adverse and to continue the representation would be unethical.

27. On September 1,1998, Brown, in proper person, filed an Addendum of Supporting Facts for Defendant's Motion for a New Trial and Hearing. (Ex. 113.)

28. The district court entered an Order Allowing Withdrawal of Attorney, and Order Appointing Attorney on September 3, 1998. (Ex. 115.) Attorney Donald Y. Evans was appointed to represent Brown in his appeal and Motion for New Trial. (Id.)

29. Again, on September 14, 1998, the parties entered into a Stipulation to Reset Motion for New Trial. (Ex. 116.)

30. On October 15, 1998, Brown, by and through counsel Evans, filed a Motion for Employment of Experts at State Expense. (Ex. 120.) The motion argued that the "expert is requested for the purpose of assisting counsel in preparing and presenting testimony and evidence relative to the issue of the proper presentation and rebuttal of the DNA evidence presented by the State in this case, and also to appear at the Motion for a New Trial to testify on behalf of the defense." (Id. at 1.)

31. On October 19, 1998, the district court entered an Order Denying Motion for New Trial. (Ex. 121.) In it's Order, the court referenced the hearing that took place on September 24, 1998, concerning the defendant's Motion for Continuance. The court stated that in an effort to resolve some of the issues, "counsel stipulated that the Court decide the timeliness of the Motion for New Trial without a hearing." The court ultimately denied the Motion for New Trial, together with all amendments thereto. (Id.)

32. On November 3, 1998, Brown, in proper person, filed a Motion for Rehearing/Reconsideration of Motion for a New Trial/Hearing arguing that attorney Evans stipulated without his consent, knowledge, or permission for the Court to determine the timeliness of the Motion for a New Trial without a hearing. (Ex. 126.)

33. On November 9, 1998, Brown, through counsel Evans, filed a timely Notice of Appeal of the denial of the Motion for New Trial. (Ex. 128.) The Nevada Supreme Court docketed this appeal as Case No. 33325.

34. A hearing was held on Brown's proper person Motion for Reconsideration on December 9, 1998; however, Brown was not present at this hearing. (Ex. 1.) Attorney Evans, counsel for Brown, was present and agreed with the court that the court had no jurisdiction since the matter had been appealed. The written Order Denying Motion for Rehearing/ Reconsideration was filed on December 11, 1998. (Ex. 137.)

35. On January 27, 1999, attorney Evans filed a Motion to Stay Briefing Schedule Pending Resolution of Motion for Leave to Withdraw as Counsel in Nevada Supreme Court Case No. 32035, and a Motion for Leave to Withdraw as Counsel in both Case No.'s 32025 and 33325. (Ex. 139, 140 & 141.) The motion to withdraw as counsel argued that Appellant filed a complaint with the State Bar of Nevada against him; therefore, the professional relationship between himself and Appellant has been damaged. (Id.)

36. On January 29, 1999, attorney Evans also filed a Motion to Consolidate Appeals No's. 32035 and 33325. (Ex. 142.)

37. The Nevada Supreme Court entered an Order on April 16, 1999, denying attorney Evans's Motions to Withdraw as Counsel stating that "the Sixth Amendment does not guarantee a meaningful attorney/client relationship." (Ex. 146.) The court further granted the Motion to Consolidate Appeals. (Id.)

38. Brown, by and through counsel Evans, filed his Opening Brief (Case No.'s 32025/33325) on June 14, 1999, and raised the following assignments of error:

I. WAS IT REVERSIBLE ERROR FOR THE HONORABLE J. MICHAEL MEMEO TO CONDUCT THE RESENTENCING IN THIS CASE, BASED UPON HIM BEING FORMERLY EMPLOYED BY THE ELKO COUNTY DISTRICT ATTORNEY, NAMELY GARY WOODBURY, ESQ., WHO IN FACT ARGUED THE CASE FOR THE

STATE AT THE RESENTENCING HEARING?

II. WAS IT A DENIAL OF APPELLANT'S DUE PROCESS AND SIXTH AMENDMENT RIGHTS OF CONFRONTATION FOR THE COURT TO ALLOW THE VICTIM'S MOTHER TO TESTIFY ABOUT HER DAUGHTER'S PSYCHOLOGICAL CONDITION AND MEDICATION, WITHOUT PROVIDING THE DEFENSE WITH THE CHILD'S PSYCHOLOGICAL RECORDS AND APPOINTING THE DEFENSE AN EXPERT TO REVIEW AND EVALUATE THOSE RECORDS?

(Ex. 147.)

39. The Nevada Supreme Court filed its Order Dismissing Appeal on September 8 , 2000. (Ex. 153.) Remittitur issued on October 4, 2000. (Ex. 156 & 157.)

PETITION FOR STATE POST CONVICTION RELIEF

40. On August 30,2001, Brown, by and through counsel David M. Schieck, filed a Petition for Writ of Habeas Corpus (Ex. 158) and Points and Authorities in Support of Petition for Writ of Habeas Corpus (Ex. 159). The following claims for relief were raised in his petition:

I. PETITIONER BROWN'S CONVICTION AND SENTENCE ARE INVALID AND MUST BE SET ASIDE BECAUSE HE WAS

DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, DUE PROCESS OF LAW, EQUAL PROTECTION OF THE LAW, CROSS-EXAMINATION AND CONFRONTATION DUE TO THE FAILURE OF TRIAL COUNSEL AND APPELLATE COUNSEL TO PROVIDE REASONABLY EFFECTIVE ASSISTANCE. US. CONSTITUTIONAL AMENDMENTS V, VI, VIII, AND SIX; NEVADA CONSTITUTION ARTICLE I, SECTION 3, 6, 8 AND 9; AND ARTICLE IV, SECTION 21.

A. TRIAL COUNSEL FAILED TO FILE A MOTION OR OTHERWISE OBJECT TO EXCLUDE ALL DNA EVIDENCE.

B. TRIAL COUNSEL FAILED TO OBTAIN TESTING BY AN INDEPENDENT DNA EXPERT, INSTEAD UTILIZING AN EXPERT THAT HAD A CONFLICT OF INTEREST AND FAILED TO BE PRESENT DURING THE TESTING.

C. TRIAL COUNSEL FAILED TO PREVENT TESTING OF DNA BY THE STATE IN THE ABSENCE OF A DEFENSE EXPERT IN VIOLATION OF A STIPULATION AND ORDER RESULTING IN TEST RESULTS THAT WERE NOT RELIABLE.

D. TRIAL COUNSEL FAILED TO INVESTIGATE AND PRESENT EVIDENCE AT TRIAL TO SHOW THAT MEGAN'S STEP-FATHER WAS THE ASSAILANT.

E. TRIAL COUNSEL FAILED TO INVESTIGATE, INTERVIEW, AND CALL WITNESSES PROVIDED BY PETITIONER TO ESTABLISH HIS INNOCENCE.

F. COUNSEL FAILED TO DISCUSS DEFENSE STRATEGIES WITH PETITIONER AND NEVER INFORMED PETITIONER THAT HE INTENDED TO ARGUE THAT PETITIONER'S BROTHER TRENT COULD HAVE COMMITTED THE CRIME.

G. COUNSEL FAILED TO OBJECT TO PETITIONER BEING BROUGHT TO COURT IN SHACKLES AND TAKEN INTO THE COURT ROOM IN SAID CONDITION WITHIN THE EYESIGHT OF THE MEMBERS OF THE JURY.

H. COUNSEL FAILED TO FILE A MOTION TO DISMISS OR IN THE ALTERNATIVE SUPPRESS EVIDENCE BASED ON THE LOSS OF EXCULPATORY EVIDENCE, SPECIFICALLY RELATING TO THE TEETH SCRAPING TAKEN FROM THE

VICTIM AS PART OF THE SEXUAL ASSAULT KIT.

I. COUNSEL FAILED TO TIMELY FILE A MOTION FOR NEW TRIAL THEREBY RESULTING IN THE MOTION FILED BY PETITIONER BEING DENIED BY THE COURT AS BEING UNTIMELY.

J. TRIAL COUNSEL FAILED TO OBJECT TO THE LACK OF PRE-TRIAL EVIDENTIARY HEARING OR TO QUALIFYING RENEE ROMERO AS AN EXPERT WITNESS THEREBY PRECLUDING APPELLATE REVIEW OF THE DNA EVIDENCE.

K. APPELLATE COUNSEL ON THE SECOND DIRECT APPEAL FAILED TO SUBMIT ISSUES TO THE APPELLATE COURT CONCERNING THE MOTION FOR NEW TRIAL THAT HAD BEEN FILED IN THE DISTRICT COURT PRIOR TO THE APPEAL.

II. PETITIONER WAS DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO DUE PROCESS OF LAW AND A FAIR TRIAL BY THE ACTIONS AND INACTIONS OF THE INVOLVED LAW ENFORCEMENT AGENCIES.

A. THE CARLIN POLICE DEPARTMENT AND RELATED PROSECUTORIAL

AGENCIES FAILED TO PRESERVE AND TEST THE TEETH SCRAPINGS OF MEGAN THEREBY SUPPRESSING EXCULPATORY EVIDENCE.

B. THE CARLIN POLICE DEPARTMENT AND RELATED PROSECUTORIAL AGENCIES FAILED TO ADEQUATELY COLLECT AND PRESERVE ITEMS OF EVIDENCE CONTAINING ALLEGED DNA THEREBY CONTAMINATING THE EVIDENCE RESULTING IN INCORRECT OR INACCURATE RESULTS.

C. THE CARLIN POLICE DEPARTMENT AND WASHOE CRIME LAB FAILED TO PRESERVE AND TEST THE BEDDING COLLECTED FROM BROWN'S BED TO ESTABLISH THE ABSENCE OF BLOOD OR EVIDENCE THAT BROWN WAS THE PERPETRATOR OF THE CRIME.

D. THE CARLIN POLICE DEPARTMENT AND RELATED PROSECUTORIAL AGENCIES FAILED TO PRESERVE AND LOST THE LETTER FROM BROWN'S DOCTOR THAT HE HAD NO BITE MARKS, SCRATCHES OR BRUISES ON HIS BODY.

(Ex. 159.)

41. An evidentiary hearing was held on February 21, 2002, before the Honorable J. Michael Memeo. (Ex. 163.) Brown was present and represented by attorney Schieck.

42. The district court denied Brown's petition and the Findings of Fact, Conclusions of Law, and Order Denying Writ of Habeas Corpus was filed on March 7, 2002. (Ex. 164.)

43. Brown, through counsel Schieck, filed a timely Notice of Appeal on April 8, 2002. (Ex. 165.) The Nevada Supreme Court docketed this appeal as Case No. 39475.

44. On October 10, 2002, Brown, by and through counsel David M. Schieck, filed Appellant's Opening Brief in Case No. 39475. (Ex. 170). The following assignment of error was raised in his brief:

> I. THE DISTRICT COURT ERRED IN DENYING BROWN'S WRIT OF HABEAS CORPUS.

45. The Nevada Supreme Court filed its Order of Affirmance on November 21, 2003. (Ex. 172.) Remittitur issued on December 16, 2003. (Ex. 175.)

46. Brown mailed his Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. 2254 By a Person in State Custody to the United States District Court on December 12, 2003. The instant petition follows.

II.

GROUNDS FOR RELIEF

GROUND ONE

BROWN WAS DENIED HIS DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE THERE WAS INSUFFICIENT EVIDENCE PRESENTED AT TRIAL TO SUPPORT A FINDING OF GUILTY OF THE SEXUAL ASSAULT CRIMES BEYOND A REASONABLE DOUBT.

Statement of Exhaustion: This claim was presented to the Nevada Supreme Court on direct appeal (see Exs. 65 & 67) and in Brown's Motion for New Trial. Ex. 86.

1. As summarized by the Supreme Court of Nevada, the state's evidence was as follows:

> In the early morning hours of January 29, 1994, Jane Doe[3] was sexually assaulted in the bedroom of her trailer home at 1637 Pruett Street in Carlin. Jane Doe and her four-year-old sister were home alone while their mother, Earn, was drinking at a bar, and their stepfather, Wayne, was working the night shift

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[3] The victim's real name has been changed to protect her identity.

at his job. Troy was arrested, tried, and convicted for the crime.

On January 28, 1994, before Wayne went to work, Pam received a telephone call from Raquel Brown. Raquel was married to Trent Brown, Troy's brother. Raquel wanted to know if Pam would like to join Raquel and Trent at a local bar named CG's for a drink and also to know if Jane Doe could babysit her children for the approximately one-half hour they expected to stay at the bar. Pam agreed that Jane Doe could babysit the children for that short amount of time and at approximately 6:30 p.m. Pam took Jane Doe and her sister over to Raquel's house located across the street at 1709 Pruett Street. Pam and Raquel went to CG's to meet Trent.

Raquel and Trent stayed at CG's for a very short time and returned home at approximately 7:30 p.m. Pam, however, remained at the bar. When Raquel and Trent returned home, all of the children were watching a movie; when the movie ended at approximately 9:30 p.m., Raquel took Jane Doe and her sister back to their trailer. When Jane Doe got back to the trailer, she attempted to call her mother at CG's to tell her that she and her sister were home, but the telephone line at CG's was busy. Jane Doe then called the Peacock Bar to see if Pam was there; Troy, who was drinking at the Peacock Bar, answered the phone. Jane Doe asked Troy if Pam was there, and Troy stated that he thought that she was at CG's. Jane Doe said that she

was trying to find Pam in order to tell her that she and her sister were home safely, and Troy said that he would go to CG's to deliver Jane Doe's message. Troy then went to CG's, but when he arrived, Pam was already talking to Jane Doe on the telephone. Jane Doe had already informed Pam that she and her sister were home safely.

Pam stated that after she finished talking to Jane Doe, she and Troy went to the Peacock Bar where they had a drink and played a game of pool. Pam stated that Troy was drunk but that he behaved like a gentleman and made no sexual advances toward her. Pam stated that the last time she saw Troy was sometime between 11:00 p.m. and midnight. Pam stated that at approximately midnight or 12:30 a.m. she received a call at the Peacock Bar from Jane Doe[4] who told Pam that some man was at the trailer looking for Pam and that the man had hurt her. Pam immediately left the bar and drove home, which was a short distance away, where she found Jane Doe covered in blood from the waist down.

Pam called 911, and police officer Michael Terry and the paramedics responded to the scene at approximately 1:15 a.m. Michael Skinner, an emergency medical technician, assessed Jane Doe's injuries, and Jane Doe told Skinner that

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[4] The bartender on duty stated that the call actually came just before 1:00 a.m.

she felt pain in her vaginal area. While the police and the paramedics were present, Pam stated that her ex-husband had done this because he had threatened to 'f . . . [Pam's] daughter in order to get back at [Pam].' Trial testimony indicated that the police attempted to locate Pam's ex-husband, but the results of their efforts were not admissible at trial because of the hearsay rules.[5]

Jane Doe was taken to the hospital where it was confirmed that she had been penetrated both vaginally and anally. Jane Doe had lost about fifteen percent of her blood and required a vaginal reconstruction. She also had bruises on her neck and had scratches on her face. A 'sexual assault kit' was taken at the hospital, which included a vaginal smear (because sperm was present) and a blood sample. Debris was also collected from Jane Doe's teeth because she stated that she had bitten her assailant.

Jane Doe described to Connie Walker, a police officer specialized in questioning child victims, what had happened in the trailer. The interview took place in the early morning hours of January 29, 1994, shortly after the sexual assault had occurred, and a second interview took place on February 1, 1994. Jane Doe stated that she fell asleep with a night light on, but

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[5] The implication from the permitted testimony was that the police had determined that the ex-husband had a credible alibi and was not involved in the assault.

that the man who assaulted her must have turned it off because it was off when the man left. Jane Doe said that the man touched her 'butt' and then put his 'thingy' into her vagina. She also stated that the man placed his fingers into 'the front and back' of her. Jane Doe described the assailant as follows: he did not wear a hat and had blonde or sandy-colored hair which was curly at the bottom and thinning on top; she thought he had a small moustache; he was wearing dark jeans, a black jacket with 'a zipper for sure,' a western type shirt, boots, and a watch which scraped her face. At the trial, Jane Doe had difficulty remembering the details of what had happened and stated that what she had told Walker at the interviews was probably correct.

When pressed by police to tell who the assailant reminded her of, Jane Doe stated 'Troy,' and when the police said, 'Who?,' Jane Doe said, 'Trent. Yes, Trent.' Jane Doe stated that Trent was Raquel's husband, Trent Brown. Jane Doe also stated that the assailant's hair looked like Troy's but then changed her mind and said that the hair looked like Trent's hair. Finally, Jane Doe stated that the assailant smelled like cologne but that it was an 'awful smell,' and that it was 'gross smelling. . .like] beer or puke or something.' Jane Doe was shortly thereafter admitted to a hospital where she stayed for twelve days and was diagnosed with post-traumatic stress disorder.

By the late hours of January 28, 1994, Troy was very intoxicated. He testified that he had been drinking steadily at several different bars and had consumed ten shots of hard liquor, each followed by a beer chaser a total of twenty drinks. Testimony indicated that on the night in question, Tray was wearing dark jeans, a cowboy hat, a black satin jacket with a CG's logo on the back, and boots. Tray stated that he did not wear a watch and therefore did not know what time he had left the Peacock Ear. The bartender on duty stated that Tray left the bar no later than 12:20 a.m. However, another bartender, whose shift had ended but who was still at the Peacock Bar, stated that she believed that she had seen Tray at the bar at approximately 1:30 a.m. Tray stated that he had left the bar and walked to his trailer on 1717 Pruett Street, approximately ten trailers away from Jane Doe's. Tray stated that because he was so intoxicated, he vomited several times on his way home and some of the vomit got on his pants and shirt. He also stated that because he was going on a one week trip to Utah later in the day on January 29, 1994, he needed all of his clothes which, other than the ones he was wearing, were packed. He washed the pants and shirt he was wearing when he got home because he had vomited on them. Travis Brown, Troy's younger brother, testified that he was sleeping on the couch at Tray's trailer and woke up when Tray got home. Travis stated that he then looked at his digital clock, and it read 1:32 a.m. Travis stated that he saw no traces of blood anywhere in the house.

At 5.00 a.m. on January 29, 1994, Officer Terry went to Tray's home to question him about the sexual assault. Terry awoke and questioned Tray, who was wearing only boxer shorts. Officer Terry stated that he saw no blood an Tray. He also stated that he checked Troy's hands because Jane Doe had told him that she had bitten her assailant's hand, but he found no evidence of any bite marks. Terry also stated that he looked at Troy's boots and saw no blood. After Troy left to go to Utah, the police went back with a search warrant and took Troy's bedding. Troy called the Carlin police to see if he was wanted for arrest, and he was told that he was not. While in Utah, Troy went to a nurse to get a full body examination because Jane Doe had stated that she had bitten and scratched her assailant, and Troy wanted a record of his condition.

Dave Prescott, another of Troy's friends living in Troy's trailer, testified that he had asked Troy on January 29, 1994, whether Troy was involved with the crime and that Troy had answered that he wished that he could remember what had happened. Troy testified that he had told Prescott that he wished that he could remember what time he got home.

Because rumors persisted about Troy's involvement in Jane Doe's assault, Troy voluntarily went in for questioning at the Carlin Police Department on February 3, 1994. Troy gave the police the black satin coat and black cowboy hat that he was wearing on the night of

the crime. Troy repeatedly denied involvement in the crime, even though the interrogating officers implied that they had found Troy's fingerprints in Jane Doe's bedroom. In actuality, Troy's fingerprints were not found anywhere in Jane Doe's trailer, and the one fingerprint that was located on the night light in Jane Doe's room did not match Troy's.

While in a foster home several days after the assault, Jane. Doe saw a television report of Troy's arrest and stated that she knew that the man on television was her assailant. Walker and police officer Roy Ladd went to the foster home; Jane Doe told Walker that the man on television had attacked her and had also sent her flowers. However, the card attached to the flowers was signed by Trent and Raquel, not Troy. Additionally, Ladd showed Jane Doe a photo lineup which included Troy's picture and several other people Jane Doe did not know; Jane Doe was unable to identify her assailant from the pictures Ladd showed her.

At trial, the defense called Madonna and Jay Doke as witnesses. They testified that at 1:05 a.m. on January 29, 1994, they were picking up their children from the babysitter's house on Pruett street near Jane Doe's trailer- Madonna stated that as they neared the babysitter's house, she saw a man wearing a black cowboy hat, a black satin jacket, and dark jeans staggering down the middle of the road. She also stated that the man's jacket had a fluorescent green emblem on the back that

looked like a skull or bandit. Jay testified that the man wore the same clothes that Madonna had described and also stated that the emblem on the back of the man's jacket was bright green. Testimony indicated that Troy's CG's jacket had an orange and yellow emblem on the back.

Troy voluntarily surrendered to the police and was arrested on or about February 7, 1994. On February 28, 1994, Troy stipulated to his commitment to the Lakes Crossing facility for a psychiatric evaluation. After approximately two months, Troy was found competent to stand trial and was returned for trial- Bail had not been set prior to Troy being sent to Lakes Crossing, and after he returned from Lakes Crossing, bail was set at $200,000. Troy's bail was later reduced to $100,000. Troy was charged with one count of sexual assault on a child under the age of fourteen resulting in substantial bodily harm by placing his penis into Jane Doe's vagina (Count I), one count of sexual assault on a child under the age of fourteen by placing his penis into Jane Doe's rectum (Count U), one count of attempted murder for trying to strangle or choke Jane Doe (Count III), and one count of abuse or neglect of a child less than eighteen years old resulting in substantial bodily harm by forcibly penetrating Jane Doe's vagina and/or rectum (Count IV). Troy's trial commenced on September 27, 1994.

Marie Fassett, a criminalist in the Washoe County Sheriff's Office, examined evidence

collected by the police for the presence of bodily fluids, including blood and semen, and stated that she found semen on Jane Doe's underwear and in the contents of the sexual assault kit. She also examined Troy's boots and found no blood on the boots. However, Fassett stated that she did not examine pubic hairs found in a fleece jacket recovered from Jane Doe's room because her laboratory conducted hair exams only if there was an absence of biological evidence, which she said was not the situation in this case. She also stated that she did not examine Troy's bedding for the presence of hair, fiber, or bodily fluids because she was informed that Troy never went to bed the night of the assault; however, Terry stated that Troy was still in bed when he woke Troy at 5:00 a.m. on January 29, 1994. Fassett stated that she did not examine the bedding and other evidence because the DNA evidence against Troy was overwhelming.

At trial, Renee Romero testified that she had conducted a DNA test on stains found on Jane Doe's underwear. Romero explained in detail what DNA is and how it is tested. Romero testified that the DNA sample tested from Jane Doe's underwear matched Troy's and that only 1 in 3,000,000 people had the same DNA code as the one tested. Troy's counsel cross-examined Romero regarding how she conducted the tests, the amount of DNA required to run the tests, and the databases against which the DNA tests were compared to determine the statistical probability that others would have the same

> DNA code. However, Troy's counsel did not call his own expert DNA witness even though the court provided funds for such a witness ....

2. In its Answer In Opposition to Brown's state post-conviction petition, the state conceded that, exclusive of deoxyribonucleic acid ("DNA"), such evidence was insufficient to convict Brown.

> There was insufficient evidence to convict the Defendant unless the DNA evidence established his guilt . . . .

Ex. 161, p. 13, ll. 22-23.

3. Brown asserts in paragraph 4 below that the DNA evidence was unreliable and should not have been admitted at his trial. If so, then, coupled with the state's concession as to the remaining evidence, the state presented insufficient evidence at trial to prove Brown guilty of the sexual assault counts to which he currently stands convicted.

4. The reliability of DNA testimony is dependent on collection and preservation of all pertinent crime scene evidence, proper testing procedures by a qualified laboratory and accurate and fair presentation of the DNA evidence to the jury. The DNA evidence presented to Brown's jury fails on all such counts.

a. Treatment of pertinent crime scene evidence. From a DNA perspective, which includes evaluating evidence from the most intimate to the least intimate, the order of importance of the crime scene evidence was (1) the bloody towel that the victim placed

between her legs right after the assault, (2) the two vaginal swab tips taken from the victim at the hospital and (3) clothing containing semen, including the victim's panties and pajama pants. However, the evidence in this case was largely addressed in reverse order, that is the panties and pajama pants received most of the attention and the towel little or none. The treatment of each such source of potential DNA trial evidence is summarized below.

Bloody towel. Following the assault the victim noticed she was bleeding extensively and placed the towel between her legs to stop the bleeding. The towel was with her in the emergency room. Ex. 194. While one evidence inventory identifies a "Mickey Mouse" towel as having been obtained from the victim's trailer, there is no indication in the record that the bloody towel placed by the victim between her legs was preserved as evidence or ever tested for DNA. As noted above, it would have been a primary source for such material.

Vaginal swab tips. Of the evidence that was recovered the swabs had by far the most semen (3+ on a scale from 1 to 4, see Ex. 189). After an initial attempt at conducting restriction fragment length polymorphism ("RFLP") testing on the swabs was unsuccessful, using all of the material from one swab tip and 90% of the material from the other, no evidence from the swabs was presented at trial.

Panties and pajama pants. When the victim was awakened by her attacker her panties and pajama pants had been removed. Ex. 194. She was then assaulted. Following the assault and the attacker's

departure she checked on her younger sister in the upper bunk and then went to use the bathroom where she noticed that she was bleeding and placed the towel between her legs. Ex. 194. She then called her mother who arrived shortly at the trailer followed closely by the police and emergency personnel. There is no indication in the record that the victim ever put back on her panties and pajama pants. There is, therefore, a gap in the record as to how the semen ever got on the panties and pajama pants.

The panties became the key piece of trial evidence. Prior to the preliminary hearing the panties were tested for DNA using the less discriminating polymerase chain reaction ("PCR") technique. Renee Romero of the Washoe County, Nevada, Sheriff's Office, Forensic Science Division (hereinafter the "crime lab") testified at the preliminary hearing that there was an insufficient amount of semen on the panties to conduct the RFLP test but that the PCR test indicated a match" between the semen that was found on the panties and Brown. At trial Ms. Romero testified that following the preliminary hearing she found an additional source of semen on the panties sufficient to conduct that RFLP test and that the test results indicated a "match" between Brown's DNA and that of the semen on the panties. Since she had not tested the epithelial cells on the panties, she could not verify that the panties contained the victim's blood (see Ex. 31, pp. 299-348). Finally, no explanation was made as to how the semen got on the panties when they had been removed by the attacker before the assault. These gaps in the chain of events respecting the source of the DNA evidence admitted against Brown at trial renders such evidence unreliable.

b. Presentation of the DNA evidence at trial. As acknowledged by Ms. Romero at trial, unlike fingerprints DNA science cannot be used to identify a specific person as the source of the material analyzed but is instead used to exclude those who could not be the source and, if the defendant is a possible source, establish a mathematical ratio between the defendant as a possible source and an appropriate population group of possible contributors. The manner in which DNA evidence is presented to the jury is critical to the fairness of this process and the DNA evidence's reliability. Here, based on the chosen genetic population database, Ms. Romero opined that there was a 1 in 3,000,000 ratio for finding a match between the perpetrator's DNA and Brown's. Ex. 31, p. 320. That number dropped to 1 in 6500 if brothers were compared as possible sources. Ex. 31, p. 344.

Not satisfied with such ratios, the prosecutor pressed Ms. Romero to convert those figures to mathematical percentages as to whether Brown was the contributor of the semen found on the panties and whether one of his siblings could have contributed the semen, calculations with which Ms. Romero was not comfortable. Ex. 31, p. 335-38. Nevertheless, she grudgingly did so, ultimately accepting a 99.99967 percent "likelihood" of a match between the perpetrator and Brown in the general population (or .000033 percent that there was not a match) and .02 percent likelihood of brothers having the same DNA. Ex. 31, pp. 336. 346; Ex. 184. At closing the prosecutor told the jury that such calculations meant that they could be "99.999967 percent sure" that Brown committed the crime. Ex. 34, p. 546, l. 18. Such misuse of the DNA evidence rendered it unreliable.

c. Violation of court ordered DNA testing protocol. On March 18, 1994, the state and Brown entered into a written Stipulation (Ex. 6) subsequently enforced by a court order (Ex. 7) which established a protocol for DNA RFLP testing in the case. A key element of the agreement was that all such testing was to be conducted "in coordination with" a California laboratory, Forensic Science Associates ("FSA"), previously engaged by the defense to provide expert DNA advice in the case. It was further agreed that a FSA representative had the right to be present "at all stages deemed critical" by it. Ex. , p. 2, ¶ 4.

On July 8, 1994, two days after the preliminary hearing where she had testified that she had concluded that there was insufficient semen to conduct a RFLP test, now finding "more than enough semen" in the piece of the victim's panties previously examined, Renee Romero of the Washoe County crime lab commenced work on RFLP testing in Troy Brown's case. See Ex. 31, p. 316. Approximately two and one-half months later, and less than two weeks before trial, she prepared a written report reflecting the results of such work. See Ex. 186. Neither the report nor her subsequent trial testimony reflect any coordination between the Washoe County crime lab and FSA in conducting such work or that an FSA representative was present for any such testing. As reflected in her September 15, 1994, written report, Ms. Romero found DNA in the victim's panties matching Troy Brown's (see Ex. 186) and testified at trial as to the 1 in 3,000,000 likelihood of a match between the perpetrator and anyone other than Troy Brown. Ex. 31, p. 320. The state has acknowledged that absent such testimony it could not have met its

burden to prove Troy Brown guilty beyond a reasonable doubt. See Ex. 161, p. 13, ll. 22-23.

Such unilateral RFLP testing breached the above referenced Stipulation (Ex. 6) and related court Order (Ex. 7). Since the established testing protocol was not followed, the RFLP test results should have been excluded from evidence at Brown's trial.

d. Expertise of Washoe County Crime Lab. At the Preliminary Hearing held July 6,1994, Washoe County Crime Lab DNA specialist Renee Romero testified that her laboratory had just begun doing DQ Alpha testing in October, 1993, (Ex. 19, pp. 162-163), and was reporting polymarker DNA test results for the first time in the Brown case after evaluating the system and completing proficiency tests, never having had such evidence admitted in court. (Ex. 19, pp. 163,177). At that time the national technical working group was working on DNA analysis methods, trying to set standards for quality control or quality assurance in the area of DNA testing and reporting so far had only issued non-mandatory guidelines. (Ex. 19, p. 164). The population database used by her lab was the FBI's Roche Molecular Systems database, which was not yet published as of that date. ("I have a pre-publication and it will be published in the Journal of Forensic Science in July.") Ex. 19, p. 166. While some databases had gained acceptance in DNA work, the FBI database had been criticized, and their DNA results declared inadmissible in some cases. Finally, Romero testified that she did not think she had enough vaginal stain sample in the panties to do an RFLP type DNA test, (Ex. 19, pp 172-176) although, by the time of trial, sufficient stain sample had materialized

casting suspicion on the entire process. While the Washoe crime lab was in its infancy in conducting DNA work, no pretrial hearing was conducted on DNA before admitting the evidence at trial and Ms. Romero's own credentials were not challenged and, instead, her curriculum vita was simply introduced into evidence with little or no discussion. Romero was the only witness to testify on DNA methods or statistics. The defense, even though it had been provided with funds for a DNA expert at trial (Ex. 24), produced no expert to challenge anything at trial and virtually no cross-examination about population genetics or statistics took place, even though it was the single biggest area of substantial controversy in the DNA field at the time.

In light of the above referenced foundation problems (mismanagement of crime scene evidence and crime lab's limited expertise), mischaracterization of the DNA evidence's significance and breach of the court-ordered DNA RFLP testing protocol, the DNA evidence admitted against Brown at trial was unreliable.

5. Absent sufficient evidence a criminal judgment entered on a jury verdict denies a defendant his right to due process of law under the Fifth and Fourteenth Amendments. Since there was insufficient evidence to prove that Brown sexually assaulted the victim, the writ should be granted and his convictions vacated.

GROUND TWO

TRIAL COUNSEL'S FAILURE TO SEEK TO ENFORCE THE STIPULATED DNA RFLP TESTING PROTOCOL AND OBJECT TO THE DNA EVIDENCE ADMITTED AT TRIAL DENIED BROWN HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Statement of Exhaustion: This claim was presented in Brown's state post-conviction petition (Ex. 158), which was denied on its merits by the Nevada Supreme Court. See Exs. 170, 174 & 172.

1. Failure to Seek to Enforce the DNA Stipulation. Prior to the preliminary hearing Brown was represented by the Elko County Public Defender, who obtained a Stipulation and Order (Ex. 6 & 7) that the state coordinate with the defense as to any RFLP DNA testing including that a defense DNA expert be allowed to be present during any testing. Forensic Science Associates ("FSA") was appointed as the defense expert and its representative attended RFLP testing in March, 1994 (Ex. 8). However, when additional RFLP testing was conducted in July through September, 1994, no such coordination occurred. While attorney David Lockie, who had replaced the public defender on May 2, 1994, (hereinafter "trial counsel") was aware of such testing (Ex. 23, p.2), he took no action to enforce Brown's rights under the Stipulation. In failing to seek

enforcement of the Stipulation and Order, trial counsel performed in a deficient manner.

2. Failure to Object at Trial. The state has acknowledged that absent the DNA evidence it presented to the jury Brown would not have been convicted. Ex. 161, p. 13, ll. 22-23. Trial counsel was 100 percent convinced that Brown would be found not guilty without the DNA evidence. On the virtual eve of trial, the state produced new RFLP test results. Ex. 186. The new test was conducted absent of coordination with Brown's expert despite the existence of a Stipulation enforced by court Order guaranteeing such right. When RFLP testing had previously been conducted in March, 1994, and Brown was represented by the Elko County Public Defender, a defense expert had been present at the testing.

Despite the last minute production of the new testing results trial counsel made no effort to continue the trial. Brown and his mother repeatedly asked trial counsel how he was going to deal with the DNA and were told not to worry about it. At the preliminary hearing and then at trial counsel failed to object to the admission of the evidence. Notwithstanding foundational problems with the DNA evidence, trial counsel never sought a pretrial hearing where they could be addressed. Counsel also lodged no objection to Romero as an expert despite the fact that she had never testified before on polymarker testing and had only been doing that test for two months.

When appellate counsel on direct appeal attempted to challenge the DNA evidence, the Nevada Supreme Court refused to consider appellate review of the DNA

evidence, finding that the defendant had waived such claim:

> Troy argues that the district judge erred in not conducting a pretrial hearing to determine whether the DNA results were trustworthy and reliable. However, Troy made no objection to either the lack of a pretrial evidentiary hearing or to qualifying Romero as an expert witness on DNA evidence. Failure to object in the district court precludes consideration of the issues on appeal; however, this court may address plain error sua sponte. Sterling v. State, 109 Nev. 391, 394, 834 P2.d 400, 402 (1992). Because we conclude that the failure to conduct an evidentiary hearing was not plain error, we will not consider this issue.

Brown v. State, 113 Nev. 275, 284, 934 P.2d 235 (1997).

3. The evidentiary and foundational problems with the collection and testing of the DNA evidence (see Ground One supra) should have prevented admission of the DNA evidence or at least, if properly challenged, diminished the importance of the evidence in the eyes of the jury. Brown was prejudiced by admission of this DNA evidence later acknowledged by the state to be essential to a conviction. In failing to challenge the DNA evidence at trial and preserve valid issues for appeal, trial counsel performed ineffectively and Brown was denied his Sixth and Fourteenth Amendment rights to the effective assistance of counsel.

GROUND THREE

TRIAL COUNSEL'S FAILURE IN GENERAL TO PROPERLY INVESTIGATE THE CASE AND, IN PARTICULAR, TO PRESENT EVIDENCE AT TRIAL THAT THE VICTIM'S STEPFATHER, WAYNE HENLE, WAS AN ALCOHOLIC PRONE TO ATTACK WOMEN WHEN DRUNK, AND WHO HAD BEEN CHARGED WITH FELONY SEXUAL ASSAULT IN UTAH AND WAS INVOLVED IN A SIMILAR MATTER IN CARLIN, NEVADA, PRIOR TO THE ATTACK ON HIS STEPDAUGHTER, DENIED BROWN HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

Statement of Exhaustion: This claim was presented in Brown's state post-conviction petition (Ex. 158), which was denied on its merits by the Nevada Supreme Court. See Exs. 170, 172 & 174.

1. The victim's stepfather, Wayne Henle, had a history of sexual assault on females at night. This information was relayed to trial counsel along with repeated requests that an investigation be conducted concerning him. Such an investigation would have shown that Henle had committed a sexual assault in Utah in May, 1994, and had committed a similar offense in Carlin, Nevada, in October, 1993, although changes had not been filed respecting it. Ex. 176, 177 & 195.)

2. The following facts, never presented at trial, were presented at the post-conviction evidentiary hearing conducted on February 21, 2002, in the Fourth Judicial District Court, Elko County, Nevada. Ex. 163.

a. The victim's stepfather, Wayne Henle, was an alcoholic who engaged in improper sexual acts with women when drinking. In October, 1993, three months before the incident in question he was found drunk by a female neighbor on the floor of her nearby trailer in the early morning hours. This matter was dropped and not pursued with the local authorities. See Ex. 195.

b. Mr. Henle was an employee of Ledcor Industries, a mining concern, working a 10 hour swing shift the night of the incident. The company maintains daily job time cards that show the hours an employee worked, what functions they were doing during those hours and what equipment was being utilized. Wayne Henle's time card showed that he was not operating his piece of equipment for three hours during the time that he worked on the swing shift on January 28-29, 1994. Dexter Baker, chief safety officer and business development officer for Ledcor learned that Brown was being represented by David Lockie and discussed the contents of the daily job time cards with Lockie after the preliminary hearing and prior to trial. Baker was never contacted by an investigator or by Lockie concerning the information on the daily job time cards nor about speaking with any co-workers of Wayne Henle concerning his activities on the night in question. Lockie was not receptive to Baker's information, even though shortly after the incident in this case, wherein Henle's stepdaughter reported that she had bitten her attacker on his hand (Ex. 194),

Henle had a bandaged hand which he claimed resulted from a horse bite. Ex. 177.

c. After Brown was charged with the sexual assault, Pam Henle moved to Huntington, Utah, which was not far from Loa, Utah, where Brown's family lived. Wayne Henle had also come to Utah and Brown's mother, Stella, became aware that he had been charged with a sexual assault on a woman. She obtained Henle's court records and sent them to Lockie prior to trial (1 APP 188). The records also contained information concerning the incident involving Henle and victim Debbie Dean in Carlin, Nevada, in October, 1993.

d. Although there was an investigator assigned to Brown's case (see affidavit of Ed Heddy, Ex. 180 attached), Stella Brown only met him once and he never came to her house or talked to any members of her family. She had talked to Dexter Baker about the case and received the time records from him and faxed the documents to Lockie. Brown requested that the information on Henle be presented to the jury but Lockie declined to do so.

3. At the state post-conviction evidentiary hearing trial counsel admitted that he was aware of the information regarding Henle but did not utilize it because he did not think he should try to prove that someone else committed the crime. To ignore information of an alternative suspect that could have been presented in order to establish a reasonable doubt as to Brown's guilt is not reasonable and constitutes deficient performance.

4. Despite trial counsel having information to effectively challenge the alleged alibi of Henle (that he was at work when the incident occurred) no effort was made to interview those persons working with Henle on the night in question. Instead of developing a strong alternate suspect defense for the jury to consider along with the DNA evidence, trial counsel ignored the evidence and never presented to the jury. One of Henle's victims, Debbie Dean, lived in Carlin and could easily it have been contacted and interviewed.

5. In inadequately investigating the case and preparing for trial, counsel not only ignored Wayne Henle but many other potential witnesses. See attached affidavit of Ed Heddy (Ex. 180) summarizing the defense investigation's inadequacies.

6. Trial counsel's failure to offer a serious alternative, Wayne Henle, as the assailant and to otherwise investigate the case properly, prejudiced Brown. Brown's conviction flowed in large part from the inadequate performance, preparation, and investigation by defense counsel.

GROUND FOUR

TRIAL COUNSEL'S FAILURE TO MOVE FOR A MISTRIAL BECAUSE BROWN WAS EXPOSED TO JURORS WHILE WEARING SHACKLES AND JAIL GARB DENIED BROWN HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

Statement of Exhaustion: This claim was presented in Brown's state post-conviction petition (Ex. 158), which was denied on its merits by the Nevada Supreme Court. See Exs. 170, 174 & 172.

1. As developed in testimony at the state post-conviction hearing (Ex. 163), on the first day of trial the court revoked Brown's bail and put him into custody until the last day of trial. He was kept in the local jail and transported each day to the court in his jail clothes. When he would arrive at the Courthouse he would have to walk past where the jurors could see him in shackles and jail clothes. His mother, Stella Brown, brought Brown's clothing to the courthouse each morning so that he could change before trial.

2. A defendant's due process rights under the Fourteenth Amendment to the United States Constitution are violated when a state compels him to stand trial in prison clothing or in restraints as they are a constant reminder of the accused's condition and inconsistent with the presumption of innocence mandated by the United States Constitution.

3. Although advised of the situation, Brown's trial counsel took no action to halt such unconstitutional exposure of his client to jurors. His failure to do so constituted deficient performance which, coupled with the prejudice reflected by the guilty verdicts, denied Brown his Sixth Amendment rights to effective assistance of counsel.

GROUND FIVE

TRIAL COUNSEL'S FAILURE TO MOVE TO DISMISS THE CASE BECAUSE OF THE STATE'S LOSS OF TEETH SCRAPINGS THAT WOULD HAVE EXCLUDED BROWN AS THE ASSAILANT DENIED BROWN HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

Statement of Exhaustion: This claim was presented in Brown's state post-conviction petition (Ex. 1581, which was denied on its merits by the Nevada Supreme Court. See Exs. 170, 174 & 172.

1. Debris was collected from the victim's teeth by the emergency room doctor because she had said she bit her assailant and it appeared that there was blood or some other substance on her teeth. Ex. 194. Thereafter, the teeth scraping evidence was never found, tested or presented. The evidence would have been exculpatory for two reasons: first, it could have revealed the DNA of the attacker; second, it would have proven conclusively that the assailant suffered a bite wound. Evidence was uncontroverted that Brown had no bite marks on him (see Ex. 182), and as such would have to be excluded as being the assailant while the victim's stepfather, Wayne Henle, had a contemporaneous bite wound. See Ex. 177.

2. Intentional or reckless mishandling of potentially exculpatory evidence by the prosecution violates a defendant's right to due process of law under

the Fourteenth Amendment. The loss of the critical teeth scraping evidence should have been the subject of a motion to dismiss prior to trial. The failure to do so prejudiced Brown at trial in not being able to exclude himself as the assailant and precluded appellate review should the district court have denied the motion. Trial counsel's failure to file such motion constituted deficient performance which, coupled with the aforementioned prejudice, denied Brown his Sixth and Fourteenth Amendment rights to the effective assistance of counsel.

III.

PRAYER FOR RELIEF

Accordingly, Brown respectfully requests that his Court:

1. Issue a writ of habeas corpus to have him brought before the Court so that he may be discharged from his unconstitutional confinement

2. Conduct an evidentiary hearing at which proof may be offered concerning the allegations in this petition; and

3. Grant such other relief that the Court deems just and proper.

DATED this 12th day of November, 2004.

Respectfully submitted,

LAW OFFICES OF THE
FEDERAL PUBLIC DEFENDER

/s/ Paul Turner
PAUL G. TURNER
Assistant Federal Public Defender

APPENDIX L

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

Case No. CV-N-03-0712-HDM(VPC)

[Filed March 28, 2005]

TROY BROWN, Petitioner,	)
vs.	)
CRAIG FARWELL, *et al.*, Respondents.	)

MOTION TO DISMISS

Respondents, by and through BRIAN SANDOVAL, Attorney General of the State of Nevada, and DAVID K. NEIDERT, Deputy Attorney General, respectfully request that TROY BROWN'S ("Brown") Petition for Writ of Habeas Corpus be dismissed because certain grounds are unexhausted. This motion is based on the following points and authorities, as well as all documents and pleadings on file in this case.

ARGUMENT

A federal court should not entertain a petition for a writ of habeas corpus unless the petitioner has exhausted available and adequate state court remedies with respect to each of the claims contained in the petition. *Rose v. Lundy*, 455 US. 509, 510 (1982). In this regard, state court remedies have not been exhausted until the petitioner unsuccessfully presents his constitutional claims to the highest available state court through direct appeal or state collateral review proceedings. *Preiser v. Rodriguez*, 411 U.S. 575, 490-94 (1973). The exhaustion doctrine is satisfied "if a petitioner presents his claim to the highest state court and that court disposes of the claim on the merits. . . ." *Hayes v. Kincheloe*, 784 F.2d 1434, 1437 (9th Cir. 1986). The exhaustion doctrine is also satisfied if a federal habeas petitioner demonstrates at the time he files his federal petition that "no state remedies are still available to the petitioner and the petitioner has not deliberately by-passed the state remedies." *Bronson v. Swinney*, 648 F.Supp. 1094, 1101 (D.Nev. 1986), *rev'd on other grounds sub. nom, Bronson v. McKay*, 870 F.2d 1514 (9th Cir. 1989), *quoting Batchelor v. Cupp*, 693 F.2d 859, 862 (9th Cir. 1982) Additionally, each claim of ineffective assistance of counsel is discrete and must be separately exhausted. *Carriger v. Lewis*, 971 F.2d 329, 333-34 (9th Cir. 1992) (*en banc*). 28 U.S.C. § 2254(b) provides:

> (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that–

> (A) the applicant has exhausted the remedies available in the courts of the State; or
> (B)(i) there is absence of available State corrective process; or
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
> (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

The exhaustion requirement is a matter of comity designed to afford state courts the first opportunity to remedy a constitutional violation. *Sweet v. Cupp*, 640 F.2d 233, 236 (9th Cir. 1981). Prior to the adoption of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") in 1996, a petition containing both exhausted and unexhausted claims had to be dismissed, leaving the petitioner with the choice of returning to state court to exhaust his claims or amending or resubmitting the habeas petition so as to present only exhausted claims to the district court. *Rose*, 455 US. at 510. The Supreme Court adopted the principle of complete exhaustion and determined that mixed petitions, those petitions containing both exhausted and unexhausted claims, must be dismissed. *Id.* at 522. Both the federal district court and the court of appeals may examine the issue of exhaustion *sua sponte*. *Batchelor*, 693 F.2d at 862 (*citing Campbell v. Crist*, 647 F.2d 956, 957 (9th Cir. 1981)).

Prior to the AEDPA, the requirement of exhaustion of state remedies could not be waived or conceded by the state "unless the interests of justice so requires."

Ventura v. Cupp, 690 F.2d 740, 741 (9th Cir. 1982) (*citing Sweet*, 640 F.2d at 237 n.5). However, the United States Supreme Court reiterated the limiting principle that the failure to exhaust state remedies does not necessarily deprive an appellate court of jurisdiction to consider the merits of a federal habeas application. *Granberry v. Greer*, 481 U.S. 129, 134-35 (1987). The Court held this while considering the issue of how federal appellate courts ought to handle a non-exhausted habeas petition when a state has not raised the objection of failure to exhaust in the federal district court.

In *Granberry*, the Court observed that:

> When the State answers a habeas corpus petition, it has a duty to advise the District Court whether the prisoner has, in fact, exhausted all available state remedies. . . . As this case demonstrates, however, there are exceptional cases in which the State fails, whether inadvertently or otherwise, to raise an arguably meritorious nonexhaustion defense. The State's omission in such a case makes it appropriate for the court of appeals to take a fresh look at the issue. The court should determine whether the interest of comity and federalism will be better by addressing the merits forthwith or by requiring a series of additional state and district court proceedings before reviewing the merits of the petitioner's claim.
>
> If, for example, the case presents an issue on which an unresolved question fact or of state

> law might have an important bearing, both comity judicial efficiency may make it appropriate for the court to insist on complete exhaustion to make sure that it may ultimately review the issue on a fully informed basis. On the other hand, if it is perfectly clear that the applicant does not raise even a colorable federal claim, the interests of the petitioner, the warden, the state attorney general, the state courts, and the federal courts will all be well served even if the state fails to raise the exhaustion defense, the district court denies the habeas petition, and the court of appeals affirms the judgment of the district court forthwith.

Granberry, 481 U.S. at 134-35 (citations omitted). The Court also stated that a federal appellate court could hold that a nonexhaustion defense has been waived by the state if district court reached the merits when the state failed to assert the defense and "it is evident that a miscarriage of justice has occurred. . . ." *Id.* at 135. However, under current law, the State must affirmatively waive exhaustion. 28 U.S.C. § 2254(b)(3). Respondents *do not* waive exhaustion.

The Ninth Circuit has stated that a claim is "fairly presented" if the petitioner has described the operative facts and legal theory upon which the claim is based. *Tamapua v. Shimoda*, 796 F.2d 261, 262 (9th Cir. 1986), *citing Picard v. Connor*, 404 US. 270, 277-78 (1971).

Subsequently, however, the Ninth Circuit explicitly repudiated the portion of *Tamapua* which held that if the state and federal claims were "essentially the

same," the claim was exhausted. *Johnson v. Zenon*, 88 F.3d 828, 830 (9th Cir. 1997); *see Tamupua*, 796 F.2d at 262-63. In *Johnson*, the Court held, "If a petitioner fails to alert the state court to the fact that he is raising a federal constitutional claim, his federal claim is unexhausted regardless of its similarity to the issues raised in state court." 88 F.3d at 830.

Johnson's holding is based on two Supreme Court decision. In 1996, the United States Supreme Court has also held that the use of such phrases as "due process" is too broad to present a more particular federal claim. *Gray v. Netherland*, 518 U.S. 152, 163 (1996). A year before, the Supreme Court held:

> If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution. If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court.

Duncan v. Henry, 513 U.S. 364, 365-66 (1995) (per curiam).

The Ninth Circuit amplified this concept further in subsequent cases:

> To "fairly present" his federal claim to the state courts, [a petitioner has] to alert the state courts to the fact that he was asserting a claim

> under the United States Constitution. The mere similarity between a claim of state and federal error is insufficient to establish exhaustion. Moreover, general appeals to broad constitutional principles, such as due process, equal protection, and the right to a fair trial, are insufficient to establish exhaustion.

Hiivala v. Wood, 195 F.3d 1098, 1106 (9th Cir. 1999) (citations omitted).

Similarly, in 2001, the Ninth Circuit held:

> We hold that a petitioner for habeas corpus relief under 28 U.S.C. § 2254 exhausts available state remedies only if he characterized the claims he raised in state proceedings specifically as federal claims. In short, the petitioner must have either referenced specific provisions of the federal constitution or statutes or cited to federal case law. Because it is uncontested that Lyons failed in state court to identify explicitly the claims at issue as federal claims, in that he cited neither provisions of federal law nor decisions of federal courts, the district court found that the six claims at issue in the instant case were unexhausted. The district court's conclusion is correct.

Lyons v. Crawford, 232 F.3d 666, 670 (9th Cir. 2000), *as modified*, 247 F.3d 904 (9th Cir. 2001).[1] As *Lyons*

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[1] The Ninth Circuit modified *Lyons* in 2001 by adding a paragraph giving the petitioner an opportunity to abandon unexhausted

noted prior to the quoted language, "The law of this circuit is plainly that a federal claim has not been exhausted in state court *unless the petitioner* both raised the claim in state court and explicitly indicated then that the claim was a federal one[.]" *Id.* at 669 (emphasis added).

Additionally, there is a failure to exhausts if the claim is presented to the state's highest court but is presented in a procedurally deficient manner. *Castille v. Peoples*, 489 U.S. 346, 351 (1989); *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994). The petitioner has the duty to prove and plead exhaustion. *Sechrest v. Ignacio*, 943 F.Supp. 1245, 1247 (D. Nev. 1996), citing *Williams v. Craven*, 460 F.2d 1253 (9th Cir. 1972).

In this case, Ground 1 of Brown's petition is unexhausted. While Ground 1 is similar to the issue Brown raised on direct appeal, the claim is assuredly unexhausted. On direct appeal, Brown did argue sufficiency of the evidence. If that was the sole basis for Ground 1, Respondents would agree that exhaustion has occurred. However, that is not what has happened.

After reciting part of the Nevada Supreme Court's decision, Brown then attacks the reliability of the DNA evidence used to convict him. The reliability of this evidence *was not* challenged on direct appeal in the same way Brown challenges it now. Respondents note

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claims and proceeding on just the exhausted claims. 247 F.3d at 904. Otherwise, the decision was not modified.

that Brown did argue on direct appeal in part, that "the total failure of the DNA evidence to be established as trustworthy and reliable in this particular case," this argument is not the same as the one he raised in the habeas corpus context.

On direct appeal, the DNA challenge is very different to the one Brown makes in his habeas corpus petition. *Compare* Exh. 65, pp. 25-33 *with First Amended Petition*, pp. 11-19. Since both the factual basis for the claim has changed, Ground one is unexhausted.[2]

However, even if Brown wished to argue a denial of his constitutional rights based upon the alleged insufficiency of the evidence based *just* on the evidence presented at trial and without his further argument regarding the reliability of the DNA evidence (other than that which was presented to the Nevada Supreme Court on direct appeal), then his claim would still be unexhausted. This is because the legal theory has changed as well. The Constitutional nature of this claim was not raised by Brown in any fashion. Indeed, reading Brown's appellate brief, there is no assertion of any legal principle at all, other than to blithely state

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[2] Respondents further note that like *Mad* Magazine frequently does, Brown uses ellipses to distort a sentence's meaning. The *full* sentence in the District Attorney's Motion to Dismiss reads, "There was insufficient evidence to convict the Defendant unless the DNA evidence established his guilt, but the insufficiency of the evidence established at trial, combined with the alleged evidence not discovered by trial counsel is simply not enough to make the DNA evidence suspect." Exh. 161, p. 13.

"that there was insufficient evidence to convict Troy Brown of these charges." Exh. 65, p. 33.

As a result, Respondents looked to the decision from the Nevada Supreme Court, since their citation to the Constitution or, perhaps, *Jackson v. Virginia*, 443 U.S. 407 (1979), would assuredly exhaust the claim as well. Unfortunately for Brown, the Nevada Supreme Court did not do so.

Instead, in addressing the issue, the Nevada Supreme Court's decision cited *Kazalyn v. State*, 198 Nev. 67, 71, 825 P.2d 578, 581 (1992). When one goes to that citation, there is no indication of a Constitutional analysis either. Instead, *Kazalyn* cites two earlier cases: *Edwards v. State*, 90 Nev. 255, 258-59, 524 P.2d 328, 331 (1974), and *Cunningham v. State*, 94 Nev. 128, 130, 575 P.2d 936, 937 (1978). *Neither* of these cases mentions a Constitutional component either. If a reference to "due process" standing alone does not fairly present a claim, then neither should a naked reference to "'insufficient evidence." As a result, Ground One was not "fairly presented" for exhaustion purposes.

Respondents further note that the Motion for New Trial (Exh. 86) could not have exhausted this claim because the denial of that motion was not appealed to the Nevada Supreme Court. *See* Exh. 147 (Opening Brief).

Respondents acknowledge that Grounds 2, 3, 4, and 5 are all exhausted.

CONCLUSION

Because this petition contains both exhausted and unexhausted claims, it must be dismissed unless Brown chooses to abandon Ground 1.

RESPECTFULLY SUBMITTED this 28th day of March, 2005.

BRIAN SANDOVAL
Attorney General

By: /s/ David K. Neidert
DAVID K. NEIDERT
Deputy Attorney General

APPENDIX M

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

No. CV-N-03-0712-HDM(VPC)

[Filed October 19, 2005]

TROY BROWN,	)
Petitioner,	)
	)
vs.	)
	)
CRAIG FARWELL, *et al.*,	)
Respondents.	)
	)

ANSWER

Respondents, by and through counsel BRIAN SANDOVAL, Attorney General of the State of Nevada, and ERIK A. LEVIN, Deputy Attorney General, answer the amended petition for a writ of habeas corpus filed in the above-entitled matter. This answer is made and based on the attached points and, as well as all other documents and pleadings on file in this case.

I.

PROCEDURAL HISTORY

On February 7, 1994, TROY DON BROWN (Brown) was charged by criminal complaint in the Elko Justice Court with committing Count I, sexual assault on a child under the age of 14 years resulting in substantial bodily harm, a felony violation of NRS 200.366; Count II, sexual assault on a child under the age of 14 years resulting in substantial bodily harm, a felony violation of NRS 200.366; Count III, sexual assault on a child under the age of 14 years resulting in substantial bodily harm, a felony violation of NRS 200.366; Count IV, attempted murder, a felony violation of NRS 193.330, NRS 200.010, and NRS 200.020. Exhibit 2.

On February 24, 1994, Brown filed a conditional waiver of preliminary examination so that he could proceed to district court and undergo a psychological examination. Exhibit 3.

On February 28, 1994, a criminal information was filed in the Fourth Judicial District Court of Nevada in which Brown was charged with the four felonies listed in the criminal complaint. Exhibit 4.

On May 10, 1994, the district court filed its order finding Brown competent to stand trial an remanding the case back to justice court for a preliminary hearing. Exhibit 16.

On May 13, 1994, an amended felony criminal complaint was filed containing the same four counts originally charged and adding Count V, abuse or

neglect of a child less than 18 years of age resulting in substantial mental harm, a felony violation of NRS 200.508, NRS 432B.020, and NRS 432B.070. Exhibit 17.

On May 27, 1994, a second amended felony criminal complaint was filed in which the wording of some counts was amended, but no counts were added or deleted. Exhibit 18.

A preliminary hearing was held on July 6, 1994, and on July 20, 1994, an order was filed binding Brown over to the district court for: Count I, sexual assault on a child under the age of 14 years resulting in substantial bodily harm, a felony violation of NRS 200.366; Count II, sexual assault on child under the age of 14 years, a felony violation of NRS 200.366; Count III, attempted murder, a felony violation of NRS 193.330, NRS 200.010, and NRS 200.020; and Count IV, abuse or neglect of child less than 18 years of age resulting in substantial mental harm, a felony violation of NRS 200.508, NRS 432B.020, and NRS 432B.070. Exhibit 20.

On July 20, 1994, a criminal information was filed charging Brown with the four felony counts for which he was bound over. Exhibit 21.

On August 1, 1994, Brown was arraigned and plead not guilty to the charges. Exhibit 22.

Brown was tried in front of a jury on September 27-30, 1994. Exhibits 29-31

On September 30, 1994, a jury found Brown guilty of Counts I, II, and IV. Exhibit 35.

On June 23, 1995, Brown was sentenced and on June 28, 1995, a judgment of conviction was filed wherein Brown was sentenced on Count I, sexual assault on a child under the age of 14 years resulting in substantial bodily harm, a felony violation of NRS 200.366, to life imprisonment with a parole eligibility after ten (10) years; on Count II, sexual assault on a child under the age of 14 years, a felony violation of NRS 200.366, to life imprisonment, with a parole eligibility after ten (10) years; and on Count IV, abuse or neglect of a child less than 18 years of age resulting in substantial mental harm, a felony violation of NRS 200.508, NRS 432B.020, and NRS 432B.070, to a term of twenty (20) years imprisonment. The court further sentenced Brown to serve his sentences consecutively to each other Exhibit 60.

On July 21, 1995, Brown filed a notice of appeal to the Nevada Supreme Court. Exhibit 62. In his direct appeal, Brown claimed: (1) that it was error to deny Brown bail in a non-capital case; (2) that Brown should be resentenced; (3) that it was double jeopardy for Brown to be convicted and sentenced for both sexual assault of a child and child abuse by means of sexual assault; (4) that DNA evidence was improperly admitted into evidence; and (5) the evidence was insufficient to convict Brown. Exhibit 65.

On February 26, 1997, the Nevada Supreme Court issued its opinion finding (1) the district court's denial of bail did not warrant reversal of the convictions; (2) the district court did not err in admitting DNA

evidence; (3) sufficient evidence existed to convict Brown; (4) the district court erred in sentencing Brown to both sexual assault on a child and child abuse by sexual abuse, in violation of the double jeopardy provisions of the state and federal constitutions; (5) the district court abused its discretion in sentencing Brown for relying on psychological reports and Brown's refusal to admit his guilt in determining the sentence; and, (6) the district court did not abuse its discretion in utilizing a post-trial DNA test in sentencing. Exhibit 70. The court then reversed the conviction on Count IV and remanded Count II for re-sentencing in front of a different judge. *Id.* The court issued its remittitur on March 18, 1997. Exhibit 72.

On March 13, 1998, Brown was re-sentenced, on Count I, sexual assault on a child under the age of 14 years resulting in substantial bodily harm, a felony violation of NRS 200.366, to life imprisonment with a parole eligibility after ten (10) years; on Count II, sexual assault on a child under he age of 14 years, a felony violation of NRS 200.366, to life imprisonment with a parole eligibility after ten (10) years. Exhibit 92. The sentence are to be sewed consecutively. The judgment of conviction was filed on March 18, 1998. *Id.*

On March 20, 1998, Brown filed a notice of appeal. Exhibit 93. In his appeal, Brown claimed (1) that it was reversible error for the resentencing judge not to recuse himself based upon him being formerly employed by the prosecuting attorney, and (2) Brown's Sixth Amendment lights were violated when the victim's mother testified at sentencing about her daughter's psychological condition and medication without providing the defense with the victim's

psychological records and appointing a defense expert to review and evaluate those records.

On September 8, 2000, the Nevada Supreme Court dismissed Brown's appeal finding: (1) the district court did not err in admitting an impact statement from the victim's mother; (2) the district court did not err in refusing to allow a psychological examination of the victim for sentencing; (3) Brown's contention that he should have had notice of the victim impact statements is without merit; and (4) the district court judge did not err in refusing to recuse himself from the case. Exhibit 153 The Nevada Supreme Court's conclusions of law are entitled to deference pursuant to 28 U.S.C. § 2254(d) and the Nevada Supreme Court's factual recitations are entitled to a presumption of correctness pursuant to 28 U.S.C. § 2254(e)(1).

The court issued its remittitur on October 25, 2000. Exhibits 156 and 157.

On August 30, 2001, Brown filed his state petition for habeas corpus relief. Exhibit 158. In his state habeas petition, Brown claimed: (1) ineffective assistance of counsel for (a) failure to move to exclude DNA evidence, (b) failure to obtain independent testing of the DNA evidence (c) failure to enforce a stipulated protocol for testing DNA evidence, (d) failure to investigate and present evidence of an alternative assailant, (e) failure to investigate and interview proposed witnesses, (f) failure to discuss defense strategies with Brown, (g) failure to object to Brown being transported in shackles in view of jurors, (h) failure to move to dismiss the case or suppress

evidence based upon the loss of potentially exculpatory evidence of teeth scrapings, (i) failure to timely move for a new trial, (j) failure to move for a pre-trial evidentiary hearing or to object to the qualifications of the state's DNA expert, (k) failure of appellate counsel to raise the issue of trial counsel's failure to move for a new trial; (2) violation of Due Process for (a) failure to preserve evidence from teeth scrapings, (b) failure to adequately collect and preserve evidence containing DNA, (c) failure to preserve and test Brown's bedding to show the absence of blood evidence, (d) failure to preserve evidence of a letter from Brown's doctor indicating the absence of wounds on Brown. Exhibit 158.

The district court held an evidentiary hearing on the petition on February 21, 2002. Exhibit 164. On March 7, 2002, the district court issued its findings of fact and conclusions of law and denied the petition. *Id.* The state district court's findings of fact contained in the order are presumptively correct pursuant to 28 U.S.C. § 2254(e)(1).

On April 8, 2002, Brown filed a notice of appeal. Exhibit 165. Brown alleged his counsel was ineffective for failing to (1) object to the jury's observation of Brown in jail garb and shackles; (2) file a motion to exclude DNA evidence; (3) require the defense DNA expert to be present during DNA testing; (4) investigate or present evidence of an alternative suspect; (5) investigate possible defenses, interview various witnesses, or discuss trial strategy with Brown; and (6) file a motion to dismiss or motion to suppress evidence based on a loss of "teeth scrapings" evidence. Exhibit 172. The Nevada Supreme Court

reviewed each claim and the factual findings of the district court and concluded Brown's arguments lacked merit. *Id.* The Nevada Supreme Court's conclusions of law are entitled to deference pursuant to 28 U.S.C. § 2254(d) and the Nevada Supreme Court's factual recitations are entitled to a presumption of correctness pursuant to 28 U.S.C. § 2254(e)(1).

Remittitur issued on December 16, 2002. Exhibit 175.

Brown then filed the instant petition in federal court.

II.

DENIAL OF FACTUAL ALLEGATIONS

Respondents deny each and every factual allegation presented in Brown's petition for habeas corpus save and except those expressly found to exist by a Nevada court of competent jurisdiction.

III.

ARGUMENT

A. Brown Is Not Entitled To Federal Habeas Corpus Relief On Ground 1.

In Ground 1, Brown argues that there was insufficient evidence to sustain his conviction, and thus he was denied his Due Process rights under the Fifth and Fourteenth Amendments to the United States Constitution.

In *Jackson v. Virginia*, 443 U.S. 307, 318 (1979), the United States Supreme Court stated:

> After *Winship*, the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." (emphasis in original). Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution. The criterion thus impinges upon "jury" discretion only to the extent necessary to guarantee the fundamental protection of due process of law. (Internal citations omitted) (footnotes omitted).

The *Jackson* decision, which was pre-AEDPA, went on to say, "[a] judgment by a state appellate court rejecting a challenge to evidentiary sufficiency is of course entitled to deference by the federal courts, as is any judgment affirming a criminal conviction." *Id.* at 323.

The question of whether AEDPA requires an additional degree of deference, beyond that required under *Jackson*, has been left open in the Ninth Circuit. *Bruce v. Terhune*, 376 F.3d 950, 957 (9th Cir. 2004) (*per curiam*). However, the court in *Bruce* stated, "that additional deference would be appropriate in light of AEDPA's reforms." *Id. See also*, *Id.* at 958-59 (O'Scannlon, J., concurring) (noting that five other circuits have held that sufficiency claims reviewed deferentially pursuant to 28 U.S.C. § 2254(d) and no circuit has held otherwise). Further citing *Jackson*, the *Bruce* court stated, '[i]f confronted by a record that supports conflicting inferences, federal habeas courts must presume-even if it does not affirmatively appear in the record-that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Id.* at 957 (internal quotations omitted).

On direct appeal, the Nevada Supreme Court made nearly nine pages of factual findings, which are quoted in Ground One of the instant petition, and then addressed the issue of sufficiency of the evidence. Exhibit 70 at 1-13. The standard of review applied by the court was "whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt." *Id.* at 13. This is the same standard applied in *Jackson*, "after viewing the

evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319.

Among the facts relied upon by the Nevada Supreme Court were, the victim was sexually assaulted in the early morning hours of January 29, 1994; that Brown was acquainted with the victim and her family; that Brown knew the victim's parents were not at home; that there was close proximity of Brown's residence to both the bar where he was seen before the crimes were committed and to the residence of the victim; that after leaving the bar, Brown had time to commit the crimes; that the victim's description of her assailant's clothes was similar to what Brown was wearing; that the victim testified her assailant smelled like beer or vomit and there was further testimony that Brown had been drinking and had vomited several times that night; that witnesses had seen someone resembling Brown stumbling down the street near the victim's residence and that the person was wearing clothes similar to those Brown was wearing; that Brown washed his pants and shirt when he got home, around 1 :30 a.m., arguably to remove the blood evidence from his clothes; and DNA evidence indicated that semen collected from the victim's underwear matched Brown's and that only 1 in 3,000,000 other people had matching DNA. Exhibit 70 at 13.

The Nevada Supreme Court concluded that a jury, acting reasonably, could have been convinced of Brown's guilt beyond a reasonable doubt. *Id.* Under the standard announced in *Jackson*, there was sufficient evidence for the jury to find each element of

the crime beyond a reasonable doubt. There was no question at any stage of the proceedings that the victim had been sexually assaulted. The only issue then, became the identity of the assailant. DNA evidence showed that semen left at the scene matched Brown and only 1 in 3,000,000 other people. Other evidence showed that: Brown matched the description of the assailant; that he was wearing clothes similar to the assailant; that he had the time and opportunity to commit the crimes; that someone matching his description was seen near the crime scene; and that after returning home at 1:30 in the morning, Brown immediately washed his pants and jacket. The Nevada Supreme Court's rejection of Brown's challenge to the evidentiary sufficiency of his conviction is entitled to deference by the federal courts. *Jackson* at 323. Thus, under *Jackson,* Ground 1 should be dismissed.

Since the Nevada Supreme Court did not act in an objectively unreasonable manner determining that there was sufficient evidence, this Court must reject Ground 1.

Brown argues that sufficiency should be reviewed in the absence of the DNA evidence. Consideration of this issue is barred.

The district court did not err in admitting DNA evidence.

Troy argues that the district judge erred in not conducting a pretrial hearing to determine whether the DNA evidence results were trustworthy and reliable. However, Troy made no objection to either the lack of a pretrial

> evidentiary hearing or to qualifying Romero as an expert witness on DNA evidence. Failure to object in the district court precludes consideration of the issues on appeal; however, this court may address plain error sua sponte. *Sterling v. State,* 108 Nev. 391, 394, 834 P.2d 400, 402 (1992). Because we conclude that the failure to conduct an evidentiary hearing was not plain error, we will not consider this issue.

Exhibit 70 at 12-13.

Brown alleges the DNA evidence was unreliable and should not have been admitted at trial. Federal habeas corpus does not ordinarily lie to review questions about the admissibility of evidence. *Estelle v. McGuire,* 502 U.S. 62, 112 S.Ct. 475 (1991). State court evidentiary rulings are only subject to federal habeas corpus review when the evidence is so prejudicial that its admission violates fundamental due process rights and the right to a fair trial. *Fuller v. Roe,* 182 F.3d 699 (9th Cir. 1999). Brown's allegations fall far short of this standard.

Where there is no question concerning a federally significant external event., such as voluntariness of a confession or the knowing use of perjured testimony, state trial rulings on admissibility of evidence may not be questioned in a federal habeas proceeding. *Crasafi v. Oliver,* 396 F.2d 293 (9th Cir. 1968), *citing Chavez v. Dickson,* 280 F.2d 727 (9th Cir. 1960). Questions about admissibility of evidence are matters of state law. *Bashor v. Risley,* 730 F.2d 1228. 1238 (9th Cir. 1983). As the Ninth Circuit Court of Appeals has explained,"[a]n erroneous evidentiary ruling will not

cause a writ to issue unless a specific constitutional guarantee has been violated or the error is of such magnitude that the result is a denial of fundamental fairness." *McGuire v. Estelle,* 873 F.2d 1323, 1325 (9th Cir. 1989) (emphasis added). *See also Bueno v. Hallahan,* 988 F.2d 86, 87 (9th Cir. 1993); *Jeffries v. Blodgett*, 988 F.2d 923, 935 (9th Cir. 1993).

Only if there are *no* permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must "be of such quality as necessarily prevents a fair trial." *Kealohapauole v. Shimoda,* 800 F.2d 1463, 1466 (9th Cir. 1986) (videotape of victim's autopsy, although unpleasant, not inflammatory and thus did not inject element of unfairness). Only under such circumstances can it be inferred that the jury must have used the evidence for an improper purpose. "The admission of inculpatory testimony violated due process only 'if there are no permissible inferences the jury may draw from the evidence' and the testimony is 'of such quality as necessarily prevents a fair trial.'" *Henry v. Estelle,* 993 F.2d 1423, 1427 (9th Cir. 1993) (quoting *Jammal v. Van de Kamp,* 926 F.2d 918, 920 (9th Cir. 1991)).

Brown's claim fails because he has failed to establish that the DNA evidence was erroneously admitted under Nevada law. The claim also fails because the DNA evidence was inculpatory. Inasmuch as the DNA evidence was inculpatory, there can be no due process violation. Furthermore, Brown has failed to show that the evidence was of such a quality as necessarily prevents a fair trial.

First, Brown asserts, without citation to any federal constitutional authority or indeed, any authority at all, that there was a particular order of importance of the crime scene evidence. Then Brown alleges that the evidence was largely addressed in reverse order of that hierarchy. The level of attention a prosecutor gives to one piece of evidence over another can hardly rise to the level of a fundamental Due Process violation. Brown fails to cite even one Supreme Court case in support of his contention. Compare this to the facts of *Estelle,* where evidence of prior injuries to the deceased child was admitted even though there was no evidence to connect the defendant to those injuries. *Estelle* at 66. The United States Supreme Court found no Due Process violation under those circumstances. *Id.* at 67.

Second, Brown complains about the presentation of the DNA evidence at trial. Brown's argument appears to be that the witness testified there was a 1 in 3,000,000 ratio for finding a match between the DNA evidence collected and Brown. That ratio drops to 1 in 6,500 if brothers are compared as possible sources. Then Brown complains that the prosecutor pressed the reluctant witness to convert these figures to mathematical percentages. These percentages were then used in closing argument. Respondents find no error in this presentation. If the witness showed reluctance the jury was free to apply whatever weight they wanted to the testimony. Certainly, as compared again to the facts in *Estelle*, there was no Due Process violation. Further, the Nevada Supreme Court addressed this issue in the context of Brown's ineffective assistance of counsel claim and concluded that counsel was not ineffective for not filing a motion

to exclude the evidence. Exhibit 172 at 3. Moreover, as noted above, because the evidence was inculpatory, there was no due process error.

Third Brown alleges a violation of a stipulated and court ordered protocol for DNA testing that involved participation of both prosecution and defense witnesses. The Nevada Supreme Court reviewed this claim and found that, in fact, there was no violation of the protocol. Exhibit 172 at 4. Further, Brown does not allege that there was any error in the testing, only that it was not in accordance with the stipulation and court order. This falls short of rising to the level of a Due Process violation.

Fourth, Brown complains that because the crime lab utilized for DNA testing was in its infancy, there should have been a pre-trial hearing on the DNA evidence before admitting the evidence at trial. The Nevada Supreme Court did not address this issue on direct appeal. Exhibit 70 at 12. However, Brown has failed to show that the United States Supreme Court has held that the admission of such evidence is such an abuse as amounts to a Due Process error.

Based upon the above, the DNA evidence was properly admitted at trial. Further, the evidence at trial was sufficient to sustain a conviction under *Jackson* v. *Virginia*. Finally, even if the DNA evidence was excluded, the remaining evidence was sufficient by which the jury could find each element of the crime beyond a reasonable doubt.

B. Brown Is Not Entitled To Federal Habeas Corpus Relief On Ground 2.

In Ground 2, Brown alleges his counsel was ineffective for failing to enforce a stipulated protocol for testing DNA evidence and for failing to object to the admission of that evidence.

In order to succeed on a claim of ineffective assistance of counsel, Brown mist show that counsel's performance fell below an objectively unreasonable standard and that he was prejudiced. *Strickland v. Washington,* 466 US. 668, 687 (1984). Additionally, a reviewing court affords a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at. 689.

In order to prevail on the prejudice prong, there must be a "reasonable probability" that the outcome of trial would have been different. *Johnson v. Baldwin,* 114 F.3d 835, 838 (9th Cir. 1997) *(citing Strickland,* 466 U.S. at 490)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 494. In evaluating a claim of ineffective assistance of counsel, the failure of either the performance or the prejudice prong defeats the claim. *See LaGrand v. Stewart,* 133 F.3d 1253, 1271 (9th Cir. 1998) ("a defendant is required to prove both prongs of the *Strickland* test before relief can be granted"). Additionally, "it is unnecessary to consider the prejudice prong of *Strickland* if the petitioner cannot even establish incompetence under the first prong." *Siripongs v. Calderon,* 133 F.3d 732, 737 (1998).

Further, the legal conclusions of the Nevada Supreme Court are entitled to deference. Federal law provides that federal habeas corpus relief is unwarranted unless the adjudication of the claim either:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). In addition, 28 U.S.C. § 2254(e)(1) provides:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

Brown argues that he received ineffective assistance of counsel when his trial attorney failed to enforce the DNA stipulation and object to the admittance of DNA evidence results obtained in violation of the stipulation. On appeal from denial of his state habeas petition, the Nevada Supreme Court addressed the issue in this manner:

> [Brown] argues that since [his attorney] failed to require [Brown's DNA expert] to be present during the DNA testing, he failed to comply with stipulated DNA procedure, and was thereby ineffective. Although the State and the defense stipulated to certain DNA procedures, the stipulation did not mandate that [Brown's DNA expert] be present during the DNA testing, but only required that she be present at all stages that she deemed critical. [Brown's attorney] testified that [Brown's DNA expert] informed him that she did not need to be present during, the DNA testing, since she would review the test results. Because [Brown's attorney] was in full compliance with the stipulation in deferring to [Brown's DNA expert's] determination that she did not need to be present during the DNA testing, we conclude that Brown has failed to show that [his attorney] was ineffective for failing to require her presence.

Exhibit. 172 at 4. Because the Nevada Supreme Court was not objectively unreasonable in applying the standard for evaluating claims of ineffective assistance of counsel, this Court must deny Ground 2. *Woodford v. Visciotti*, 537 U.S. 19 (2002) (*per curiam*). *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (standard for evaluating claims of ineffective assistance of counsel).

Brown further argues that his counsel was ineffective for not objecting to the admission of DNA evidence at trial. The state district court made factual

findings related to this (claim that are presumptively correct. Exhibit 64 at 3-6.

On direct review, the Nevada Supreme Court found that counsel's failure to object waived consideration on direct review. Exhibit 70 at 12. However, *sua sponte* the court went on to look at whether failure to conduct such an evidentiary hearing was plain error and found that it was not. *Id.* at 13.

Furthermore, Brown has failed to satisfy either prong of *Strickland.* On appeal from denial of his state habeas petition, the Nevada Supreme Court found (1) that Brown failed to establish that the DNA evidence was contaminated, (2) that Brown's own DNA expert was satisfied with the collection of the DNA evidence, and (3) that Brown's DNA expert was satisfied with the qualifications of the state's DNA. expert. Exhibit 172 at 3. The court concluded, "that [Brown's attorney's] decision not to file a motion to exclude DNA evidence was tactical and did not fall below an objective standard of reasonableness. In addition, prejudice cannot be shown by Brown. Even if Brown's counsel had objected, the findings of the state district and Supreme Courts are that the evidence was properly admitted. Brown's own expert failed to provide any opinion or information that could lead a court to conclude the DNA evidence could or would have been excluded.

"Only those habeas petitioners who can prove under *Strickland* that they have been denied a fair trial by the gross incompetence of their attorneys will be granted the writ and will be entitled to retrial

without the challenged evidence." *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574 (1986).

The state court factual findings are presumptively correct. 28 U.S.C. § 2254(e)(1). The Nevada Supreme Court applied the correct federal constitutional standard. The Nevada Supreme Court's adjudication of the claim did not result in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, nor result in a decision in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. § 2254(d).

This court should deny federal habeas corpus relief on Ground 2.

C. Brown Is Not Entitled To Federal Habeas Corpus Relief On Ground 3.

In Ground 3, Brown alleges his counsel was ineffective for failing to present evidence that the victim's stepfather "was an alcoholic prone to attack women when drunk, and who had been charged with felony sexual assault in Utah and was involved in a similar matter in Carlin, Nevada. prior to the attack on his stepdaughter." Docket #19 at 21.

The law for reviewing claims of ineffectiveness of counsel is cited with Respondents' argument in Ground 2 above and is not repeated here. In addition, in the case of an allegation that there was a failure to investigate, as here, Brown must show what

information would have been obtained through investigation, and whether, assuming the evidence was admissible, that it would have produced a different result at trial. *Wade v. Calderon,* 29 F.3d 13 12, 13 16-17 (9th Cir. 1994); *Hamilton v. Vasquez*, 17 F.3d 1149, 1157 (9th Cir. 1994). Brown has failed to do this.

Brown admits in his petition that trial counsel was aware of all the information regarding the stepfather. Docket #19 at page 23, paragraph 3. Brown has failed to show what additional information would have been obtained through further investigation. Therefore, Brown has failed to show ineffective assistance of counsel based upon failure to investigate. Further, Brown complains that counsel should have, but did not, introduce the evidence regarding the victim's stepfather at trial.

The state district court made factual findings regarding this claim that are presumptively correct. 28 U.S.C. § 2254(e)(1). Exhibit 164 at 4-5. In addition, the district court found in its findings of fact:

> 10. That prior to trial, [Brown's attorney] was aware that the stepfather of the victim, [], had been charged and convicted of a felony in Utah of a violent and sexual nature and that [the stepfather] was also alleged to have been in the residence of a woman in Carlin, Nevada, under circumstances similar to those in Utah.
>
> 11. That prior to trial, [Brown's attorney] had been informed either by Stella Brown or Derek Baker, whether true or not, that [the stepfather]

did not have a solid work related alibi for his whereabouts at the time of the attack on the victim. That [Brown's attorney] has no present recollection of having received alibi information. That at the hearing on Petitioner's writ, Petitioner failed to establish that [the stepfather] had been absent from his employment at the time of the attack on the victim, or that his potential alibi was unreliable.

12. That [Brown's attorney] considered placing information regarding [the stepfather's] conviction and other activities before the jury, but concluded not to do so on grounds independent of whether [the stepfather] had a sufficient alibi.

13. That [Brown's attorney's] decision not to specifically attempt to prove that [the stepfather] committed the crime against the child was based on his conclusion that his effort to inculpate [the stepfather] would be unsuccessful and potentially hurtful to the defense of Petitioner, and [Brown's attorney] would have made the same decision whether or not [the stepfather] had a good alibi.

Exhibit 164 at 4.

Furthermore, on appeal from denial of his state habeas petition, the Nevada Supreme Court addressed the issue in this manner:

[Brown's attorney] testified that he considered alternative suspects during his trial strategy.

> He also testified that although he was aware that [the victim's stepfather] was previously charged with sexual assault and that there were discrepancies regarding [the victim's stepfather's] alibi, he decided for tactical reasons not to present evidence the [the stepfather] was the perpetrator. We conclude that [Brown's attorney's] decision not to investigate and present evidence that [the stepfather] was the perpetrator was a reasonable tactical decision and that he was not ineffective in this regard.
> fn
>
> fn *See Howard v. State,* 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) ("Tactical decisions are virtually unchallengeable absent extraordinary circumstances."), *abrogated on other grounds by Harte* v. *State,* 116 Nev. 1054, 1072, 13 P.2d 420,432 (2000).

In its decision, the court relied on *Howard* which in turn relied on *Strickland. Howard* at 722 The language relied upon is in *Strickland* at 690-691:

> ... strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes

> particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.
>
> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland at 689.

Clearly, the factual findings of the state courts show an informed and reasoned decision of Brown's attorney. Brown's attorney was not ineffective under *Strickland* and Brown's claims in Ground 3 must be denied.

D. Brown Is Not Entitled To Federal Habeas Corpus Relief On Ground 4.

Ground 4, Brown complains that his counsel was ineffective for failing to move for a mistrial because Brown was exposed to jurors while wearing shackles

and jail garb. Brown's assertion of these facts is not supported by the factual findings of the Nevada Supreme Court and the reviewing district court.

The law for reviewing claims of ineffectiveness of counsel is cited with Respondents argument in Ground 2 above and is not repeated here.

The factual findings of the district court, Exhibit 164 at 2-3, are presumptively correct pursuant to 28 U.S.C. § 2254(e)(1), and show that while Brown's mother may have informed *appellate* counsel of the allegations that jurors may have seen Brown in jail garb and restraints, nobody had informed trial counsel of these allegations. Further, the court heard testimony regarding the procedures used to transport Brown to the court and did not find credit in the testimony of Brown and his family that the jurors had observed Brown in jail garb and restraints. *Id.*

On appeal from denial of his state habeas petition, the Nevada Supreme Court addressed the issue in this manner:

> Brown claims that his trial counsel was ineffective for failing to raise the issue of whether the jurors observed Brown in jail garb and shackles. This court has held that a defendant has the right to appear before the jury "in the apparel of an innocent person." If this right is violated, this court will reverse "unless it is clear that the defendant was not prejudiced thereby." When reviewing whether the error was harmless, this court reviews the entire record.

> As the district court noted in its findings of fact, the testimony regarding whether the jurors observed Brown in jail garb and shackles was inconsistent. Based on these inconsistencies, the district court found that Brown and his family's testimony was not credible. We defer to the district court's findings that Brown failed to demonstrate that the jurors observed him in jail garb and shackles. We also defer to the district court's findings that [Brown's attorney] was not informed by Brown or his family that the jurors had had seen Brown in jail garb and shackles. Accordingly we conclude that [Brown's attorney's failure to raise the issue in the district court did not fall below an objective standard of reasonableness.

Exhibit 172 at 2. (Citations omitted).

"[W]here care is taken to ensure that a defendant's shackling is not visible to the jury in the courtroom, no error results." *Rich v. Calderon*, 187 F.3d 1064, 1069 (9th Cir. 1999). The factual findings clearly show that there was no credible evidence to suggest jurors observed Brown in jail garb or shackles. More importantly to Brown's ineffective assistance of counsel claim, nobody, was found to have informed trial counsel of the allegations. Therefore, Brown's attorney cannot be said to fall below an objective standard of reasonableness and Brown's claim in Ground 4 must be denied.

The state court factual findings are presumptively correct. 28 U.S.C. § 2254(e)(1). The Nevada Supreme Court applied the correct federal constitutional

standard. The Nevada Supreme Court's adjudication of the claim did not result in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, nor result in a decision in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. § 2254(d).

E. Brown Is Not Entitled To Federal Habeas Corpus Relief On Ground 5.

In Ground 5, Brown claims that trial counsel was ineffective for not making a motion to dismiss because the state lost evidence from teeth scrapings that would have excluded Brown as the assailant.

The law for reviewing claims of ineffectiveness of counsel is cited with Respondents argument in Ground 2 above and is not repeated here.

The factual findings of the district court, Exhibit 164 at 5, further show that the district court reviewed the trial testimony and concluded there from that neither the fact that the victim bit her attacker nor the fact that teeth scrapings had been taken was firmly established. The district court fount no evidence of bad faith on the part of police officers in connection with the alleged loss and no, evidence that had the scrapings been preserved it would have been exculpatory. *Id.*

On appeal from denial of his state habeas petition, the Nevada Supreme Court addressed th issue in this manner.

> We have stated, "A conviction may be reversed when the state loses evidence if (1) the defendant is prejudiced by the loss or, (2) the evidence was 'lost' in bad faith by the government.
>
> Here, the district court found that Brown failed to establish that the loss of the victim's teeth scrapings was in bad faith or that he was prejudiced by the loss. Indeed, the only evidence Brown presented at the post-conviction hearing was his mother's testimony that she remembered that the victim's teeth scrapings had been lost. Additionally, [Brown's attorney] testified that he considered filing such a motion, but concluded that it was not justified under the law. Thus, we conclude that [Brown's attorney's] decision not to file a motion regarding the loss of evid nce did not fall below an objective standard of reasonableness.

Exhibit 172 at 4. (Citations omitted)

The United States Supreme Court has addressed the issue of due process violations for loss of evidence.

> The Due Process Clause of the Fourteenth Amendment, as interpreted in *Brady*, makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. Bus we think the

Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant. Part of the reason for the difference in treatment is found in the observation made by the Court in *Tromhetta, supra,* 467 U.S., at 486, 104 S.Ct., at 2532, that "[w]henever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed." Part of it stems from our unwillingness to read the "fundamental fairness" requirement of the Due Process Clause, *see Lisenha v. California,* 314 US. 219, 236, 62 S.Ct. 280, 289, 86 L.Ed. 166 (1941), as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution. We think that requiring a defendant to show bad faith or the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. ***We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve***

potentially useful evidence does not constitute a denial of due process of law.

Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333 (1988). (Emphasis added)

Brown has failed to allege, much less provide, evidence of bad faith. In light of the lack of such evidence, trial counsel's decision not to file a motion to dismiss due to loss of evidence cannot be said fall below an objectively reasonable standard. Therefore, Brown's claim must be denied.

The state court factual findings are presumptively correct. 28 U.S.C. § 2254(e)(l). The Nevada Supreme Court applied the correct federal constitutional standard. The Nevada Supreme Court's adjudication of the claim did not result in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, nor result in a decision in a decision that was based on an unreasonable determination of the acts in light of the evidence presented in the state court proceedings. 28 U.S.C. § 2254(d).

IV.

CONCLUSION

The Nevada Supreme Court found there was sufficient evidence presented at trial to sustain Brown's conviction. The court's decision cannot be said to have resulted in a decision that was contrary to, or involved an unreasonable application of, clearly

established Federal law, as determined by the Supreme Court of the United States; or to have resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Brown has failed to meet his burden of rebutting the presumption of correctness of the state court factual findings by clear and convincing evidence. Even if AEDPA does not impose a higher standard for reviewing sufficiency of evidence claims, the evidence was nevertheless sufficient under the standard announced *Jackson v. Virginia, supra.* Therefore, Ground 1 must be denied.

The Nevada Supreme Court and the Fourth Judicial District court performed an extensive review of Brown's allegations of ineffective assistance of counsel. Both courts made lengthy factual findings and conclusions of law and failed to find that Brown met his burden on either prong of *Strickland, supra,* on any of his claims. The Nevada Supreme Court's decision cannot be said to have resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or to have resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Therefore, Grounds 2-5 must be denied.

For the foregoing reasons, Brown's petition for writ of habeas corpus relief must be denied

RESPECTFULLY SUBMITTED this 5th day of October, 2005.

BRIAN SANDOVAL
Attorney General

By: /s/
ERIK A. LEVIN
Deputy Attorney General

APPENDIX N

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

No. 3:03-CV-0712-PMP(VPC)

[Filed March 1, 2006]

TROY BROWN,	)
	)
Petitioner,	)
	)
vs.	)
	)
CRAIG FARWELL, et al.,	)
	)
Respondents.	)
	)

MOTION TO EXPAND RECORD

Petitioner, Troy Brown ("Brown"), through his attorney, Assistant Federal Public Defender, Paul G. Turner, hereby moves pursuant to Rule 7 of the Rules Governing Section 2254 Cases In The United States District Courts (the "Habeas Rules") that the record be expanded so that the documents identified in the attached points and authorities may be considered in support of petitioner's Reply filed contemporaneously herewith. This Motion is based upon the following

points and authorities as well as all other pleadings and exhibits on file in this proceeding.

Dated this 1st day of March, 2006.

Respectfully Submitted:

/S/ Paul G. Turner
PAUL G. TURNER
Assistant Federal Public Defender

POINTS AND AUTHORITIES

1. On October 19, 2005, respondents filed their Answer in this 28 U.S.C. §2254 post-conviction proceedings. Clerk's Record (CR) 42.

2. Petitioner has contemporaneously filed his Reply which references as supplemental exhibits the documents listed below. Since such documents are pertinent to the issues raised by Brown in his First Amended Petition and Reply, petitioner requests that they be accepted as part of the record in this case for consideration by the Court. See Habeas Rule 7.

No.	DATE	DOCUMENT	COURT	CASE #62.
196.	01/2006	Curriculum Vitae Laurence Dochez Mueller		

No.	DATE	DOCUMENT	COURT	CASE #62.
197.	02/28/06	Report by Laurence D. Mueller, Department of Ecology & Evolutionary Biology, University of California, Irvine		
198.	03/01/06	Affidavit of Ed Heddy		

Dated this 1st day of March, 2006.

Respectfully Submitted:

/S/ Paul G. Turner
PAUL G. TURNER
Assistant Federal Public Defender

APPENDIX O

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Case No. 3:03-cv-0712-PMP-VPC

[Filed March 30, 2006]

TROY BROWN,	)
	)
Petitioner,	)
	)
vs.	)
	)
CRAIG FARWELL, *et al.*,	)
	)
Respondents.	)
	)

OPPOSITION TO MOTION TO EXPAND RECORD AND MOTION TO STRIKE

Respondents, by and through counsel GEORGE J. CHANOS, Attorney General of the State of Nevada, and ERIK A. LEVIN, Deputy Attorney General, oppose TROY BROWN's (Brown) motion to expand the record and move to strike, in part, petitioner's reply in the above-entitled matter. This opposition and motion are made and based on the attached points and, as well as all other documents, pleadings and exhibits on file in this case.

I.

PROCEDURAL HISTORY

On February 7, 1994, Brown was charged by criminal complaint in the Elko Justice Court, with committing Count I, sexual assault on a child under the age of 14 years resulting in substantial bodily harm, a felony violation of NRS 200.366; Count II, sexual assault on a child under the age of 14 years resulting in substantial bodily harm, a felony violation of NRS 200.366; Count III, sexual assault on a child under the age of 14 years resulting in substantial bodily harm, a felony violation of NRS 200.366; Count IV, attempted murder, a felony violation of NRS 193.330, NRS 200.010, and NRS 200.020. Exhibit 2.

On February 24, 1994, Brown filed a conditional waiver of preliminary examination so that he could proceed to district court and undergo a psychological examination. Exhibit 3.

On February 28, 1994, a criminal information was filed in the Fourth Judicial District Court of Nevada in which Brown was charged with the four felonies listed in the criminal complaint. Exhibit 4.

On May 10, 1994, the district court filed its order finding Brown competent to stand trial and remanded the case back to justice court for a preliminary hearing. Exhibit 16.

On May 13, 1994, an amended felony criminal complaint was filed containing the same four counts originally charged. Count V, abuse or neglect of a child

less than 18 years of age resulting in substantial mental harm, a felony violation of NRS 200.508, NRS 432B.020, and NRS 432B.070 was added to the complaint. Exhibit 17.

On May 27, 1994, a second-amended felony criminal complaint was filed in which the wording of some counts was amended, but no counts were added or deleted. Exhibit 18.

A preliminary hearing was held on July 6, 1994. On July 20, 1994, an order was filed binding Brown over to the district court for: Count I, sexual assault on a child under the age of 14 years resulting in substantial bodily harm, a felony violation of NRS 200.366; Count II, sexual assault on a child under the age of 14 years, a felony violation of NRS 200.366; Count III, attempted murder, a felony violation of NRS 193.330, NRS 200.010, and NRS 200.020; and Count IV, abuse or neglect of a child less than 18 years of age resulting in substantial mental harm, a felony violation of NRS 200.508, NRS 432B.020, and NRS 432B.070. Exhibit 20.

On July 20, 1994, a criminal information was filed charging Brown with the four felony counts for which he was bound over. Exhibit 21.

On August 1, 1994, Brown was arraigned and plead not guilty to the charges. Exhibit 22.

Brown was tried by a jury on September 27-30, 1994. Exhibits 29-31.

On September 30, 1994, the jury found Brown guilty of Counts I, II, and IV. Exhibit 35.

On June 23, 1995, Brown was sentenced. On June 28, 1995, a judgment of conviction was filed wherein Brown was sentenced on Count I, sexual assault on a child under the age of 14 years resulting in substantial bodily harm, a felony violation of NRS 200.366, to life imprisonment with a parole eligibility after ten (10) years; on Count II, sexual assault on a child under the age of 14 years, a felony violation of NRS 200.366, to life imprisonment, with a parole eligibility after ten (10) years; and on Count IV, abuse or neglect of a child less than 18 years of age resulting in substantial mental harm, a felony violation of NRS 200.508, NRS 432B.020, and NRS 432B.070, to a term of 20 years imprisonment. The court further sentenced Brown to serve his sentences consecutively to each other. Exhibit 60.

On July 21, 1995, Brown filed a notice of appeal to the Nevada Supreme Court. Exhibit 62. In his direct appeal, Brown claimed: (1) that it was error to deny Brown bail in a non-capital case, (2) that Brown should be resentenced, (3) that it was double jeopardy for Brown to be convicted and sentenced for both sexual assault of a child and child abuse by means of sexual assault, (4) that DNA evidence was improperly admitted into evidence, and (5) the evidence was insufficient to convict Brown. Exhibit 65.

On February 26, 1997, the Nevada Supreme Court issued its opinion finding: (1) the district court's denial of bail did not warrant reversal of the convictions, (2) the district court did not err in admitting DNA

evidence, (3) sufficient evidence existed to convict Brown, (4) the district court erred in sentencing Brown to both sexual assault on a child and child abuse by sexual abuse, in violation of the double jeopardy provisions of the state and federal constitutions, (4) the district court abused its discretion in sentencing Brown for relying on psychological reports and Brown's refusal to admit his guilt in determining the sentence, (5) the district court did not abuse its discretion in utilizing a post-trial DNA test in sentencing. Exhibit 70. Those conclusions and findings are entitled to deference pursuant to 28 U.S.C. § 2254(d). The court then reversed the conviction on Count IV and remanded Count II for re-sentencing in front of a different judge. *Id.* The court issued its remittitur on March 18, 1997. Exhibit 72.

On March 13, 1998, Brown was re-sentenced, on Count II, sexual assault on a child under the age of 14 years resulting in substantial bodily harm, a felony violation of NRS 200.366, to life imprisonment with a parole eligibility after ten (10) years; on Count II, sexual assault on a child under the age of 14 years, a felony violation of NRS 200.366, to life imprisonment with a parole eligibility after ten (10) years. Exhibit 92. The sentence are to be served consecutively. The judgment of conviction was filed on March 18, 1998. *Id.*

On March 20, 1998, Brown filed a notice of appeal. Exhibit 93. In his appeal Brown claimed: (1) that it was reversible error for the resentencing judge not to recuse himself based upon his former employment by the prosecuting attorney, and (2) Brown's Sixth Amendment rights were violated when the victim's mother testified at sentencing about her daughter's

psychological condition and medication without providing the defense with the victim's psychological records and appointing a defense expert to review and evaluate those records.

On September 8, 2000, the Nevada Supreme Court dismissed Brown's appeal finding: (1) the district court did not err in admitting an impact statement from the victim's mother, (2) the district court did not err in refusing to allow a psychological examination of the victim for sentencing, (3) Brown's contention that he should have had notice of the victim impact statements is without merit, and (4) the district court judge did not err in refusing to recuse himself from the case. Exhibit 153. The Nevada Supreme Court's conclusions of law are entitled to deference pursuant to 28 U.S.C. § 2254(d) and the Nevada Supreme Court's factual recitations are entitled to a presumption of correctness pursuant to 28 U.S.C. § 2254(e)(1).

The court issued its remittitur on October 25, 2000. Exhibits 156 and 157.

On August 30, 2001, Brown filed a state petition for habeas corpus relief. Exhibit 158. In his state habeas petition Brown claimed: (1) that his counsel was ineffective for (a) failing to move to exclude DNA evidence, (b) failing to obtain independent testing of the DNA evidence, (c) failing to enforce a stipulated protocol for testing DNA evidence, (d) failing to investigate and present evidence of an alternative assailant, (e) failing to investigate and interview proposed witnesses, (f) failing to discuss defense strategies with Brown, (g) failing to object to Brown

being transported in shackles in view of jurors, (h) failing to move to dismiss the case or suppress evidence based upon the loss of potentially exculpatory evidence of teeth scrapings, (i) failing to timely move for a new trial, (j) failing to move for a pre-trial evidentiary hearing or to object to the qualifications of the State's DNA expert, and (k) appellate counsel failed to raise the issue of trial counsel failing to move for a new trial; (2) violation of Due Process for (a) the failure to preserve evidence from teeth scrapings, (b) the failure to adequately collect and preserve evidence containing DNA, (c) the failure to preserve and test Brown's bedding to show the absence of blood evidence, and (d) the failure to preserve evidence of a letter from Brown's doctor indicating the absence of wounds on Brown. Exhibit 158.

The district court held an evidentiary hearing on the petition on February 21, 2002. Exhibit 164. On March 7, 2002, the district court issued its findings of fact and conclusions of law and denied the petition. *Id.* The state district court's findings of fact contained in the order, Exhibit 164, are presumptively correct pursuant to 28 U.S.C. § 2254(e)(1).

On April 8, 2002, Brown filed a notice of appeal. Exhibit 165. In his appeal Brown claimed his counsel was ineffective for failing to: (1) object to the jury's observation of Brown in jail garb and shackles, (2) file a motion to exclude DNA evidence, (3) require the defense DNA expert to be present during DNA testing, (4) investigate or present evidence of an alternative suspect, (5) investigate possible defenses, interview various witnesses, or discuss trial strategy with Brown, and (6) file a motion to dismiss or a motion to

suppress evidence based on a loss of "teeth scrapings" evidence. Exhibit 172.

The Nevada Supreme Court reviewed each claim and the factual findings of the district court and concluded Brown's arguments lacked merit. *Id.* The Nevada Supreme Court's conclusions of law are entitled to deference pursuant to 28 U.S.C. § 2254(d) and the Nevada Supreme Court's factual recitations are entitled to a presumption of correctness pursuant to 28 U.S.C. § 2254(e)(1).

Remittitur issued on December 16, 2002. Exhibit 175.

On February 6, 2004, Brown filed his petition for habeas corpus pursuant to 28 U.S.C. § 2254. Docket #6. On November 12, 2004, with the assistance of counsel, Brown filed his first-amended petition for writ of habeas corpus. Docket #19.

On March 28, 2005, Respondents filed a motion to dismiss, arguing that the petition was mixed. Docket #30. This court denied Respondents' motion on July 22, 2005. Docket #33.

On October 19, 2005, Respondents answered Brown's petition. Docket #42.

On March 1, 2006, Brown filed his reply and motion to expand record. Docket #'s 47 and 48.

II.

DENIAL OF FACTUAL ALLEGATIONS

Respondents deny each and every factual allegation presented in Brown's motion to expand record and reply save and except those expressly found to exist by a Nevada court of competent jurisdiction.

III.

ARGUMENT

A. This Court Cannot Consider Brown's Newly Submitted Evidence.

In his motion to expand the record, Brown seeks to have this court consider three documents, a curriculum vitae for Laurence Mueller, a report by Dr. Mueller, and an affidavit of Ed Heddy, an investigator of the Federal Public defender's office dated March 1, 2006. In support of his motion, Brown cites Rule 7 of the Rules Governing Section 2254 cases and merely states that the proffered exhibits "are pertinent to the issues raised by Brown."

Unfortunately for Brown, the applicable standard for expanding the record is not one of "pertinence." Brown must comply not only with Rule 7, but also with 28 U.S.C. § 2254(e)(2), which states:

> If the applicant failed to develop the factual basis of the claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

> (A) the claim relies on—
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable;
> or
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; AND (emphasis added)
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

In *Holland v. Jackson*, 542 U.S. 649, 652 (2004), the United States Supreme Court stated that "the 'unreasonable application' clause of 28 U.S.C. § 2254(d)(1) applies when the state court identifies the correct governing legal principle from the Supreme Court's decision but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 2737. The Supreme Court went on to state, "[i]n this and related contexts we have made clear that whether a state court's decision was unreasonable must be assessed in light of the record the court had before it." *Id.* The Supreme Court held that under the habeas statute, evidence of a statement could have been the subject of an evidentiary hearing by the federal district court, but only if the petitioner was not at fault in failing to develop that evidence in state court, or (if he was at fault) if the conditions prescribed in 28 U.S.C. § 2254(e)(2) were met. The Supreme Court further determined that the restrictions enunciated in 28 U.S.C. § 2254(e)(2) also applies when a prisoner seeks

relief based on new evidence *without* an evidentiary hearing.

In *Cooper-Smith v. Palmateer*, 397 F.3d 1236, the Ninth Circuit noted that Rule 7 of the Rules Governing Section 2254 Cases in the United States District Courts allows the district court to expand the record without holding an evidentiary hearing. In *Cooper-Smith*, the petitioner argued that expansion of the record under Rule 7 should be granted without regard for the requirements of 28 U.S.C. § 2254(e)(2). The Ninth Circuit rejected that argument and determined that the requirements of 28 U.S.C. § 2254(e)(2) do apply. Thus, the Ninth Circuit determined that the petitioner could not present evidence to bolster his ineffective assistance of counsel claims. *Cooper-Smith*, 397 F.3d at 1241-42. The Ninth Circuit stated that diligence for purposes of 28 U.S.C. § 2254(e)(2) depends on whether petitioner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court. *Cooper-Smith*, 397 F.3d at 1241. The failure to investigate or develop a claim given knowledge of the information upon which the claim is based is not the exercise of diligence. Consequently, the constraints of 28 U.S.C. § 2254(e)(2) applied to the petitioner's attempt to introduce evidence in the district court. *Id.*

The Ninth Circuit stated that to meet the burden § 2254(e)(2) imposed, the petitioner has to show that his claim was based either on a new retroactive rule of constitutional law, or on "a factual predicate that could not have been previously discovered through the exercise of due diligence." *Id.*, 28 U.S.C. § 2254(e)(2).

Brown has not even alleged he has met the requirements of 28 U.S.C. § 2254(e)(2). He merely argues the documents are "pertinent."

With respect to 28 U.S.C. § 2254(e)(2)(A), Brown concedes that *United States v. Chischilly*, 30 F.3d 1144 (9th Cir. 1994), which approved the use of RFLP DNA evidence in federal trials, was decided a few months *prior* to Brown's trial. Brown relies on *Chischilly* in his claim that DNA evidence was improperly admitted at his trial. Because *Chischilly* did not impose a new rule of constitutional law, made retroactive to cases on collateral review by the United States Supreme Court, that was previously unavailable, Brown cannot avail himself of 28 U.S.C. § 2254(e)(2)(A)(i).

Moreover, *Chischilly* is not a United States Supreme Court case holding that RFLP DNA evidence is inadmissible in state court trials. Rather, *Chischilly* applied the United States Supreme Court holding of *Daubert v. Merrill Dow Pharmaceuticals, Inc*, 509 U.S. 579 (1993) (displacing the previously utilized *Frye*[1] test), to the admission of scientific evidence in *federal courts*. Therefore, *Chischilly* does not provide Brown a basis for relief. 28 U.S.C. § 2254(d)(1).

Further, Brown offers no factual predicate that could not have been previously discovered through the exercise of due diligence. Through the curriculum vitae and report of Dr. Mueller, Brown attempts merely to present bolstering evidence to attack the testimony of the State's witnesses. The report does not allege that

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[1] *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923).

any of the facts contained therein were unavailable at the time of Brown's trial. Indeed, the implication of Dr. Mueller's report is that the State's expert chose the most favorable assumptions available *at the time of trial* to support the State's case.

Through the affidavit of Ed Heddy, Brown alleges that two of his four brothers were also present in Carlin, Nevada, at the time these crimes were committed. The presence of these brothers, Brown argues, should have changed, to Brown's advantage, the probability calculations used by the State in comparing Brown's DNA to that found at the crime scene. It cannot reasonably be argued that, through the exercise of due diligence, Brown could not have discovered that he had two brothers living in Carlin, Nevada, at the time of these crimes. Therefore, pursuant to 28 U.S.C. § 2254(e)(2)(A)(ii) neither the report of Dr. Mueller nor affidavit of Ed Heddy can be used to expand the record.

With respect to 28 U.S.C. § 2254(e)(2)(B), Brown must also show that the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense. Brown cannot support such a conclusion.

In his amended petition, Docket #19, and reply brief, Docket #47, Brown argues that, in the absence of DNA evidence, there was insufficient evidence to sustain the jury's verdicts of guilty. First, as detailed in Respondents' answering brief, the DNA evidence was but one of numerous pieces of evidence and

testimony the Nevada Supreme Court found that supported the jury's verdict. Docket #42 and Exhibit #70. Nowhere does Brown even address the other evidence against him. Second, Brown has provided no authority to support a conclusion that the DNA evidence could not be admitted. Brown's authorities, at best, merely go to the weight of the evidence and the credibility of the State's witnesses. Therefore, Brown has failed to meet his burden of showing, by clear and convincing evidence, that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

As shown, all of the evidence that Brown wishes this Court to consider could have been previously discovered through the exercise of due diligence. Further, even absent the facts underlying Brown's claim, Brown has failed to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found him guilty of the underlying offenses.

28 U.S.C. § 2254(e)(2) requires that the evidence be a "factual predicate" to the claim. None of the information related in the proposed exhibits is a "factual predicate" either to Brown's claims in this action. Brown was able to bring his claims before the state courts. Brown was not prevented from bringing either claim in the Nevada courts because he had no factual basis in existence at that time to bring them. Respondents interpret the language of 28 U.S.C. § 2254(e)(2)(ii) to mean there existed no factual basis at all upon which the claim could even have been brought in state court. Such interpretation is

consistent with provisions of the Anti-Terrorism and Effective Death Penalty Act of 1996.

Consideration of any evidence that was not presented in state court is incompatible with 28 U.S.C. § 2254(d) (analysis of exhausted claims [by definition a "claim that was adjudicated on the merits in State court proceedings] limited to a determination whether the adjudication (1) resulted in a decision that was contrary to, or involved an unreasonable determination of, clearly established Federal law, as determined by the Supreme Court of the United States or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding).

This Court cannot consider any of the exhibits offered by Brown in support of his reply brief because they were never presented to the state courts.

B. <u>Brown Is Not Entitled To An Evidentiary Hearing</u>.

As cited above, 28 U.S.C. § 2254(e)(2) prohibits an evidentiary hearing where, as here, a petitioner has not developed the factual basis of his claim in the State courts. *Williams v. Taylor*, 529 U.S. 420, (2000).

In order to obtain an evidentiary hearing, a petitioner must have been diligent in developing the state court record. *Id.* at 437. Brown was far from diligent in developing the state court record. Brown fails to allege that he could not have obtained any of the proffered exhibits for inclusion in his state court records. As argued above, it cannot reasonably be

argued that Brown did not know or could not have known, through reasonable diligence, that he had two brothers living in Carlin, Nevada. Dr. Mueller's report does not allege that any of the information contained therein was unavailable during Brown's State court proceedings. In fact, the opposite is clearly implied.

Further, the question of sufficiency of the evidence is a question of law. *Hemphill v. U.S.*, 120 F.2d 115 (9th Cir. 1941). A habeas petitioner is not entitled to an evidentiary hearing on a question of law. *Beardslee v. Woodford*, 327 F.3d 799, 823 (9th Cir. 2003), *amended* 358 F.3d 560, 585 (2004).

For these reasons, Brown is not entitled to an evidentiary hearing with respect to the DNA issue.

C. Motion To Strike.

As shown above, Brown's motion to expand record is not supported by the facts or law. As a result, that motion must be denied. Brown's reply brief relies heavily on the objectionable exhibits Brown seeks to introduce as well as several newly cited studies not previously presented to the state courts.[2] This court has not granted Brown permission to expand the record with his proffered exhibits. Therefore,

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[2] Docket #47 at 6-7, citing to 13 Cardoza L. Rev. 303 (1991).
Id. at 6-7, citing to National research Council, DNA Technology in Forensic Science (1992).
Id. at 7, citing to 3 J.L. & Pol'y (1995).
Id. at 7, citing to 23 Am. J. Crim.L. (1995).
Id. at 9, citing to National Research Council, "The Evaluation of Forensic DNA Evidence" (1996).

Respondent moves to strike the portions of Brown's reply brief that depend on or incorporate any of these exhibits.

Further, if this court were to expand the record as Brown requests, admission of this additional evidence would render Brown's sufficiency of the evidence claim unexhausted. 28 U.S.C.A. §§ 2254(b), (c); *Rose v. Lundy*, 455 U.S. 509, 510 (1982). Exhaustion requires not only that the theory of the claim be presented to the state courts but also that the facts supporting the claim be presented to the state courts. *Duncan v. Henry*, 513 U.S. 364 (1995); *Gray v. Netherland*, 518 U.S. 152, 162, (1996). Respondents reserve the right to raise and argue failure to exhaust should Brown submit any factual material not previously presented to the state courts.

IV.

CONCLUSION

Brown wants this court to consider his new "evidence" regarding his claim of insufficiency of the evidence, a claim that is merely a question of law. This court cannot consider Brown's "evidence." Brown is trying to make this proceeding a retrial of his guilt. Federal habeas corpus proceedings are not retrials. *Hastings v. U.S.*, 184 F.2d 939 (9th Cir. 1950).

Brown is not entitled to expand the record because he has failed to make the showings required by 28 U.S.C. § 2254(e)(2). Indeed, Brown has not even alleged that he has made such showings. Similarly, Brown is not entitled to an evidentiary hearing

because he did not diligently pursue development of his factual basis in the Nevada State courts. Finally, because Brown is not entitled to expand the record, those portions of his reply brief that rely on or reference his proffered exhibits or newly cited studies should be stricken.

RESPECTFULLY SUBMITTED this 30th day of March, 2006.

GEORGE J. CHANOS
Attorney General

By: /s/ Erik A. Levin
ERIK A. LEVIN
Deputy Attorney General

OPPOSITION BRIEF

No. 08-559

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2008

E.K. McDANIEL, Warden, Petitioners,

v.

TROY DON BROWN, Respondent.

On Petition For A Writ of Certiorari
To the United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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*Attorney of Record for Respondent

E.K. McDANIEL, Warden, Petitioners,

v.

TROY DON BROWN, Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Respondent, Troy Don Brown, asks for leave to file the attached Petition for Writ of Certiorari, without prepayment of costs and to proceed in forma pauperis. Respondent has been granted leave to so proceed in the District Court and in the United States Court of Appeals. No affidavit is attached, inasmuch as the District Court appointed counsel for Respondent under the Criminal Justice Act of 1964.

Respectfully submitted,

Paul G. Turner

PAUL G. TURNER
Assistant Federal Public Defender
Counsel for Respondent

QUESTIONS PRESENTED

1. Whether The District Court And Court Of Appeals Reweighed The Conflicting Evidence In A Manner Inconsistent With *Jackson v. Virginia* In Light Of The Prosecutor's Concession That Such Evidence Was Insufficient To Convict The Defendant And Raised A Reasonable Doubt As To Brown's Guilt.

2. Whether The District Court and Court Of Appeals Improperly Considered Any Non-record Evidence Inconsistent With *Jackson v. Virginia* And *Vasquez v. Hillery* In Light Of Brown's Submission Of A DNA Expert Report Which Merely Supplemented And Clarified The Challenge To DNA Evidence Submitted At Trial Set Forth In His Opening And Reply Briefs On Direct Appeal.

TABLE OF CONTENTS

Page

I. STATEMENT OF THE CASE 1

II. REASON FOR DENYING THE WRIT 2

A. The District Court And Court Of Appeals Correctly Applied The Clearly Established Federal Law Set Forth In *Jackson v. Virginia*, 443 U.S. 307 (1979), And *Vasquez v. Hillery*, 474 U.S. 254 (1986). 2

1. The Prosecutor Has Conceded The Insufficiency Of The Non-DNA Evidence. 2

2. The District Court And Court Of Appeals Correctly Applied The Clearly Established Federal Law Set Forth In *Vasquez v. Hilliary*, 474 U.S. 254 (1986), To The DNA Evidence. 4

III. CONCLUSION 8

CERTIFICATE OF SERVICE 9

INDEX TO APPENDIX 10

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Brown v. Farwell, 525 F.3d 787 (2008) 1, 2, 7

Jackson v. Virginia, 443 U.S. 307 (1979) 2

Kyles v. Whitley, 514 U.S. 419 (1995) 3

Landrigan v. Schriro, 441 F.3d 638 (9th Cir. 2006) 6

Napue v. Illinois, 360 U.S. 264 (1958) 1

Singh v. Prunty, 142 F.3d 1157 (9th Cir. 1998) 3

Vasquez v. Hillery, 474 U.S. 254 (1986) 2, 4-7

FEDERAL RULES

76 Judicature 222 (1993) 5

I.

STATEMENT OF THE CASE[1]

By Order On Merits Clerk's Record (CR) 66, P.App. 31a) and Judgment In A Civil Case (CR 67, P.App. 29a), the United States District Court for the District of Nevada, granted a writ of habeas corpus as to Grounds One through Three of Brown's First Amended Petition. On May 5, 2008, the United States Court of Appeals for the Ninth Circuit issued an opinion, reported at 525 F.3d 787, affirming the district court's grant of Troy Don Brown's ("Brown's") writ of habeas corpus and reversing his conviction. As found by the district court and affirmed by the court of appeals, Brown has been in custody for almost 14 years because of an indictment and conviction based upon (i) false deoxyribonucleic acid ("DNA") information and (ii) additional evidence conceded by the state to be insufficient without the DNA evidence to establish guilt.

> At Petitioner Troy Brown's trial for sexual assault, the Warden and State's ("Respondents") deoxyribonucleic acid ("DNA") expert provided critical testimony that was later proved to be inaccurate and misleading.[2] Respondents have conceded at least twice that, absent this faulty DNA testimony,[3] there was not sufficient evidence to sustain Troy's conviction. In light of these extraordinary circumstances, we agree with District Judge Philip Pro's conclusions that Troy was denied due process, and we affirm the district court's grant of Troy's petition for writ of habeas corpus.

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[1] Citations to the record will be referenced as they were in the court of appeals except for references to the record that have been included in the Petitioner's Appendix (P.App.) Or Respondent's Appendix (R.App.).

[2] The court of appeals also found that Brown "was most probably convicted based on the jury's consideration of false, but highly persuasive, evidence." 525 F.3d at 796. Not withstanding its duty to do, the state has never admitted its Napue v. Illinois, 360 U.S. 264 (1958), error and never taken affirmative action to correct it.

*Respondents conceded this point at least twice in the state post-conviction proceedings, both in their written papers and during oral argument.

See Brown v. Farwell, 525 F.3d 787, 789-90, 798 (9th Cir. 2008)("The conflicts in the evidence are simply too stark for any rational trier of fact to believe that Troy was the assailant beyond a reasonable doubt, an essential element of any sexual assault charge. This conclusion is confirmed by Respondents' own concessions."). On July 30, 2008, the court of appeals denied petitions for rehearing and rehearing en banc, respectively. See General Docket entries 32 & 38, United Sates Court of Appeals for the Ninth Circuit, Appeal # 07-15592. Petitioner's Petition For Writ of Certiorari (hereinafter the "Petition") was docketed October 28, 2008. Respondent now files his Brief In Opposition To Petition For Writ Of Certiorari.

II.

REASON FOR DENYING THE WRIT

A. The District Court And Court Of Appeals Correctly Applied The Clearly Established Federal Law Set Forth In *Jackson v. Virginia*, 443 U.S. 307 (1979), And *Vasquez v. Hillery*, 474 U.S. 254 (1986).

1. The Prosecutor Has Conceded The Insufficiency Of The Non-DNA Evidence.

In their petition for writ of certiorari petitioners assert that the district court and court of appeals misapplied the standard set forth in Jackson v. Virginia, 443 U.S. 307 (1979), for measuring the sufficiency of evidence to sustain a criminal conviction under the Due Process Clause by reweighing the evidence, saying that "rather than consider the evidence in the light most favorable to the prosecution, the panel reweighed the evidence and considered it in a light most favorable to the defense" and that "the District Court and the Court of Appeals resolved the inconsistencies and contrary testimony in favor of Brown." See Petition at pp. 8-9. Actually, rather than reweigh the

evidence, the district court and court of appeals acknowledged the prosecutor's own confirmation on the record in state post-conviction proceedings not mentioned by petitioners in the Petition of the reasonable doubt resulting from the evidentiary inconsistencies. During state post-conviction proceedings the prosecutor conceded in a written pleading that

> There was insufficient evidence to convict the Defendant unless the DNA evidence established his guilt, but the insufficiency of the evidence established at trial, combined with the alleged evidence not discovered by trial counsel is simply not enough to make the DNA evidence suspect.

R.App. 8, ll. 22-25. The prosecutor reaffirmed such evidentiary analysis in closing argument at the state post-conviction evidentiary hearing, conceding that the defense counsel

> created a reasonable doubt. And everybody concedes, everybody - - I think, concedes that but for the DNA there was reasonable doubt. How much reasonable doubt does [the defense counsel] have to keep piling up when the problem is the DNA?

R.App. 6, p. 256, ll. 5-9. The court of appeals accepted the prosecutor's concessions.

> The conflict in the evidence are simply too stark for any rational trier of fact to believe that Troy was the assailant beyond a reasonable doubt, an essential element of any sexual assault charge. This concession is confirmed by Respondents' own concessions . . . .

525 F.3d 798. A prosecutor is uniquely qualified to appraise the strengths and weaknesses of a case.

> During the evidentiary hearing on Singh's state habeas petition, [the prosecutor] conceded it might have been 'the kiss of death' to the State's case if the jury heard Copas was in essence being rewarded for his testimony with some kind of benefits. With all due respect to the state court of appeal, which felt otherwise, we deem [the prosecutor's] candid concession to be highly significant. In the adversarial process, the prosecutor, more than neutral jurists, can better perceive the weakness of the state's case . . . .

Singh v. Prunty, 142 F.3d 1157, 1163 (9th Cir. 1998)(emphasis added); cf. Kyles v. Whitley, 514 U.S.

419, 437 (1995)("prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net affect of all such evidence and make disclosure when the point of 'reasonable probability' is reached"). The district court and court of appeals did not misapply Jackson v. Virginia by reweighing the evidence.

2. The District Court And Court Of Appeals Correctly Applied The Clearly Established Federal Law Set Forth In *Vasquez v. Hilliary*, 474 U.S. 254 (1986), To The DNA Evidence.

With respect to the DNA, petitioners assert that the district court and court of appeals relied on non-record evidence to grant the writ. To the contrary, as set forth below, Brown addressed the presentation of DNA evidence at trial, including the DNA evidence's lack of reliability, in his Opening and Reply Briefs on direct appeal to the Nevada Supreme Court. See, e.g.:

(a) Sufficiency of the evidence.

> "Given the plethora of evidence that the assailant was not Troy Brown, include the hair which did not match, the coat which was different, the lack of watch and zipper, the fact that Megan repeatedly named Trent every time the police brought up Troy to her, the lack of blood on Troy when he first came back home at 1:32 a.m., the absence of scratches or bites from Megan on Troy's body and the total failure of the DNA evidence to be established as trustworthy and reliable in this particular case, Appellant submits that there was insufficient evidence to convict Troy Brown of these crimes. Opening Brief, EOR 590, ll. 11-20 (emphasis added).

(b) Presentation of the DNA evidence at trial.

> "She [Renee Romero] further testified that the national technical working group (TWG-DAM) which is working on DNA analysis methods, is trying to set standards for quality control or quality assurance in the area of DNA testing and reporting, but that so far, they've only issued non-mandatory guidelines. [citation omitted]. She further testified that the population database used by her lab was the FBI's Roche Molecular Systems database, which was not yet even published as of that date. ('I have a pre-publication and it will be

published in the Journal of Forensic Science in July.') [citation omitted]). Opening Brief, EOR 584, l. 20 – EOR 585, l. 3 (emphasis added).

. . . . .

"When a jury is told that the 'chances that the DNA in the panties and blood is not Troy's is 1 in 3 million' [citation omitted] and that is 3 times the entire population of Nevada, this effectively relieves the jury of its decision-making task by replacing the jury's function of weighing all the evidence with considering instead the probability of guilt." Reply Brief,[3] EOR 647, l. 21 – EOR 648, l. 3 (emphasis in original).

. . . . .

"In our case, Romero told the jury that the percent of likelihood that the DNA in the panties is the same as the defendant's DNA is 99.99967% [citation omitted]. That is improper exaggeration and source error, according to the experts. It is also extremely prejudicial to the accused." Reply Brief, EOR 650, ll. 10-15 (emphasis added).

[T]he impact of brothers in the suspect population is an important consideration that bears on the Random Match Probabilities (RMP). 'But the probability that the suspect and his biological brother will share a set of alleles on each of the three probe sites is approximately (1/4)3 = 1/64.' See - Jonathan J. Koehler, DNA Matches and Statistics: Important Questions, Surprising Answers, 76 Judicature 222 (1993). In the present case, that factor is critically important, not only because the victim constantly referred to Trent' instead of 'Troy', but also because Renee Romero, the State's DNA 'expert' quoted the odds of two brothers sharing the same alleles as **1 in 6500**! Reply Brief EOR 636-37 and n.1 (emphasis in original).

The statistical analysis set forth in Dr. Laurence Mueller's report (R.App. 001) submitted to the district court (see CR 48) merely supplemented and clarified the DNA claims previously raised in the state-court proceedings. In Vasquez v. Hillery, 474 U.S. 254 (1986), this Court analyzed the issue of whether expansion of the state court record to include statistical figures related to an equal

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[3] Brown had a right to address DNA evidence further in his Reply Brief in response to the state's defense of the DNA evidence in its answering brief.

protection claim altered the petitioner's claim. In his state court proceedings Vasquez had raised an equal protection challenge to the discriminatory selection of the grand jury. Seeing a need to "supplement and clarify" the state court record, the district court ordered the state to provide statistical figures regarding juror eligibility at the time of Vasquez' trial and directed the parties to present their views regarding the application of statistical probability analysis to the facts of the case. This Court rejected the argument that the district court's order had drastically altered Vasquez' claim, thereby rendering it unsuitable for review without prior consideration before the state courts, explaining that the statistical estimates added "nothing new to the case" that was not already intrinsic to the consideration of the grand jury discrimination claim. Id. at 259. This Court further noted that the district court's request for further information was "evidently motivated by a responsible concern that [the court] provide the meaningful federal review of constitutional claims that the writ of habeas corpus has contemplated throughout its history." Id. at 259-60; accord, Landrigan v. Schriro, 441 F.3d 638, 648 (9th Cir. 2006) ("additional information offered by Landrigan in support of the federal habeas claim does not 'fundamentally alter' the ineffective assistance claim presented to the state court [but] simply provides additional evidentiary support for the claim . . .").

Dr. Mueller's report (R.App. 1) likewise merely supplements Brown's claims that he was convicted by the state's presentation of unreliable and untrustworthy DNA evidence to the jury. As set forth in Dr. Mueller's report, Renee Romero's 1/6500 ratio was incorrect and grossly understated the probability of a random match of two siblings at five loci. The correct figure is 1/1024, more than six times the likelihood of a random match than the 1/6500 figure provided to the jury by Romero. Furthermore, Romero's calculation for two brothers was inaccurate because she never considered the fact that a third brother was in Carlin, Nevada, the night in question and that Brown

had two other brothers in Utah. Since it was at least 6 to 12 times more likely that the DNA matched one of the two brothers living in Carlin the evening in question than the 1/6500 probability opined by Ms. Romero, materially inaccurate evidence was provided to the jury. Dr. Mueller's report merely supports and clarifies Brown's claim that the DNA evidence, which included the mathematical calculations and testimony presented at trial through Romero, was unreliable. Indeed, the 1 in 66 figure for a sibling match presented in Dr Mueller's report is comparable to the figure1 in 64 presented by Brown to the Nevada Supreme Court.

Accordingly, as set forth below, the court of appeals correctly applied this Court's Vasquez holding:

> [A]s the district court found, the Mueller Report merely clarifies, rather than fundamentally alters, the DNA evidence and expert testimony that was already before the Nevada courts. *See Vasquez v. Hillery*, 474 U.S. 254, 260, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) ("We hold merely that the supplemental evidence presented by respondent did not fundamentally alter the legal claim already considered by the state courts, and, therefore, did not require that respondent be remitted to state court for consideration of that evidence."). Therefore, the district court did not err by admitting the Mueller report.

525 F.3d at 794.

Since the district court and court of appeals correctly applied the clearly established federal law set forth in Jackson v. Virginia and Vasquez v. Hillary, supra, there is no reason to grant certiorari on the questions presented. Since none of the considerations set forth in this Court's Rule 10 are present in this case, review is not warranted.

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III.

CONCLUSION

Brown respectfully asks that this Court deny the Petition For Writ of Certiorari.

Dated this 28th day of November, 2008.

Respectfully submitted,

Paul G. Turner

PAUL G. TURNER
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

E.K. McDANIEL, Warden, ET AL.,
Petitioners

v.

TROY DON BROWN,
Respondent.

USDC Case No. 3:03-cv-0712-PMP(VPC)

CA No. 07-15592

The undersigned hereby certifies that she is an employee in the office of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on November 28, 2008, she served a copy of the attached Opposition to Petition for Writ of Certiorari and Motion to Proceed in Forma Pauperis by personally placing a copy in the United States mail, postage paid to the addresses named below:

Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Troy Brown
NDOC No. 44132
Ely State Prison
P.O. Box 1989
Ely, NV 89301

Robert E. Wieland
Senior Deputy Attorney General
Office of the Attorney General
5420 Kietzke Lane, Suite 202
Reno, NV 89511

Leianna Montoya, Secretary

INDEX TO APPENDIX

Page

1. REPORT OF LAURENCE MUELLER, DEPARTMENT OF ECOLOGY & EVOLUTIONARY BIOLOGY, UNIVERSITY OF CALIFORNIA, IRVINE; UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA; CASE NO. 3:03-cv-0712-PMP(VPC);(CR 48, Ex. 197); Filed February 28, 2006 001

2. ROUGH DRAFT TRANSCRIPT OF MOTION TO DISMISS AND WRIT OF HABEAS CORPUS HEARING; FOURTH JUDICIAL DISTRICT COURT, ELKO, NEVADA; TROY DON BROWN v. WARDEN OF LOVELOCK CORRECTIONAL CENTER and THE STATE OF NEVADA; CASE NO.: CV-HC-01-607; Filed June 11, 2002 003

3. ANSWER IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) AND MOTION TO DISMISS PETITION; FOURTH JUDICIAL DISTRICT COURT, ELKO, NEVADA; TROY DON BROWN v. WARDEN OF LOVELOCK CORRECTIONAL CENTER and THE STATE OF NEVADA; CASE NO.: CV-HC-01-607; Filed December 14, 2001 007

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28 February 2006

Mr. Paul Turner
Law Offices of the Federal Public Defender
411 E. Bonneville Ave., Suite 250
Las Vegas, Nevada 89101

RE: Brown v. Farwell

Dear Mr. Turner:
Below I have summarized my opinions about the case material you sent me for review. I have reviewed the preliminary hearing and trial transcripts of Renee Romero, the Washoe County Sheriff's reports of 11 and 14 February, 6 June, and 15 September 1994 as well as their lab notes, the FSA FAX sheet dated 26 September 1994, the FSA report of 31 May 1995 and the curriculum vitae of Renee Romero.

On page 343 of the trial transcript Ms. Romero states that there is a 25% chance of two brothers sharing both alleles at a single locus in common. This conclusion is only correct if both parents are heterozygotes and share at most one allele in common. For other possible parental pairs the probability of two sibs matching could be 50% or 100%. Thus, in this portion of Ms. Romero's testimony she has chosen a special case which suggests that sibs have the lowest chance of matching that is biologically possible.

On page 344 Ms. Romero utilizes the assumption that two siblings have a 25% chance of matching at a single locus to estimate that the chances of two siblings matching at five of the loci used in this case would be 1 in 6500. Even if we assume that 25% is the proper number to use in this calculation the chance of two brothers matching is $(0.25)^5$ = 1 in 1024 not 1 in 6500. As before the error made here by Ms. Romero tends to suggest that the chance of two brothers matching is actually much less than it really is.

I have been told that defendant Brown may in fact have 2 brothers that were living in the near vicinity of the crime and two additional brothers that lived a greater distance away. With these additional facts we can address the more relevant question about siblings which is: what is the chance that any one of the two (four) brothers would match the evidence profile? Even if we use the least likely chance of two brothers matching at one locus, 25%, the chance that one or more brothers would match the evidence is 1 in 512. With four brothers this total goes up to 1 in 256.

The calculations in the preceding two paragraphs used the smallest probability that two sibs will have matching profiles. As mentioned before this probability could be as high as 100%. The second National

Research council report on DNA typing gave a formula for computing the chance of matching profiles when the profiles of the parents are unknown. Using this formula and the FBI Caucasian database the chance of a single sib matching defendant Brown's profile is 1 in 263. The chance that among two brothers one or more would match is 1 in 132 and the chance that among four brothers one or more would match is 1 in 66.

In the course of questioning Ms. Romero about the statistical meaning of the DNA match Prosecutor Smith says (pg. 338) "..the likelihood that it is not Troy Brown would be 0.000033?" The accepted meaning of these statistics is that they represent the chance that a single person chosen at random from the suspect population would match the evidence. The phrase above suggests that the probability is that chance of anyone other than the defendant matching the evidence sample. This is not correct since in the population at large there are very many people not just one and the chance of finding a match to any one of these people is much greater (more likely) than the chance of finding a match to just a single person. This erroneous phraseology is in fact so common it has been given a special name, the prosecutor's fallacy.

The report of FSA has a profile for the vaginal swab, sperm fraction that clearly has DNA from more than one person. Since one of the contributors to this mixture is likely to be the victim, FSA has used information about the victims profile and the intensity of the color dots on the test kits to infer the profile or genotype of the second contributor. The ability of analysts to accurately decompose mixtures like this is uncertain. At the very least there is no estimate of how likely it is that this inferred profile is wrong.

Sincerely,

Laurence D. Mueller

Laurence D. Mueller

FILED

'02 JUN 11 A9:28

CASE NO. CV-HC-01-607

DEPT. NO. I

IN THE FOURTH JUDICIAL DISTRICT COURT

OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

TROY DON BROWN,

APPELLANT,

V.

MOTION TO DISMISS AND WRIT OF HABEAS CORPUS HEARING

WARDEN OF LOVELOCK CORRECTIONAL CENTER, and the STATE OF NEVADA,

RESPONDENT.

_____/

ROUGH DRAFT TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that the above-entitled matter came on for hearing on February 21, 2002, at the hour of 9:30 a.m. of said day, before the HONORABLE J. MICHAEL MEMEO, District Judge.

The Petitioner, was present in court and represented by David M. Schieck.

The Respondent, was represented in court by Gary D. Woodbury, Elko County District Attorney.

EXHIBIT 25

That report from Jennifer Mikolevich shows that all she did was correct from the web. And that's based on the work already done by Kenda Pomeroy in the absence of her being there to see how it's being done, testing her results and just plugging it in. And coming up with not. It's a search because Kenda's work matches what I'm finding. Without any verification that in fact the work was properly done.

Quite candidly to the Court, one of the allegations that we put forward had to do with the relationship between Mikolevich and Kenda. There was no evidence presented to show they were college roommates. In fact, the college roommate angle was not accurate information that was obtained and as we are not proceeding with the college roommate part of it. But we do have -- you know, west of a handholding mere of between Mikolevich and Pomeroy.

Mikolevich conducts no reports. Mr. Lockie doesn't even know what she got to review and when she got to review it. Did she review the M.F.L.P. prior to going to trial? Did she even know what tests were done? They say they learned about it about three days before trial. Mr. Lockie is not sure but certainly it was in close proximity to trial at his recollection. He offers was made to be sure that in fact the Independent Defense Lawyer had the opportunity to review these results and consult with Mr. Lockie about how to best attack it. Choose to back his attack around on the DNA saying, "We

changed her mind between the preliminary hearing and the trial on what was present on the panties.

We didn't have the evidence concerning Mr. Banks. The State acknowledged that we had filed certified court records showing he was charged with burglary and a force able sexual assault in Utah and ultimately was convicted of that. That information was present in those reports as was Dee Banks reporting that he had done this before in Carlin. That the victim in that incident was Debbie Dean. We testimony that Mr. Lockie did anything to look at Mr. Banks as an alternative suspect.

He says, I looked at the crime scene but I don't recognize those as the crime cards. As we had -- you know, Mr. Baker and Trent Brown came in here and verify those are the same records that were kept. And there are representations in here that show that Mr. Banks was not at work when he says he was at work. It claims he was at work. That he drove his own truck. There was ample opportunity for him to be absent from work during the relevant period of time when the sexual assault occurred.

You don't have to be able to prove someone else did it in order to get your client acquitted. When you are arguing the presumption of innocence for your client you're creating a doubt in that jury's mind. And what Mr. Lockie did is he rejected the evidence that could have been used to create

that reasonable doubt and acted in a different result from this jury.

There was an investigation but there's no evidence that he talked to anybody other than Tracy and Travis for about 30 minutes, and did absolutely nothing to verify anything in the case. So, we have an absence of investigation on numerous fronts in this case. On evidence that people are calling and saying, you've got to talk to these people. We've got these receipts. We've gone and done an investigation at the Courthouse. We've gone and done the investigation of Lockie. We've talked to the people. We know what's going on. Some of it is covered but. Some of it is presented at trial.

And although Mr. Lockie says he thought the trial went good or whatever. There was really no evidence presented to create the presumption of innocence. And so, one weaknesses of the trial was the weaknesses of the create a basis to conviction based on the failures of Defense Counsel to present theories and issues for the jury to find reasonable doubt.

The same thing with the idea of the check accepting, the record would reflect that the witness, Mary Lou Tapparelli was present and observed the check accepting being collected and stored in the sexual assault kit. And even when they got around to checking it they are not to be found. Nobody knows where they are. The police is not sure whether it was

collected or not collected. We have checks and no notes that say that we collected it. But you don't just reject that as a possibility. We have to preserve not only for these proceedings but for appellate proceedings. For arguments to be made to an appellate court or to a jury as accumulation of things that went wrong in this case.

So, it's just not this little thing here. This little thing there but a culmination of things that were not done. Things that went along with the investigation. That were wrong with the collection of evidence. That were wrong with looking at alternative suspects. All geared to preserving issues for appellate review and creating in the jury's minds. In their minds the presence of reasonable doubt.

Your Honor. Based on the testimony that the Court has heard we would respectfully request that the Court grant Mr. Brown's Petition.

THE COURT: Mr. Mookherjee.

MR. MOOKHERJEE: Thank you, Your Honor. The evidence that we've heard about ineffectiveness and the fact of the jail card argument is made now seven years after trial. Darrell Lockie, the Counsel said I did not -- I was not informed that there was any possibility that he was in jail, dismiss and that the jury was seeing him or in a position to see him. That means that either Lockie failed if he is in his making the

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Court. He said, had I known that -- I was aware of the rules had I known that I would have done something about it. He didn't do anything about it. The record is clear. That substantiates with what Mr. Lockie says. Mr. Lockie has no sex to grind care, only that if he had been told he would have done something about it.

Mr. Conner testified. I was around, he was not upstairs in jail clothing. Mr. Brown testified that he was upstairs in the foyer, outside she said in jail clothing that means that Jim Conner is wrong. Neither was he on the second floor in jail clothing according to Jim Conner. That means, Mr. Brown is wrong. Nobody ever brings prisoners who are at trial to the side of the Courthouse. Everybody, according to the policy as explained by John Croswell comes to the back. So, all of a sudden in order to accommodate him now, the Court has to find that the policies and procedures that are in effect and have been since Cromer v. State in Elko County, are all of a sudden avoided to get Troy Don Brown in a pickle. So, that the jury can see him. So, now against that you have the mother and the father of Troy Don Brown and Troy Don Brown himself. The Court can weigh that evidence.

We did not think, and I apologize because it's my mistake. I should have moved based on the Seat Allegation Theory, we did mention in our response that we didn't think it was anything more than a Seat Allegation and adopt that not as

heard as a part of this. But I did not bring that to the Courts attention because they truly had no justification based on what they gave us before hand to sustain that.

There is conflicting evidence but there is not conflicting evidence that Mr. Brown said she told Dorothy Nash-Holmes that. That matter goes to his right to be presumed innocent. It goes to the protection of his Counsel. It's a constitutional issue and could of been and should of been, if he had it brought before the State Supreme Court on appeal. On the direct appeal, the first direct appeal. And that under the status is one of the reasons why you can take that issue and say, that's wrong. You had your opportunity to present that and you didn't.

The one evidence, first time ever we hear that Michael Tatty and he have chimistry between them. It's not written any place, no place else, whether recent fabrication, is it in his affidavit to support of the Petition, no. First time. First time we've ever heard it is today. You can search this record, it isn't there. It isn't anyplace. It's a recent fabrication. It's brand new. Because they need in order to sustain their theory they need to have Michael Tatty as a potential person who wants to do him harm. And if you look at the record in this case, Michael Tatty had an opportunity to say -- if he had wanted to really subvert this guy, he had the opportunity to say, yep I examined him at a

o clock in the morning and he had a dite mark on him. And you can look at the record and see that Michael Tatty did not testify to that effect. Even though if had really wanted to do him some harm he could have done that and then just taken the claim that it went away before anybody else saw it.

The somero challenge, I mean, if you look at Lockie's strategy it makes sense. There is no surprises about the DNA evidence. Granted the S.F.L.P. testing comes a little bit before hand but what he is faced with is the proposition that his own expert -- and we are entitled to rely on experts on DNA, trial lawyers are at the mercy of them. If they make a mistake then we make a mistake. But in this case there is no evidence that Minalovich made a mistake. He said, there is enough somen on those panties to test them. S.F.L.P. for do the DNA test for S.F.L.P. There is enough.

At the time, Somero is saying there isn't enough but Lockie knew that. That isn't a mistake on Lockie's part. He used that as a part of his trial strategy. That was how he was avoiding -- essentially how he intended to avoid the devastating effect of that DNA evidence. I mean, you can't hold that against him. That Somero made a mistake. Minalovich knew that she made a mistake. Knew there was enough for DNA for an S.F.L.P. test. So, how is he incompetent there?

Why didn't he move for a continuance when the S.F.L.P. test then came in three or four or five days before

trial or whatever it was. Did you feel like you needed more time Mr. Lockie, no. He was satisfied that his theory was going to hold together regardless of which way it went. Why didn't you put Mr. Minalovich on the stand, why didn't he? Because she was telling us the more testing that was done the more Troy Don Brown was getting convicted. That was all that DNA testing was doing was putting a moose around Troy Don Brown's neck. And he made a reasonable, rationale, decision not to put Jennifer Minalovich on there.

So what they are left with is what they said they didn't prove and that is that Jennifer Minalovich had some reason to not -- to sustain sense Somero's finding. Talking about a certification of a Court to do DNA testing. There is no requirement in Nevada for DNA -- or Washoe County Crime Lab be certified to that. You bring your expert up and she tells you what she's done, and what procedure she went through, and what the scientific theory is, and if it's proper the Court admits her as an expert.

Now, I don't know about the feet of it. Maybe they probably have their little group that does little certifications, maybe that's so. But it doesn't make it or prevent it from being admissible in the court of law in Nevada because that isn't the test as whether it's certified. In some cases they have to do but not in DNA testing.

And Lockie did examine her. He examined her

considerably down at the preliminary examination as far
qualifications to do DNA testing. And at some point as Lottie
says in his affidavit I made a determination Renee Romero is
a pretty good witness. She's a compelling witness. I think is
what he called her, and I don't want to put her before a jury
so she can explain, number one and two about how good she really
is at this. Particularly when he's got his own expert in the
background saying she's all right, she knows what she's
doing.

The contamination evidence, if you look at the
rape kit the vaginal swab was done up at the Elko General
Hospital -- pardon there. Tracy Ann Brown's person or clothes was
undressed. Either which the DNA testing was done, was undressed
at the Elko General Hospital. How in the world would she ever
get that child, that 9 year old child's vagina what got his
sperm on her vagina? His DNA on her vagina based upon perhaps
bedclothes and socks. In a certain amount that's not even
conceivable. If it were feasible, of course what we would have
is we'd have an accused up there saying, do you know this rather
coincidental can happen. And if she was abused where Tracy
Ann Brown has had -- assuming he had a condom wrapped around
somewhere. It should happen. But we don't have that. Do you
see based on because that scenario off of paymaster's or off of
anyone that may have been in Trent's house who got his DNA on
her vagina.

On top of that if can I like Renee Romero or
Jennifer Whatever said look there's a couple of different
kinds of DNA here on this child's vagina or on her panties.
That's not the testimony at all. There is one kind of DNA on
her panties, big. And looks us into the test with respect to
Mr. Mario.

I'm not sure -- I state down when Mr. Estrada said
that reasonable doubt you have that every possibility. That's
not a theory that Dave Lattie states. That is not a theory I
suggest to you that is shared by everybody because you can
get so short of covering every possibility that you loose
credibility. That you're picking at little tiny things the
jury finally says if this guy had anything he wouldn't be
going after this little, bitty stuff. There are, I suppose in
every jury trial, there are things reasonable doubt arguments
that counsel can overlook but that doesn't mean his
conviction. We only have to provide reasonable defense we
doesn't have to provide perfect defense. And in this case I
would suppose to you that we did provide reasonable defense.

First of all, Mario's time card shows he was there
not to work. I forget who it was, one of the Brown brothers
testified that it doesn't look like his signature at his
initials at the end. But I suppose you look at it. It can and
it can come cold. I suppose that as said it looks like four
and five are made by the same guy and I suppose that you just

look at the 4. And I think you will find that the persons who
drew the 4 in each of those draw that decidedly differently
although they have a superficial resemblance between you can
see the pen not leaving the paper.

Instead of all, what if he's only there for seven
hours. He went to work at 7:0 o'clock so he was supposed to be a
o'clock as Mr. Baker said -- Mr. Jones Mr. Brown said that he
did. It's 7:0 o'clock in the morning. This thing has taken
place. I, I will grant you 1:0 o'clock in the morning. It's no
secret then that before that a rape the call to the police is
made. So it's not like we're -- that somehow this time could
magically make that Ben's could have done it.

There is an interesting proposition can almost just
how much you can reasonable of Mario's character. I mean
Lizzie sure look I don't want to get in the position of
growing Mr. Mario guilty. Plus, golly I would assume because
as he says in his affidavit it I got tested so -- first of
all. If I do it early enough they are going to do DNA testing
on Mario and exclude him as a possible suspect. Second the
child didn't identify him. And third what happened. I
can't prove it. I've got DNA not just DNA a. Just one in the
vagina and the panties of that child. Not Mario's DNA. His
DNA. So where -- then I come to a story and there is no way I
can prove it.

So he did statutorily the deal of raping the husband

We won't going to get any DNA testing on Mario to exclude
him. He simply volunteered it. If you look in the records he
talked to Dan about the threat that Mario had made about going
to do some here. I don't know if it was here to the child or
something like that. He created a reasonable doubt. And
everybody confirmed everybody -- I think conceded that but
for the DNA there was reasonable doubt. How much reasonable
doubt does he have to keep piling up what the position of the
DNA?

And while I suppose from a defense counsel point of
view it's understandable that sometimes you just caught in a
spot where you can't escape. It's like having a fingerprint
and DNA. Everything else can be going your way but if you
still have to overcome the fact that his DNA is on that
child's vagina. His DNA is on that child's panties. What is
he going to do?

I mean the burden is insurmountable. To tell
jurors you sit on the proceedings that the DNA was tainted
under. His position is taken in calling his the prosecutor
appears to be okay. DNA is calling him I don't have to be
there. I can review the proceedings afterward. Unless you can
show that Romero is not qualified and Mr. Mario is calling
him and is qualified. Unless you can see that the testing
procedure by itself is the collected procedure I suppose can
contemplated. What's said Whitaker told him was alright

FILED

CASE NO. CV-HC-01-0000607

DEPT. NO. I

01 DEC 14 P3:46

ELKO CO DISTRICT COURT

CLERK DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF ELKO, STATE OF NEVADA

TROY DON BROWN,

Petitioner,

vs.

WARDEN OF LOVELOCK CORRECTIONAL CENTER, and the STATE OF NEVADA,

Respondent.

ANSWER IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION) AND MOTION TO DISMISS PETITION

COMES NOW, the Respondent, State of Nevada, by and through the Elko County District Attorney, who hereby respectfully submits its Answer in Opposition To Petition For Writ of Habeas Corpus (Post Conviction) and Motion to Dismiss Petition (hereinafter referred to as "Opposition"). This Opposition is made and based upon the following Memorandum of Points and Authorities in support hereof, as well as the documents, pleadings and exhibits already on file with this Honorable Court.

In compliance with NRS 34.780, the State informs the Court that the Defendant filed a direct appeal from his judgement of conviction, a second appeal from the re-sentencing ordered as a result of the first appeal, as well as an appeal from the denial of the court of Petitioner's motion for a new trial.

All transcripts of all proceedings are available in the file of the Elko County Clerk.

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EXHIBIT 22

Sallee's purported testimony, if consistent with her statement of March 3, 1998, attached to the petition, would be that the Defendant came into CeeGee's Bar on the night in question, with two friends. She was told they had just come from the Peacock Lounge. They stayed at CeeGee's for about an hour or until about 12:45 a.m. Then Defendant and his friends left. Such testimony, had it been received by the jury, is inconsistent with the Defendant's own trial testimony, which was that after he left the Peacock Lounge, he went into CeeGee's, "looked around, ordered a beer, took a couple drinks out it, and took it with me and headed home", Trial Transcript, Defendant's testimony at page 448, line 3 through line 9. It is also inconsistent with Defendant's statement dated February 3, 1998, and attached to his supplemental Pre-Sentence Report. He also told Detective Ladd that his connection with the Peacock, after he left CeeGee's was to walk in, vomit in the toilet and then leave (D-120). All three versions contradict the proposed testimony of Sallee.

The statement of Rarrick attached to the petition adds nothing. In his statement, he admits having no knowledge regarding the presence or absence of Petitioner at any particular bar at any particular time on the night of the attack.

The testimony of neither of these persons adds any validity to the Petitioner's claim that he could not have committed the offense because he had an alibi.

Trial counsel sought out and found an alibi witness, Beverly Scarlett Patrick (Patrick), who testified that Brown was in the Peacock Lounge until 1:30 to 2:00 a.m. (page 435 commencing at line 15).

As outlined in the argument on issue number 4 and in trial counsel's affidavit, additional alibi evidence would simply have been cumulative. There was insufficient evidence to convict the Defendant unless the DNA evidence established his guilt, but the insufficiency of the evidence established at trial, combined with the alleged evidence not discovered by trial counsel is simply not enough to make the DNA evidence suspect.

4 COUNSEL FAILED TO DISCUSS DEFENSE STRATEGIES WITH PETITIONER, AND NEVER INFORMED PETITIONER THAT HE INTENDED TO ARGUE THAT PETITIONER'S BROTHER TRENT COULD HAVE COMMITTED THE CRIME

JOINT APPENDIX

127

(4)

No. 08-559

FILED
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SUPREME COURT, U.S.

In The
Supreme Court of the United States

E. K. MCDANIEL, WARDEN and THE ATTORNEY GENERAL OF THE STATE OF NEVADA,
Petitioners,

v.

TROY BROWN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX, Volume 1

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May 2009

Petition for a Writ of Certiorati filed October 24, 2008
Petition for Writ of Certiorari granted January 26, 2009

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TABLE OF CONTENTS

VOLUME 1

Relevant Docket Entries United States District Court for the District of Nevada (Reno) . . . . JA 1

Relevant Docket Entries United States Court of Appeals from the Ninth Circuit . . . . . JA 19

Fourth Judicial District Court, Criminal Information, filed July 20, 1994 . . . . . JA 28

Fourth Judicial District Court, Jury Trial Transcript Day 2, September 28, 1994 . . . . JA 34

VOLUME 2

Fourth Judicial District Court, Jury Trial Transcript Day 3, September 29, 1994 . . . JA 330

Fourth Judicial District Court, Jury Trial Transcript Day 4, September 30, 1994 . . . JA 588

VOLUME 3

Fourth Judicial District Court, Trial Exhibit H, Renee Romero Report, February 11, 1994 . JA 746

Fourth Judicial District Court, Trial Exhibit I, Renee Romero Report, June 6, 1994 . . . . . JA 749

Fourth Judicial District Court, Trial Exhibit G, Renee Romero Report, September 15, 1994 . . . . . JA 752

Fourth Judicial District Court, Exhibit 31, RFLP picture 100.000000 - 99.999976% . . JA 754

Fourth Judicial District Court, Exhibit 28A (same as J10), Renee Romero Curriculum Vitae . . . . . JA 755

Fourth Judicial District Court, Exhibit K, Wayne County Medical Clinic, Inc., physicial examination report . . . . . JA 761

Fourth Judicial District Court, Instructions 1-18, filed September 30, 1994 . . . . . JA 762

Fourth Judicial District Court, Instructions 1-3, filed September 30, 1994 . . . . . JA 781

Fourth Judicial District Court, Verdict 1A, filed September 30, 1994 . . . . . JA 783

Fourth Judicial District Court, Verdict 2A, filed September 30, 1994 . . . . . JA 784

Fourth Judicial District Court, Verdict 3B, filed September 30, 1994 . . . . . JA 785

Fourth Judicial District Court, Verdict 4A, filed September 30, 1994 . . . . . JA 786

Fourth Judicial District Court, Verdict 1B, filed September 30, 1994 . . . . . JA 787

Fourth Judicial District Court, Transcript of Proceedings, Sentencing Hearing, June 23, 1995 . . . . . JA 789

Supreme Court of Nevada, Appellant's Opening Brief, November 9, 1995 . . . . . JA 812

Supreme Court of Nevada, Respondent's Answering Brief, December 18, 1995 . . . . JA 852

Supreme Court of Nevada, Appellant's Reply Brief with Exhibit A (9 fold-out pages), January 29, 1996 . . . . . JA 878

Fourth Judicial District Court, Sentencing Rough Draft Transcript of Trial Proceedings, March 13, 1998 . . . . . JA 923

Fourth Judicial District Court, Petition for Writ of Habeas Corpus (Post-Conviction), August 30, 2001 . . . . . JA 1036

Fourth Judicial District Court, Points and Authorities In Suppport of Petition for Writ of Habeas Corpus (Post-Conviction) (2 fold-out pages), August 30, 2001 . . . . . JA 1081

Fourth Judicial District Court, Answer in Opposition to Petition for Writ of Habeas Corpus (Post Conviction) and Motion to Dismiss Petition, December 14, 2001 . . . . . JA 1160

VOLUME 4

Fourth Judicial District Court, Rough Draft Transcript of Prodeedings Motion to Dismiss and Writ of Habeas Corpus Hearing, Febraury 21, 2002 . . . . . JA 1202

Fourth Judicial District Court, Findings of Fact, Conclusions of Law, And Order Denying Writ of Habeas Corpus, March 7, 2002 . . . . . JA 1489

Supreme Court of Nevada, Order of Affirmance, November 21, 2003 . . . . . JA 1500

United States District Court, Response in Opposition to Motion to Dismiss, April 15, 2005 . . . . . JA 1507

United States District Court, Petitioner's Reply, March 1, 2006 . . . . . JA 1530

United States District Court, Exhibits 196, 197 and 198 to Motion to Expand Record, March 1, 2006 . . . . . JA 1552

United States District Court, Reply to Opposition to Motion to Expand the Record and Motion to Strike, May 30, 2006 . . . . . JA 1587

United States District Court, Order, July 31, 2006 . . . . . JA 1595

United States District Court, Motion For Reconsideration of Leave to File Supplemental Answer, August 21, 2006 . . . . . JA 1599

United States District Court, Response in Opposition to Motion for Reconsideration of Leave to File Supplemental Answer, September 22, 2006 . . . . . JA 1606

United States District Court, Order, October 18, 2006 . . . . . JA 1614

The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

Appendix A: Ninth Circuit Order Amending Opinion and Amended Opinion, dated July 21, 2008 ..... 1a

Appendix B: United States District Court, Judgment in a Civil Case, dated December 15, 2006 ..... 29a

Appendix C: United States District Court, Order on Merits, dated December 14, 2006 . 31a

Appendix D: United States District Court, Order, dated July 22, 2005 ..... 55a

Appendix E: Fourth Judicial District Court, Amended Judgment of Conviction, dated March 18, 1998 ..... 63a

Appendix F: Nevada Supreme Court Opinion, dated February 26, 1997 ..... 68a

Appendix G: Ninth Circuit Order denying rehearing, dated July 30, 2008 ..... 97a

Appendix H: Statutes 99a

Appendix I: Nevada Supreme Court, Appellant's Opening Brief, dated November 20, 1995 .. 111a

Appendix J: Nevada Supreme Court, Appellant's Reply Brief, dated March 4, 1996 ..... 122a

Appendix K: United States District Court, First Amended Petition for Writ of Habeas Corpus By A Person In State Custody Pursuant to 28 U.S.C. § 2254, dated November 12, 2004 .. 130a

Appendix L: United States District Court, Motion to Dismiss, dated March 28, 2005 . 175a

Appendix M: United States District Court, Answer, dated October 19, 2005 ..... 186a

Appendix N: United States District Court, Motion to Expand Record, dated March 1, 2006 ..... 219a

Appendix O: United States District Court, Opposition to Motion to Expand Record and Motion to Strike, dated March 30, 2006 ... 222a

RELEVANT DOCKET ENTRIES

United States District Court for the
District of Nevada (Reno)

3:03-cv-00712-PMP-VPC

Troy Don Brown v. Craig Farwell, et al.

12/18/2003	1	MOTION/APPLICATION FOR LEAVE TO PROCEED IN FORMA PAUPERIS obo P. (Entered: 01/05/2004)
12/18/2003		MISCELLANEOUS DOCUMENT Petn for W/H/C obo P. (located on left side of file) (Entered: 01/05/2004)
12/18/2003		MISCELLANEOUS DOCUMENT Mtn for appoint/cnsl obo P. (located on left side of file) (Entered: 01/05/2004)
01/05/2004	2	LETTER obo USDC to P advising judicial assignment and case number. (Entered: 01/05/2004)
01/28/2004	3	RECEIPT OF PAYMENT in amount of $5.00 (receipt #15805) obo P; (Entered: 01/29/2004)
02/06/2004	4	ORDER tht the clrk shl file/docket the petn, the mtn for appoint/cnsl and the affdvt recd 12/18/03; further ord tht the mtn for appoint/cnsl is denied; further ord tht the clrk shl

		srv the petn upon Rs by cert/mail; further ord tht P shl hv 30 dys frm dt (Entered: 02/09/2004)
02/06/2004	5	MOTION TO APPOINT COUNSEL obo P. (#4-ord filed/denied.) (Entered: 02/09/2004)
02/06/2004	6	PETITION FOR WRIT OF HABEAS CORPUS obo P. (fld in compliance w/ord #4) (Entered: 02/09/2004)
02/06/2004	7	AFFIDAVIT obo P. (fld in compliance w/ord #4) (Entered: 02/10/2004)
02/25/2004	8	NOTICE (OTHER) of representation as to David K. Neidert assuming responsibility for representing the interests of the named Respondents in this actn; (Entered: 02/26/2004)
03/03/2004	9	MOTION FOR MISCELLANEOUS RELIEF (2nd) for apptmnt of cnsl w/req for add'l time to file statement of add'l claims obo P; (Entered: 03/04/2004)
03/09/2004	10	ORDER ORD Ps req for ext of tm and cnsl (#9) granted. Cnsl sh be apptd to represent P. FUR ORD clk sh send the FPD a cpy of this ord w/cpy of the petition W/H/C (#6). FPD sh hv 30-dys frm dt of entry of

		this ord to undertake direct representation of P or (Entered: 03/10/2004)
04/08/2004	11	NOTICE (OTHER) of appearance as to Assistant FPD Paul G. Turner srvng as cnsl for P in this actn; (Entered: 04/09/2004)
04/13/2004	12	ORDER ORD cnsl for P will contact P as soon as reasonably possible re applicable procedure. FUR ORD cnsl for Rs sh make avail to cnsl for P a cpy of whatever portions of the state crt record they possess re the jdmnt P is challenging herein. FUR ORD 1st a (Entered: 04/14/2004)
06/14/2004	13	MOTION FOR EXTENSION OF TIME (1st request) to file an amend/petn obo P til 8/13/04. (m) (Entered: 06/15/2004)
06/22/2004	14	ORDER ORD Ps mtn for enlrgmnt of tm to file his amended petition W/H/C (#13) granted. The 1st amended petition W/H/C sh be due by 8/13/04; (Entered: 06/23/2004)
08/12/2004	15	MOTION FOR EXTENSION OF TIME til 10/12/04 to file 1st amended petition W/H/C obo P (m) (Entered: 08/13/2004)
08/17/2004	16	ORDER ORD Ps mtn for enlrgmnt of tm (#15) granted. The 1st amended petition W/H/C sh be due

		by 10/12/04. P shld make every effort to file the amended petition by this deadline. (Entered: 08/18/2004)
10/12/2004	17	MOTION FOR EXTENSION OF TIME for enlrgmnt of tm in wh to file am petn for writ of H/C til 11/11/04 obo P. (m) (Entered: 10/14/2004)
10/18/2004	18	ORDER tht the mtn for enlargmnt of time #17 is granted; the 1st/amend/petn shl be due by 11/12/04; (Entered: 10/19/2004)
11/12/2004	19	PETITION FOR WRIT OF HABEAS CORPUS obo P. (same Ds) (Entered: 11/15/2004)
11/18/2004	20	EXHIBIT in support of 1st amended petition W/H/C (#19) obo P (fld sep due to size) (volume I of V) (Entered: 11/18/2004)
11/18/2004	21	EXHIBIT in support of 1st amended petition W/H/C (#19) obo P (fld sep due to size) (volume II of V) (Entered: 11/18/2004)
11/18/2004	22	EXHIBIT in support of 1st amended petition W/H/C (#19) obo P (fld sep due to size) (volume III of V) (Entered: 11/18/2004)
11/18/2004	23	EXHIBIT in support of 1st amended petition W/H/C (#19) obo P (fld sep

		due to size) (volume IV of V) (Entered: 11/18/2004)
11/18/2004	24	EXHIBIT in support of 1st amended petition W/H/C (#19) obo P (fld scp due to size) (volume V of V) (Entered: 11/18/2004)
12/09/2004	25	NOTICE (OTHER) of client verification of 1st amended petition W/H/C obo P (m) (Entered: 12/10/2004)
12/17/2004	26	MOTION FOR EXTENSION OF TIME (1st request) til 2/10/05 to respnd to 1st/amend/petn obo Rs. (m) (Entered: 12/20/2004)
12/22/2004	27	ORDER tht the mtn for enlargmnt of time #26 is granted; the response to the 1st/amend petn is due by 2/10/05; (Entered: 12/27/2004)
02/10/2005	28	MOTION FOR EXTENSION OF TIME til 3/27/05 to file resp to Ps 1st amended petition W/H/C obo Rs; (m) (Entered: 02/11/2005)
02/14/2005	29	ORDER tht the mtn for enlargmnt of time #28 is granted; the response to the 1st/amend/petn shl be be on or before 3/27/05; (Entered: 02/15/2005)
03/28/2005	30	MOTION TO DISMISS pet whc obo Rs. (Entered: 03/29/2005)

04/15/2005	31	RESPONSE IN OPPOSITION TO MOTION to mtn to dismiss (#30) obo P (m) (Entered: 04/20/2005)
04/20/2005	32	MISCELLANEOUS DOCUMENT notc of supplmnt authority in spt of opp (#31) to mtn to dism (#30) obo P. (m) (Entered: 04/21/2005)
07/22/2005	33	ORDER th Rs mtn to dism (#30) is DENIED; th Rs sh file an ans to the grounds for relief w/in 45 days fm entry of th Ord. P sh hv 30 days following serv of Rs ans to file reply. (Entered: 07/25/2005)
08/11/2005	34	ORDER Actn reassigned to PMP for all fur procdngs; Cnsl advised that all fur documnts sh bear case number CV-N-03-712-PMP(VPC). Clk of Crt sh chg file & dkt to reflect this reassignmnt. (Entered: 08/15/2005)
08/29/2005	35	NOTICE OF CHANGE OF ADDRESS Paul G. Turner, FPD mov'd to 411 East Bonneville Ave, Ste 250, Las Vegas, NV 89101, cnsl for P obo P (m) (Entered: 09/02/2005)
09/01/2005	36	NOTICE (OTHER) Representation as to Erik A. Levin, Deputy AG cnsl for Rs (m) (Entered: 09/02/2005)

09/09/2005	37	MOTION FOR EXTENSION OF TIME for enlrgmnt of tm til 9/16/05 in wh to file & serv ans to P petn for WHC (#19)obo Rs (m) (Entered: 09/09/2005)
09/12/2005	38	ORDER Rs req for enlrgmnt of tm to file ans to Ps remaining grounds for relief (#37) til 9/16/05 is grntd. (Entered: 09/14/2005)
09/15/2005	39	NOTICE (OTHER) Representation as to Erik A. Levin Depty AG obo Rs (m) (Entered: 09/15/2005)
10/06/2005	40	MOTION FOR EXTENSION OF TIME req to file ans 20 days late w/attach'd affidavit & answer. obo Rs (m) (Entered: 10/12/2005)
10/19/2005	41	ORDER tht the mtn for lv to file a late pleading (#40) is grntd; the clk sh detach & file the proposed ans; P sh hv 45 days to file his reply to the ans. (Entered: 10/19/2005)
10/19/2005	42	ANSWER TO COMPLAINT obo R (m) (Entered: 10/19/2005)
12/01/2005	43	MOTION for Enlargement of Time in which to File Reply (First Request) by Petitioner Troy Don Brown. (JMA) (Entered: 12/13/2005)
12/14/2005	44	ORDER granting 43 Motion for Extension of Time to File Response/Reply to answer to

		petition for writ of habeas corpus. Replies due by 1/19/2006. Signed by Judge Valerie P. Cooke on 12/14/05. (DN,) (Entered: 12/14/2005)
01/19/2006	45	Second MOTION for Extension of Time to File Response/Reply *Unopposed Motion For An Enlargement Of Time In Which To File Reply* by Petitioner Troy Don Brown. (Turner, Paul) (Entered: 01/19/2006)
01/30/2006	46	ORDER granting 45 Motion for Extension of Time to File Reply to Answer to amended petition for writ of habeas corpus. Replies due by 3/1/2006. Signed by Judge Valerie P. Cooke on 1/30/06. (DN,) (Entered: 01/30/2006)
03/01/2006	47	REPLY *PETITIONER'S REPLY* filed by Petitioner Troy Don Brown. (Turner, Paul) (Entered: 03/01/2006)
03/01/2006	48	MOTION TO EXPAND RECORD re 47 Reply - Other *PETITIONER'S REPLY* by Petitioner Troy Don Brown. Responses due by 3/19/2006. (Attachments: # 1 Exhibit 196# 2 Exhibit 197# 3 Exhibit 198)(Turner, Paul) (Entered: 03/01/2006)
03/20/2006	49	MOTION for Extension of Time by Respondents Craig Farwell, Brian Sandoval. (Levin, Erik) (Entered: 03/20/2006)

03/21/2006	50	ORDER granting 49 Motion for Extension of Time to file response to petitioner's motion to expand the record 48. Responses due by 3/30/2006. Signed by Judge Valerie P. Cooke on 3/21/06. (DN) (Entered: 03/21/2006)
03/30/2006	51	RESPONSE to 48 MOTION TO EXPAND RECORD re 47 Reply - Other *PETITIONER'S REPLY*; filed by Respondents Craig Farwell, Brian Sandoval. *& Motion to Strike* Replies due by 4/13/2006. (Levin, Erik) (Entered: 03/30/2006)
04/12/2006	52	First MOTION for Extension of Time *UNOPPOSED MOTION FOR AN ENLARGEMENT OF TIME IN WHICH TO FILE A REPLY TO RESPONDENTS OPPOSITION TO MOTION TO EXPAND RECORD AND MOTION TO STRIKE* by Petitioner Troy Don Brown. (Turner, Paul) (Entered: 04/12/2006)
04/13/2006	53	ORDER granting 52 Motion for Extension of Time to file reply to opposition to motion to expand record. Replies due by 5/30/2006. Signed by Judge Valerie P. Cooke on 4/13/06. (DN) (Entered: 04/13/2006)
05/30/2006	54	REPLY *TO OPPOSITION TO MOTION TO EXPAND THE RECORD AND MOTION TO*

STRIKE filed by Petitioner Troy Don Brown. (Turner, Paul) (Entered: 05/30/2006)

07/31/2006 55 ORDER granting 48 Motion to expand the Record. The Clerk shall detach the proposed exhibits from the motion and they shall be filed and docketed into the record. Signed by Judge Philip M. Pro on 7/31/06. (WJ,) (Entered: 08/01/2006)

07/31/2006 56 EXHIBIT 196 to 19 Petition for Writ of Habeas Corpus filed by Petitioner Troy Don Brown. (WJ,) Modified on 8/1/2006 (WJ,). correct spelling (Entered: 08/01/2006)

07/31/2006 57 EXHIBIT 197 to 19 Petition for Writ of Habeas Corpus filed by Petitioner Troy Don Brown. (WJ,) (Entered: 08/01/2006)

07/31/2006 58 EXHIBIT 198 to 19 Petition for Writ of Habeas Corpus filed by Petitioner Troy Don Brown. (WJ,) Modified on 8/1/2006 (WJ,). Typo (Entered: 08/01/2006)

08/10/2006 59 First MOTION for Extension of Time to File Response/Reply as to 55 Order on Motion for Miscellaneous Relief *to file and served their motion for reconsideration of, or seek other relief from, the court's order filed under docket #55* by Respondents

		Craig Farwell, Brian Sandoval. (Levin, Erik) (Entered: 08/10/2006)
08/15/2006	60	ORDER denying as moot 59 Motion for Extension of Time to File motion for reconsideration pursuant to Fed.R.Civ.P. 60(b). The rule requires only that such a motion be filed "within a reasonable time." Signed by Judge Valerie P. Cooke on 8/15/06. (DN) (Entered: 08/15/2006)
08/21/2006	61	MOTION to Reconsider District Judge Order *Or Leave To File Supplemental Answer* by Respondents Craig Farwell, Brian Sandoval. Responses due by 9/8/2006. (Levin, Erik) (Entered: 08/21/2006)
09/07/2006	62	First MOTION to Extend Time regarding dispositive matter *UNOPPOSED MOTION FOR AN ENLARGEMENT OF TIME IN WHICH TO FILE AN OPPOSITION TO MOTION FOR RECONSIDERATION OR LEAVE TO FILE SUPPLEMENTAL ANSWER* by Petitioner Troy Don Brown. (Turner, Paul) (Entered: 09/07/2006)
09/18/2006	63	MINUTE ORDER IN CHAMBERS of the Honorable Valerie P. Cooke, U.S. Magistrate Judge on 9/18/2006. Re: doc # 62 Ordered tht the First

		Motion to Extend Time is GRANTED. The response shall be filed on or before September 22, 2006. (SA,) (Entered: 09/19/2006)
09/22/2006	64	RESPONSE to 61 MOTION to Reconsider District Judge Order *Or Leave To File Supplemental Answer*; filed by Petitioner Troy Don Brown. *RESPONSE IN OPPOSITION TO MOTION FOR RECONSIDERATION OR LEAVE TO FILE SUPPLEMENTAL ANSWER* Replies due by 10/6/2006. (Turner, Paul) (Entered: 09/22/2006)
10/18/2006	65	ORDER tht P's mtn for Reconsideration or leave to file Supplemental Answer doc # 61 is DENIED as to reconsideration and is GRANTED as to the supplemental answer. Signed by Judge Philip M. Pro on 10/18/06. (SA,) (Entered. 10/19/2006)
12/14/2006	66	ORDER ON MERITS GRANTING 19 First Amended Petition for Writ of Habeas Corpus filed by Troy Don Brown.FURTHER ORDERED tha the conviction is REVERSED as being in violation of the Constitution of the United States. Rs shall retry Brown within 180 days or shall release him from custody. Clerk shall enter judgment accordingly. Signed by Judge Philip

		M. Pro on 12/14/06. See Ord for spec. (DRM,) (Entered: 12/15/2006)
12/15/2006	67	JUDGMENT in favor of Petitioner against Respondents. Signed by Clerk Lance S Wilson on 12/15/06. See judg for spec. (DRM,) (Entered: 12/15/2006)
01/03/2007	68	NOTICE OF APPEAL by Respondents Craig Farwell, Brian Sandoval. Filing fee $ 455, receipt number 442445. (Levin, Erik) (Entered: 01/03/2007)
01/03/2007	69	MOTION to Stay *Writ of Habeas Corpus* by Respondents Craig Farwell, Brian Sandoval. (Attachments: # 1 Exhibit A)(Levin, Erik) (Entered: 01/03/2007)
01/22/2007	70	RESPONSE to 69 MOTION to Stay *Writ of Habeas Corpus*; filed by Petitioner Troy Don Brown. *RESPONSE IN OPPOSITION TO MOTION FOR STAY OF WRIT OF HABEAS CORPUS AND MOTION FOR RELEASE* (Attachments: # 1 Exhibit A# 2 Exhibit B)(Turner, Paul) (Entered: 01/22/2007)
02/08/2007	71	First MOTION to Extend Time regarding discovery/non dispositive matter re 70 Response to Motion to Stay, by Respondents Craig Farwell, Brian Sandoval. (Levin, Erik) (Entered: 02/08/2007)

02/12/2007	72	MINUTE ORDER IN CHAMBERS of the Honorable Valerie P. Cooke, U.S. Magistrate Judge on 2/12/2007. 71 Mtn to extend time to reply GRANTED. Reply shall be filed on or before 2/23/07. (JW) (Entered: 02/13/2007)
02/23/2007	73	REPLY to Response to 69 MOTION to Stay *Writ of Habeas Corpus*; filed by Respondents Craig Farwell, Brian Sandoval. (Attachments: # 1 Exhibit A)(Levin, Erik) (Entered: 02/23/2007)
02/23/2007	74	RESPONSE to filed by Respondents Craig Farwell, Brian Sandoval. 70 *Motion For Release* Replies due by 3/9/2007. (Attachments: # 1 Exhibit A# 2 Exhibit B)(Levin, Erik) Modified on 2/26/2007 (WJ,). added link. (Entered: 02/23/2007)
02/26/2007	75	MINUTE ORDER IN CHAMBERS of the Honorable Philip M. Pro, U.S. District Judge on 2/26/2007 by Deputy Clerk: Donna Andrews. RE: 69 MOTION to Stay Writ of Habeas Corpus filed by Respondents; 70 MOTION for Release filed by Petitioner: IT IS ORDERED a Telephonic Motion Hearing is set for 3/22/2007 at 02:30 PM before Judge Philip M. Pro. Counsel for Respondents shall initiate the conference call with Petitioner and

shall then contact the Court at 702-464-5598 on the date and time listed above. Counsel for Respondents should contact the Court's clerk, Donna Andrews, at 702-464-5426, if they have any questions. (*no image attached*) (DMA) (Entered: 02/26/2007)

03/09/2007 76 REPLY *TO 74 OPPOSITION TO 70 MOTION FOR RELEASE* filed by Petitioner Troy Don Brown. (Attachments: # 1 Exhibit A# 2 Exhibit B)(Turner, Paul) Modified on 3/12/2007 (WJ,). (Entered: 03/09/2007)

03/22/2007 77 MINUTES OF PROCEEDINGS - Motion Hearing held on 3/22/2007 before Judge Philip M. Pro. Crtrm Administrator: *Donna Andrews*; Petitioner(s) Counsel: *Paul Turner*, *John Lambrose*; Respondent(s) Counsel: *Robert Wieland*, *Erik Levin*; Court Reporter/FTR #: *Erin Smith*; Time of Hearing: 2:30 *p.m.* RE: 69 MOTION for Stay of Writ of Habeas Corpus filed by Brian Sandoval, Craig Farwell; 70 Motion for Release filed by Troy Don Brown. The Court hears the arguments of counsel. IT IS ORDERED Respondents' Motion for Stay of Writ of Habeas Corpus 69 is GRANTED. The Court finds Petitioner's Motion for Release 70

		stands submitted. The Court will issue a ruling promptly. **(no image attached)** (DMA) (Entered: 03/22/2007)
03/30/2007	78	ORDER re 70 Response to Motion to Stay and Motion for Release filed by Troy Don Brown,. It is ORDERED that P's motion for release pending final resolution of this case is DENIED. Signed by Judge Philip M. Pro on 03/30/2007. (LK) (Entered: 03/30/2007)
04/04/2007	79	TRANSMITTAL of Notice of Appeal and Docket Sheet to US Court of Appeals re 68 Notice of Appeal. (DRM,) (Entered: 04/04/2007)
04/04/2007	80	CERTIFICATE OF RECORD on Appeal Transmitted to USCA re 68 Notice of Appeal. (DRM,) (Entered: 04/04/2007)
04/12/2007	81	TRANSCRIPT of Proceedings: 77 Motion Hearing held on 3/22/07 before Judge Philip M. Pro. Court Recorder: Erin Smith. Transcript prepared by Exceptional Reporting Services. **(no image attached)** (EDS) (Entered: 04/12/2007)
04/16/2007	82	TRANSMITTAL RETURN of Notice of Appeal from USCA re 68 Notice of Appeal. **USCA Case Number 07-15592**. (JW) (Entered: 04/16/2007)

04/16/2007	83	ORDER for Time Schedule as to 68 Notice of Appeal (JW) (Entered: 04/16/2007)
07/10/2007	84	Record on Appeal sent to US Court of Appeals re 68 Notice of Appeal. (DRM,) (Entered: 07/11/2007)
07/18/2007	85	Appeal Record Received by USCA re 84 Appeal Record Sent to USCA. (DRM) (Entered: 07/18/2007)
07/23/2008	86	ORDER AMENDING OPINION AND AMENDED OPINION of USCA as to 68 Notice of Appeal. (KO) (Entered: 07/23/2008)
07/30/2008	87	ORDER of USCA dtd 7/30/08 as to 68 Notice of Appeal DENYING petition for reheaing and petition for rehearing en banc. (DRM) Modified on 12/16/2008 to add date of USCA order. (WJ). (Entered: 12/15/2008)
12/15/2008	88	ORDER of USCA dtd 8/28/08 as to 68 Notice of Appeal. Appellants' Motion to Stay Issuance of mandate and Motion for Stay Pending Application for Petition for Writ if Certiorari is GRANTED. (KO) Modified on 12/16/2008 to add date to USCA order (WJ). (Entered: 12/15/2008)
12/16/2008	89	ORDER of USCA dtd 9/17/2008 as to 68 Notice of Appeal DENYING as

moot, Respondents-Appellants' Motion to File Opposition to Motion for Release Pending Final Disposition of Appeal. (KL) (Entered: 12/16/2008)

United States Court of Appeals
from the Ninth Circuit

07-15592

Brown v. Farwell, et al

04/11/2007	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): No. setting schedule as follows: appellant's opening brief is due 5/21/07; appellees' brief is due 6/20/07; appellants' reply brief is due 7/5/07. [07-15592] (RT)
04/11/2007	3	Filed certificate of record on appeal RT filed in DC None Stated (CASEFILE) [07-15592] (RT)
04/12/2007	12	Filed petnr's motion to expedite appeal. [07-15592] served on 4/11/07 MOATT PER PROMO (bail mtn pending) [07-15592] (CW)
04/23/2007	8	Filed Troy Don Brown motion for release pending final disposition of appeal. (MOATT) [07-15592] served on 4/16/07 (SW)
04/23/2007	9	Filed Appellant Craig Farwell, Appellant Brian Sandoval response opposing appellee's motion for release. served on 4/23/07 (MOATT) [07-15592] (SW)

04/24/2007	10	Filed Appellee Troy Don Brown "FAXED" reply to Petitioners-appellee's opposition to motion for release. served on 4/24/07 (MOTION) [07-15592] (ORIGNAL RCVD 4/25/07) (SW)
04/26/2007	11	Filed order (Diarmuid F. O'SCANNLAIN, Jay S. BYBEE): The parties are reminded that Feeral Rule of Appellate Procedure 27(d) governs the format and page limitations of motions and motion reponses. Requests to exceed the page limitations of Federal Rule of Appellate Procedure 27(d) should be made in writing. The clerk shall file aplts oversized opposition to aples motion for release pending appeal. Aples motion for release pending appeal is denied. ***CITE*** The briefing schedule established previously shall remain in effect. (PHONED/FAX @ 2:15 pm) [07-15592] (SW)
04/30/2007	13	Filed PROMO order (Deputy Clerk: cb) Aples motion to expedite is granted in part. The opening brief remains due May 21, 2007. The answering brief is due June 18, 2007 and shall be served personally or by overnight courier. The optional reply brief is due 7 calendar days after service of the answering brief. The provisions on

		9th Circuit Rule 31-2.2(a) shall not be applicable to this case; any Rule 31--2.2(b) motion is disfavored. This appeal shall be placed on the August 2007 calendar. [07-15592] (SW)
05/23/2007	14	Filed original and 15 copies Appellant Craig Farwell, Appellant Brian Sandoval opening brief (Informal: no) 54 pages and five excerpts of record in 5volumes; served on 5/21/07 [07-15592] (SW)
06/06/2007	15	Calendar check performed [07-15592] (MW)
06/19/2007	17	Calendar materials being prepared. [07-15592] [07-15592] (XX)
06/19/2007	18	Filed original and 15 copies appellee Troy Don Brown's 55 pages brief, 1 Exc. vols: ; served on 6/18/07 [07-15592] (SW)
06/21/2007	19	Rec'd errata to aples brief from Appellee Troy Don Brown, served 6/20/07 (RECORDS) [07-15592] (SW)
06/27/2007	22	Filed original and 15 copies Craig Farwell, Brian Sandoval reply brief with 1 vol of supplemental excerpts of record. (Informal: no) 18 pages; served on 6/25/07 (PANEL) [07-15592] (SW)

06/28/2007	21	CALENDARED: SF Fri Aug 17, 2007 9:00 a.m. Courtroom 1 ** moved to THUR AUG 16 2007 900 AM *** [07-15592] (XX)
07/12/2007	24	FILED CERTIFIED RECORD ON APPEAL IN 1 CLERKS RECORD, 1 REPORTER'S TRANSCRIPT, AND 5 EXPANDOS OF BULKY DOCUMENTS. [07-15592] (JR)
07/12/2007	25	Rec'd errata to excerpts of record from Appellant Craig Farwell, Appellant Brian Sandoval, served 7/10/07 (RECORDS) [07-15592] (SW)
07/15/2007	26	Rec'd second errata to excerpts of record from Appellant Craig Farwell, Appellant Brian Sandoval,(RECORDS) [07-15592] (SW)
08/08/2007	27	Filed Troy Don Brown additional citations, served on 8/7/07 (FAXED TO PANEL) [07-15592] (MF)
08/15/2007	28	Rcvd notice of appearance of Robert E. Wieland as csl for the aplt [07-15592] (WP)
08/16/2007	29	ARGUED AND SUBMITTED TO Diarmuid F. O'SCANNLAIN, Michael D. HAWKINS, Kim M. WARDLAW [07-15592] (WP)

08/16/2007	30	Received Craig Farwell additional citations, served on 8/16/07 (PANEL served in court) [07-15592] (WP)
05/05/2008	32	FILED OPINION (DIARMUID F. O'SCANNLAIN, MICHAEL DALY HAWKINS and KIM MCLANE WARDLAW) AFFIRMED. [Affirmed;Terminated on the merits after oral hearing;Written, reasoned, signed, published; Judge: DFO Dissenting, Judge: MDH On Panel But Did Not Write, Judge: KMW Authoring]. FILED AND ENTERED JUDGMENT. (RP)
05/16/2008	33	Filed original and 50 copies of Appellants Craig Farwell and Brian Sandoval's petition for panel rehearing and suggestion for rehearing en banc. Number of Pages: 21. Served on 05/15/2008. Date circulated to the court: 05/19/2008 (PANEL-ACTIVE JUDGES-ANY INTERESTED SENIOR JUDGES) (LC)
05/23/2008	34	Filed order (DIARMUID F. O'SCANNLAIN, MICHAEL DALY HAWKINS and KIM MCLANE WARDLAW) Appellee Troy Brown is hereby directed to file a response to Appellants' Petition for Rehearing and Suggestion for Rehearing En Banc. The response shall not exceed 15 pages. An

		original and 50 copies shall be filed within 21 days. (KKW)
06/13/2008	35	Filed original and 50 copies of Appellee Troy Don Brown's response to appellant's petition for enbanc rehearing, 14 pages; served on 06/12/2008. (PANEL-ACTIVE JUDGES-ANY INTERESTED SENIOR JUDGES) PLEASE NOTE: THE ATTACHED DOCUMENT IS A DOCUMENT INTERNAL TO THE COURT AND IS NOT ACCESSIBLE ON PACER OR ECF (LC)
07/21/2008	36	Filed order and amended opinion (DIARMUID F. O'SCANNLAIN, MICHAEL DALY HAWKINS and KIM MCLANE WARDLAW).The Opinion filed May 5, 2008 and published at 525 F.3d 787 (9th Cir. 2008) is hereby AMENDED as follows: (See order for full text). The petition for rehearing and suggestion for rehearing en banc are still pending. (RP)
07/21/2008	37	Deleted Incorrect Docket Entry (RP)
07/30/2008	38	Filed order (DIARMUID F. O'SCANNLAIN, MICHAEL DALY HAWKINS and KIM MCLANE WARDLAW) Denying Petition for enbanc rehearing filed by

		Appellants Brian Sandoval and Craig Farwell (KKW)
08/05/2008	39	Filed Appellants Craig Farwell and Brian Sandoval's motion to stay the mandate pending application for writ of certiorari. Served on 08/04/2008. (faxed PANEL) (LC)
08/13/2008	40	Filed Appellee Troy Don Brown response in opposition to appellant motion for stay of mandate and renewed motion for release pending final disposition of appeal. Served on 08/12/2008. (Fed-Ex to PANEL) (TB)
08/13/2008	41	Received Appellee Troy Don Brown additional citations, 28 (j) letter; served on 08/13/2008. (faxed PANEL) (LC)
08/26/2008	42	Filed withdrew Attorney Erik A. Levin for Appellants Brian Sandoval and Craig Farwell. Served on 08/22/2008. (JFF)
08/26/2008	44	Received Appellants Craig Farwell and Brian Sandoval's opposition to motion for release pending final disposition of appeal; served on 08/25/2008. (fed-ex PANEL) (LC)
08/27/2008	43	ENTRY UPDATED. Filed Appellant's motion to file opposition to motion for release pending final disposition of appeal in excess of 30

		pages; served on 08/25/2008. (fed-ex PANEL)--[Edited 08/27/2008 by LC]. (LC)
08/28/2008	45	Filed order (DIARMUID F. O'SCANNLAIN, MICHAEL DALY HAWKINS and KIM MCLANE WARDLAW) Respondents-Appellants' Motion to Stay Issuance of Mandate and Motion for Stay Pending Application for Petition for Writ of Certiorari is GRANTED. (KKW)
09/05/2008	46	Filed (ECF) Appellee Troy Don Brown reply to response (Appellant Motion to stay the mandate). Date of service: 09/05/2008. [6637359] (PGT)
09/17/2008	47	Filed order (DIARMUID F. O'SCANNLAIN, MICHAEL DALY HAWKINS and KIM MCLANE WARDLAW) Respondents-Appellants' Motion To File Opposition To Motion For Release Pending Final Disposition of Appeal is DENIED as moot. (KKW)
10/31/2008	48	Received notice from the Supreme Court: petition for certiorari filed on 10/24/2008. Supreme Court Number 08-559. (LC)
12/17/2008	49	Transmitted to the U.S. Supreme Court: 1 volume(s) of 9th Circuit U.S. Court of Appeals record

		proceedings; The district court record will be forwarded by 9th Circuit Chambers. U.S. Supreme Court Case Number: 08-559. Tracking Information: FedEx 943607127464. (SS)
12/24/2008	50	Received letter from the Supreme Court dated 12/16/2008 re: requesting Court to transmit entire record to Supreme Court immediately via commercial carrier. (RECORDS) (LC)
01/30/2009	51	Received notice from the Supreme Court. Petition for certiorari GRANTED on 01/26/2009. Motion to proceed IFP granted. Supreme Court Number 08-559 . (LC)

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

NO. 5833
DEPT. I

[Filed July 20, 1994]

THE STATE OF NEVADA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
TROY DON BROWN,	)
	)
Defendant.	)
	)

CRIMINAL INFORMATION

MARSHALL S. SMITH, Elko County District Attorney for the County of Elko, State of Nevada, in the name and by the authority of the State of Nevada, informs the above-entitled Court that TROY DON BROWN, Defendant above-named, on or about the 28th and 29th days of January, 1994, at or near the location of 1637 Puett Drive, in the City of Carlin, County of Elko, State of Nevada, committed certain crimes which are described as follows:

COUNT I

SEXUAL ASSAULT ON A CHILD UNDER THE AGE OF 14 YEARS, RESULTING IN SUBSTANTIAL BODILY HARM, A FELONY AS DEFINED BY NRS 200.366.

That the Defendant, TROY DON BROWN, did willfully and unlawfully subject another person, to-wit: MEGAN ALLRED, who is a child under the age of 14 years, to sexual penetration, to-wit: by placing his penis into the vagina of the said MEGAN ALLRED, against the child's will or under conditions in which the perpetrator knew or should have known that the child was mentally or physically incapable of resisting or understanding the nature of his conduct. Further, that such act resulted in substantial bodily harm to the said Megan Allred.

COUNT II

SEXUAL ASSAULT ON A CHILD UNDER THE AGE OF 14 YEARS, A FELONY AS DEFINED BY NRS 200.366.

That the Defendant, TROY DON BROWN, did willfully and unlawfully subject another person, to-wit: MEGAN ALLRED, who is a child under the age of 14 years, to sexual penetration, to-wit: by placing his penis into the rectum of the said MEGAN ALLRED, against the child's will or under conditions in which the perpetrator knew or should have known that the child was mentally or physically incapable

of resisting or understanding the nature of his conduct.

COUNT III

ATTEMPTED MURDER, A FELONY AS DEFINED BY NRS 193.330, 200.010 AND 200.020.

That the above-named Defendant, TROY DON BROWN did willfully, unlawfully and feloniously with malice aforethought, with the specific intent to kill, attempt to kill and murder another human being, one MEGAN ALLRED, in the following manner: by strangling or choking her.

COUNT IV:

ABUSE OR NEGLECT OF A CHILD LESS THAN EIGHTEEN (18) YEARS OF AGE, RESULTING IN SUBSTANTIAL MENTAL HARM. A FELONY AS DEFINED BY NRS 200.508, NRS 432B.020, AND NRS 432B.070.

That the Defendant, TROY DON BROWN, did willfully and unlawfully cause a child, less than eighteen (18) years of age, one MEGAN ALLRED, to suffer unjustifiable mental suffering and harm as a result of abuse. That the defendant committed said offense in the following manner, to-wit: by forcibly penetrating the vagina and/or anus of the said child.

All of which is contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Nevada.

Dated: July 15, 1994

/s/
DISTRICT ATTORNEY

Witnesses known to the District Attorney at the time of filing the above Information, if known, are as follows:

MS. MEGAN ALLRED, P.O. BOX 343, HUNTINGTON, UT 84528.

MR. CHRIS MURPHY, CARLIN, NV 89822.

MRS. MARION BROWN, C/O CARLIN POLICE DEPARTMENT, CARLIN, NV 89822.

MR. ALLEN CHRISTENSEN, C/O CARLIN POLICE DEPARTMENT, CARLIN, NV 89822.

DETECTIVE ROY LADD, ELKO POLICE DEPARTMENT, 1401 COLLEGE AVENUE, ELKO, NV 89801.

MS. LORI ROBINSON, ELKO GENERAL HOSPITAL, COLLEGE AVENUE, ELKO, NV 89801.

MS. LEAH DOKE, #15 YORKSHIRE VILLA, CARLIN, NV 89822.

MR. JAY DOKE, #15 YORKSHIRE VILLA, CARLIN, NV 89822.

MR. DAVID PRESCOTT, CIMARRON WEST #69, ELKO, NV 89801.

MARILOU TOGNARELLI, C/O CARLIN POLICE DEPARTMENT, CARLIN, NV 89822.

MR. TRAVIS BROWN, 1411 HUNTLEY, CARLIN, NV 89822.

OFFICER CONNIE WALKER, ELKO POLICE DEPARTMENT, 1401 COLLEGE AVENUE, ELKO, NV 89801.

MS. JENNIFER BONAUDI, C/O ELKO GENERAL HOSPITAL, COLLEGE AVENUE, ELKO, NV 89801.

MARIA FASSETT, WASHOE CRIME LAB, RENO, NV 89502.

MR. JASON NEW, C/O CARLIN POLICE DEPARTMENT, CARLIN, NV 89822.

MR. TRENT BROWN, C/O CARLIN POLICE DEPARTMENT, CARLIN, NV 89822.

MR. STEVE PENNINO, 331 N. DOVE CREEK, ELKO, NV 89801.

MR. WAYNE HENLE, C/O CARLIN POLICE DEPARTMENT, CARLIN, NV 89822.

OFFICER STAN VAUGHN, CARLIN POLICE DEPARTMENT, CARLIN, NV 89822.

MRS. RACHEL BROWN, C/O CARLIN POLICE DEPARTMENT, CARLIN, NV 89822.

DR. BRUCE CAMPBELL, C/O ELKO GENERAL HOSPITAL, COLLEGE AVENUE, ELKO, NV 89801.

MS. PAM HENLE, P.O. BOX 343, HUNTINGTON, UT 84528.

PATRICIA HOPPS, UNIVERSITY OF UTAH, 501 CHIPETA WAY, SALT LAKE CITY, UT 84108.

DR. MARION SHERMAN, UNIVERSITY OF UTAH, 501 CHIPETA WAY, SALT LAKE CITY, UT 84108.

DR. GEORGE WINCH, C/O ELKO GENERAL HOSPITAL, COLLEGE AVENUE, ELKO, NV 89801.

RENEE ROMERO, WASHOE CRIME LAB, RENO, NV 89502.

OFFICER MIKE TERRY, CARLIN POLICE DEPARTMENT, CARLIN, NV 89822.

OFFICER RUDY GONZALEZ, CARLIN POLICE DEPARTMENT, CARLIN, NV 89822.

DETECTIVE BILL SCHULTZ, ELKO SHERIFF'S DEPARTMENT, 775 W. SILVER STREET, ELKO, NV 89801.

MIKE SKINNER, C/O CARLIN POLICE DEPARTMENT, CARLIN, NV 89822.

MS. LYLE KLUSE, C/O CARLIN POLICE DEPARTMENT, CARLIN, NV 89822.

DA No. F-94-25729-1

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF ELKO

[caption omitted in printing]

WEDNESDAY, SEPTEMBER 28, 1994
JURY TRIAL - DAY 2

* * *

[p.11] WEDNESDAY, SEPTEMBER 28, 1994, 9:02 A.M.

THE COURT: Please be seated. The record will reflect the presence of counsel and the defendant. Counsel, will you stipulate to the presence of the jury?

MR. LOCKIE: We stipulate, your Honor.

MR. SMITH: For the State, Judge.

THE COURT: Thank you. There's a couple of housekeeping matters we'll take care of before we start. First, we're required by the legislature at this point to read to you the entire Criminal Information from top to bottom. Stefanie will do this and please keep in mind, once again, that the mere fact that these allegations have been authored by the District Attorney's office is absolutely no proof of the charges whatsoever. They're simply allegations at this point.

Ms. Clerk, if you would please approach one of the mikes. I'll turn this one around for you and there you go.

(The Court Clerk read the entire Criminal Information document)

THE COURT: The defendant's plead not guilty to those charges. Counsel, will you stipulate to my reading Instruction number One?

MR. SMITH: Yes, Judge.

MR. LOCKIE: Yes.

(The Court read Jury Instruction Number One together with the proper admonishments)

THE COURT: Mr. Smith you may now make your opening statement.

MR. SMITH: Thank you, Judge. Prior to that may I request counsel and I approach the bench concerning one of the instructions [p.12] that the Court just read?

THE COURT: All right.

OPENING STATEMENT

By MARSHALL S. SMITH, Elko County District Attorney:

Good morning ladies and gentlemen of the jury, your Honor, Mr. Lockie, Mr. Brown. As the Court indicated, this is the opening statement. This is the time for me to present, on behalf of the State, what the evidence in this case will show. I refer to this opening statement like a book that if you wanted to know what was in the book, you would look first to the table of contents to get an idea of what the book is going to be

about. So, at this time, we'll review the facts of the case which will be presented during this case.

What is this case about? Why are we here? This case is about an unimaginably brutal rape and sodomy and attempted murder of a child. The facts of this case will show that in January of 1994, a child by the name of Megan Allred, who at that time was nine years old and attending third grade in Carlin. She was living in Carlin, in a trailer, in a trailer court on Puett Drive with her little sister -- five-year-old sister -- her mother and her father. On this particular evening, in January of 1994, her father was at work, her mother had gone to a bar with some friends, and Megan and her little sister, Dallas, five years old, were at home alone.

At the bar, the mother -- her name is Pam Henle -- saw and spoke to the defendant Troy Brown. The defendant was drinking heavily that night at the bar. He was also dressed wearing a black cowboy hat, a black jacket, jeans and boots.

[p.13] You will hear testimony that at approximately 12:15 or 12:20 on January 29th, just after midnight, the defendant left the bar. The facts will show that between that time and approximately 1:00 o'clock in the morning, a person matching that description, black hat, black coat, jeans and boots, was seen walking away from the victim's residence, the trailer. Now, a few minutes after that, Megan was able to get to the phone and call her mother and tell her, "Mom, I've been hurt." Something's -- "I'm hurt, come home."

Now, between the time that the defendant left the bar and the time that a person matching that description -- not an eyewitness identification of that person, but of the clothing -- someone, and the State will show that it was the defendant, Troy Brown, entered that child's trailer, went into her bedroom in semi-darkness, forcibly put his penis into the vagina of Megan Allred, also penetrated her anus, attempted -- and strangled her, and left her for dead. And then he left. A call, at approximately 1:00 o'clock, is when this neighbor saw a person matching that description walking away from Megan's house.

You will hear testimony, and Megan's going to testify that as to what happened to her. One thing she's not going to testify to is who did this. She doesn't know who did this. Now, she will testify to some, to a sketchy identification or description of some characteristics of the person. The recall that, the circumstances under which she could make this identification, it was approximately 12:00 o'clock between 12:30 and 1:00 o'clock in the morning. She was brutally raped, sodomized, strangled and left for |p.14| dead.

Now, so what is the evidence that the State has to show that the defendant did this? You will hear, and in the course of this trial, that the police went out to Megan's bedroom where this occurred, and that a fingerprint was found. You will hear that that fingerprint was subjected to an analysis and that that fingerprint does not match the defendant.

What other evidence will the State show? We have another type of fingerprint that the State has to show that the defendant committed this crime. And that is

called DNA. You will hear evidence of an expert from the Washoe County Crime Lab who is an expert in DNA analysis.

So, what happened, the police went out to the scene and found evidence. The evidence that they had was a pair of bloody panties that Megan had been wearing, located on those panties was semen -- sperm. Now, with that the State then obtained a blood sample from the defendant.

Now, you will learn that each one of us has a specific genetic pattern. The DNA is found in sperm, and it's found in blood. So, what they did at the lab, the evidence will show that the DNA was extracted from that sperm found on those child's bloody panties and was compared to the DNA which was extracted from the defendant's blood. And they were compared.

The evidence will show that the likelihood of those same characteristics occurring in those two samples is not 1 out of 100,000; it's not 1 out of 500,000; it's not 1 out of 2 million; it's 1 out of 3 million. One out of 3 million will share those [p.15] characteristics. The characteristics the DNA found in the semen is exactly and it will show -- will be compared to the DNA in that blood is 1 in 3 million. They match.

Ladies and gentlemen, these are the facts of the case. The State would request that you listen to all of the evidence and at the conclusion of the trial that the only fair, just, and reasonable verdict is guilty as charged on all counts. Thank you.

THE COURT: Thank you.

Mr. Lockie? What's your favor? Do you want to--

MR. LOCKIE: I'd like to make an opening now.

OPENING STATEMENT

By MR. DAVID B. LOCKIE, Attorney at Law:

Judge Stringfield and Mr. Smith, Troy, and ladies and gentlemen, as you're aware by now, my name is Dave Lockie, and my job, or my role in this trial is to help Troy Brown. And Troy Brown has consistently denied that he's committed these horrible crimes -- consistently denied it. We probably wouldn't be here in court, but for the DNA evidence that you're going to hear.

As you're all aware, there are two sides to every story. And the purpose of this opening statement is not only for Mr. Smith to outline for you, this table of contents in a book, but it's also to allow me an opportunity to indicate to you what the evidence will show.

But it's very important that you keep firmly in mind what Mr. Smith just told you isn't evidence of anything. What I tell you isn't evidence of anything. You have to make your decision based upon what you hear from the witness stand.

[p.16] Troy Brown, this 23 year old young man. He grew up on a small ranch in Loa, Utah with his parents, where his brothers live and his grandparents. He came to Carlin in August of 1993, he's skilled in construction trades and taking care of animals, and

ranch work. He went to work for Ledcor on a project out at one of the mines.

The evidence will show in this case, that Troy lived in Carlin as well, and so did Megan Allred, who is the child, and her mom, Pam Henle. Now, Megan knew Troy before these events happened. She knew Troy's brother Trent. They were not unfamiliar with each other.

Troy had, on several occasions, been over to the Henle household, he was friends with Megan's stepfather, Wayne. He used to go over and listen to Wayne pick guitar and have some drinks together and so forth. Megan would play, and there was never any indication that there was a problem at the time. Never any fear on anyone's part regarding Troy, at all.

On January 28th, Troy had the day off and he was planning to go back to Loa for a week. Held already made the arrangements with work and the 28th was his first day off, and he was planning to leave the next morning to go over to Loa. Slept in that day, did a few chores, watched T.V., relaxed. And then during the evening, he decided to go down to the local bars.

That day, incidentally, was also payday and his brothers Trent and Travis, who also worked out at Ledcor, were going to bring his check home. So, he went down to the bar, and he first went down to CG's and had a few drinks there, and he went over to a place called [p.17] The Peacock, which was really crowded and busy that night. It's a popular drinking establishment over in Carlin.

Now, Megan was doing some baby-sitting that night. And Megan was baby-sitting Troy's brother Trent's two kids. And Trent's married to Raquel, so Raquel's Troy's sister-in-law and Trent's his brother. And so Megan baby-sat those two kids over at Trent's house. And also, Megan was with her younger sister -- Megan's nine and Dallas is five. All right.

So, they're all down at the bar, initially. Pam, Trent, Troy, just basically having a good time. Now Travis was down there, too, who is another brother of Troy's who lives in Carlin. So, Travis left real early and he went home, he was Troy's roommate at the time, who also lives on Puett Street.

Then Trent and Raquel went home, and according to Raquel they went to bed early, they went to bed around 9:00 o'clock, but when they got home, they took Megan and Megan's younger sister, Dallas, the five-year old, back over to Megan's house alone. And I suppose the understanding was that mom would be coming home from the bar and not staying there until, you know, after midnight. In any event, Megan and Dallas were truly home alone in this case.

Then around 10:00 or 10:30 at night, a call came into The Peacock, where Troy was, and Pam was over at CG's. And it's just customary in The Peacock, apparently the phone's just a pay phone where anyone can reach it, and the phone rings, anyone that happens to be near just picks it up.

And Troy picked up the phone and it was Megan. And she said she wanted to get a hold of her mom, she'd been trying to call over [p.18] to CG's, but the

phone had been busy. And so Troy said, "Well I think she's over at CG's, I'll go tell her that you're calling."

So he hung up the phone, he walked over to CG's, and when he got over there, Pam was already on the phone, it's a cellular phone, talking to Megan, and Troy did say to Pam, "Your kids are trying to get a hold of you." And she said, "Yeah, I know. They're here on the phone."

So they went back over to The Peacock. I think Troy went a little bit earlier than she did, but they all ended up going over to The Peacock, and that's where they played pool and just had fun for awhile.

Pam will tell you that Troy was a perfect gentleman all night. And everyone agrees that he drank a lot. He was extremely intoxicated that night. And I think that you'll he had at least ten shots of whiskey and beer chasers following them. He's extremely gone. But nevertheless, Pam will tell you that he was a perfect gentleman, there was no conflict between them. He made no sexual advances towards Pam. Just had a good time playing pool.

Then, somewhere after midnight Troy left the bar. He left The Peacock. No one knows exactly when he left. As you can imagine on a late night in a bar, no one was, you know, carefully examining their watches and so forth, at the time to figure out exactly when anyone left. But, the bartender will testify that he believes that that Troy left somewhere around 12:15 to 12:20. Other people think it was closer to 12:30, but in any event that's approximately when he left.

He had drank so much he was nearly sick at the time. He [p.19] walked out of The Peacock, he went over to CG's bar and ordered a beer and only just took a couple swallows of the beer, and he was thinking, I'd better get home. He didn't spend much time in CG's at all. He left at -- with the beer in hand -- and drank it on the way, and started walking home. And he wasn't walking very well. All right.

Now, you'll hear evidence that -- well, Troy didn't have a car there, so that's why he's walking home, and he didn't live, you know, more than walking distance from the bar. And normally he would walk home from the bar.

And you will hear evidence that, yes, a person matching Troy Brown's description was walking away from Megan's house, but what you didn't hear is he was a lot closer to his own house when he was seen. Okay. Puett Drive is a street that comes along, and winds along. Megan lived at 1637 Puett Drive, and Troy Brown lived at 1717.

You'll also hear that there's a couple of different ways to walk home to Troy's house, and you'll hear that he normally walked home a way that doesn't even take him past Megan's house. And that will be consistent with the testimony that you hear, that the witnesses saw this person walking at the place where he was seen.

We have no doubt at all that Megan was brutally raped and attacked that night. No doubt at all. And that's not an issue that Troy's here contesting. He is contesting that he's the one who did it.

Now, I told that Megan didn't know Troy, but she knew Troy's brother Trent. And despite that she's not been able to say who did [p.20] this to her. The evidence is, according to Megan, that it was too dark to see who did it in the trailer.

Now, Megan normally slept in her bedroom, there is a bunk bed and Dallas was on top and Megan was on the bottom. In that bedroom, the kids normally used a night light that was -- it was a mirror, it was actually like a make-up mirror that has those little bulbs on the side. And that was always lit. What they did at night to use for their little night light, and I think it would be turned around in the corner so it would shine indirectly. And the evidence that you will hear is that the man moved the mirror. Somehow he turned that light off in the room.

The mirror light was off, Megan noticed that it was off and it was on earlier. Megan's mother will testify that normally used it, and when she got home it looked different than it normally looks. And, yes, the police, because of that evidence, called Bill Schultz, the detective with the sheriff's office to come in and dust that mirror for fingerprints. And they dusted it and yet, and they found a usable fingerprint. And they sent it to the FBI and the FBI ran it and the report came back and said it doesn't match Troy Brown. Okay.

Now, what description was Megan able to give? Megan said that the man had blond hair. She said he had curly hair. She said that he wore a black coat that definitely had a zipper. And you'll see the coat that Troy wore that night, and you'll know it's a CG's coat, it's a common coat around Carlin, it buttons.

She said that he had on a stiff shirt, he had on a soft cotton shirt. She said that his hair was long in back, it was short. She [p.21] was able to feel the hair apparently. And really none of the descriptions that you're going to hear are going to fit Troy Brown at all, that Megan was able to provide.

Now, no doubt, she was brutally attacked, and all those things that make it difficult for a child to say exactly what happened, but she interviewed several times. And not, not just immediately after it happened, but a couple days after it happened as well, and what she said a couple days after it happened matched what she told everyone on the scene at the time. So, she's consistently said that man had blond hair. I mean numerous times.

Megan also said that she bit the man on the hand in order to make him go away from her, and Dr. Campbell who examined Megan scraped some debris off Megan's teeth. And Mike Terry, the Carlin Police officer that talked to Troy at about 5:00 the next morning, Troy was wearing cutoffs, only, no shirt on, looked at his hands, no marks. No marks on his body anywhere.

Megan knows what alcohol smells like. She was asked that by the police. And the police, I think, asked, "Do you know what it smells like when someone's been drinking and stuff?" And she said, "Yeah, but he didn't smell like that." He smelled like he had on cologne.

She said that he had a watch on and you'll hear Troy Brown didn't have a watch on that night and he doesn't wear a watch. She said that her face got scratched by a watch and the doctor saw some

scratches on her face. Troy Brown didn't have a watch on that night.

Troy Brown didn't flee. He didn't run. Every time the police [p.22] came to talk to him, he talked to them. And he always said that he didn't do it. Why did the police come and talk to him? They knew that he'd gotten this call at the bar.

Another piece of evidence that you're going to hear is that Troy had washed some clothes after he got home that night to his trailer. Oh, and by the way, we know approximately when he got home to the trailer because his brother Travis was home. And his brother Travis will say that he got home around 1:30.

All right, so, why did he wash his clothes? The reason that he did, is he was planning to go over to Loa the next day. You heard that and that no one will contest that. He was planning on leaving in the morning and, he's a young, single guy, he's got about two pairs of decent clothes that he normally wears. All right? And so, he had gotten sick on his way home, he'd thrown up and he'd gotten some barf on his pants and he didn't smell very good and he's a very fastidious type person, so he threw his clothes in the washer as opposed to in the dirty clothes, so that he'd have clean clothes to take over to Loa with him. All right. The underwear weren't in there, it's just the clothes.

Now, when Troy was arrested, Megan was off into foster care at the time and she was watching T.V. and a news flash came across and said that Troy Don Brown had been arrested and Megan said, "That's him. I knew it was him." Okay?

So the foster parents called Detective Roy Ladd and Connie Walker who were the people who'd been interviewing Megan and said that she'd said this. So, Roy Ladd and Connie Walker put together a photo line-up of photographs, and photograph number two [p.23] was of Troy. And they brought photographs over and Megan looked at them and said, "Oh, no, that's not him, that's a friend of my dad's." Then she said, "I knew it was him because he sent me flowers afterwards." And Megan -- Roy Ladd said, "Well, do you have the card from the flower?" And yeah, she had them, and when she retrieved the card it was from Trent Brown, Troy's brother.

And she knows the difference between Trent. She knows, obviously, who Trent Brown is. Trent's married to Raquel, and she baby-sits for them. And she knows Troy, too. She looks at photo number two, it doesn't have Trent Brown in this line-up, and she says, "No, that's a friend of my dad's." No identification at all. Okay.

Now, Mr. Smith has told you that we don't have a fingerprint, but we've got this other DNA fingerprint. Well, the DNA's not a fingerprint at all, and no one will tell you that it is a fingerprint. You know, a fingerprint is a substance directly from a person that's left and then analyzed, okay? And directly matches that person.

DNA is only a statistical probability based on other samples from other people that have been submitted to various hospitals and labs throughout the nation. So, they have a big database of information, of probabilities of, like Caucasian people and Black people and Hispanic people of having a certain gene

characteristic. And that's what they matched this against. So it is really not like a fingerprint at all. It's an identification tool.

Now, probably the most critical evidence that you're going to hear, other than the lack and -- positive identification that -- [p.24] that's other than Troy Brown, is this so-called DNA evidence. All right. And you're going to hear a well-groomed, well-rehearsed presentation on DNA evidence, and you're going to hear it from a DNA analyst who has a Bachelor's degree named Renee Romero, and she's a very nice-looking woman, she seems very sincere. All right.

The beauty of our system of justice, though, is that you get to make the decision, all right? So, I want you to listen very, very carefully as to what she has to say, and then listen very, very carefully as to just how she went about this test.

I really urge you to keep an open mind on this issue. Keep a completely open mind until the State's had their opportunity, I've had my opportunity, and all the evidence has come in and we've had an opportunity to make our closing arguments, okay? It's a natural, human tendency to begin to form, you know, conclusions, but this is a situation where it's absolutely critical that you not do that.

The State goes first and puts on their case. The defense puts on it's case, and you'll hear Troy Brown testify. He'll tell you he didn't do it. The most valuable thing that you can do is to keep an open mind. Judge Stringfield has told you to relax, and I encourage you to do that as well. It's going to take several days. Take in the evidence. Keep an open mind. And at the close

of all that evidence, there'll be only one possible verdict in this case, and that will be not guilty. I thank you for listening to me.

THE COURT: Thank you very much. We're going to take a brief recess at this moment, before we call the first witness, and I'll [p.25] ask you to take five minutes and then use the rest rooms or stretch or whatever and then please go back to your jury room and I'll call you back, hopefully right away. We do have one little matter to take care of. During this recess, and every recess that we take, the jury is once again admonished:

Do not converse amongst yourselves, or with anyone else on any subject connected with the trial.

Do not read, watch, or listen to any report of the trial, or to any commentary on the trial, or to any person connected with the trial. This includes any medium of information such as newspapers, television, and radio.

Do not form or express any opinion on any subject connected with the trial until the case is finally submitted to you.

Do not visit the alleged scene.

Do not attempt to make any independent investigations concerning this matter.

A violation of these admonishments may result in a mistrial, the unnecessary expenditure of public funds, and your name in the newspaper.

Please resume the same seats each time you come back to the courtroom. I would ask that you take five minutes to stretch. As soon as you're in your jury room, the bailiff would let me know and court's in recess.

(Court recessed at 9:50 a.m. for 15 minutes)

THE COURT: Please be seated. The record will reflect that present are the defendant and counsel, but the jury is not present. We have a couple matters to take care of real quickly.

[p.26] In opening arguments, I've already received two notes from jurors. And I want to review how we're going to handle these with counsel, before we bring these jurors in. One of them, and I'll have these taped to paper and the Court Clerk will make them exhibits. Julie McCauley, the alternate number one --

CLERK: She's number two.

THE COURT: She's number two?

CLERK: Yeah, we switched those two.

THE COURT: Okay. She's alternate number two. We should change our form some day.

Simply says, "I need to speak to the judge. Julie McCauley." So in a moment we'll call her in.

The next note is from, I can't be too mad about handwriting since I can't read my own handwriting. Is it Tom Foree, or is it --

CLERK: Tam Foree.

THE COURT: Tam Foree?

CLERK: T-A-M.

THE COURT: T-A-M? First, I can see she started making a couple notes simply identifying the counsels' names. And then it says, of course, once again I'll make this part of the record, too, "May I see a picture of Megan Allred? I have taught many students and can't remember their names, or find out if she went to any other school other than Carlin."

So, Counsel, my thought is to simply call them in here one at a time and interview them and see if there's any reason why they can't continue to serve as a juror.

[p.27] The other thought I have is the issue here is not, as I understand it from listening to counsel, is not whether or not the little girl was raped, it's a matter of whether or not the defendant did it. Now that may help us in deciding whether or not the fact that these people may have known the little girl. In other words, I don't think anybody is calling the little girl a liar. And, in fact, apparently, defense is actually relying upon her statements.

So, anyway, with that I was going to call them in and then just let you interview them. Is there anything else that you want to talk about before we do that?

Okay, let's call Julie --

MR. SMITH: Judge, as long as we're out of the presence of the jury -- about the sidebar that I made earlier concerning the issue. In this particular case, as the Court knows, if the jury finds the defendant guilty of Count One, the substantial bodily harm, then the jury is, in fact, the one who will make the determination of sentence. And I believe in your Instruction number One indicated that they're not to be concerned with that.

THE COURT: Okay. Now, at sidebar we talked about it and we agreed that we would correct that in our final instructions. Is that sufficient, Mr. Lockie?

MR. LOCKIE: That's fine with us, Judge.

MR. SMITH: Thank you, Judge.

THE COURT: All right. That is my standard deal. Okay. Ms. McCauley.

Hi, Ms. McCauley, just have your normal seat over there so [p.28] we'll not get you confused with anyone else. Have a seat right there.

Now, are you going to be able to hear her okay?

REPORTER: I don't know.

THE COURT: Well, let's do this. Then you come up and sit in the witness box. We'll just do that. You come on, sit next to me.

MR. SMITH: You know, I don't think we have a chair in there.

BAILIFF: We can fix that.

THE COURT: Add chair in witness box to our checklist.

Have a seat right there, Ms. McCauley. I would remind you that you're still under oath from your prior oath to answer these kind of questions truthfully, honestly. You wrote me note that says, "I need to speak to the judge. Julie McCauley." What was that note about?

MISS McCAULEY: Yeah, it just clicked. I'm not sure if they're the same people, but are the plaintiff's from Utah?

THE COURT: Yeah.

MISS McCAULEY: And they have red hair?

THE COURT: The defendant's are from Utah.

MISS McCAULEY: Yeah, yeah.

THE COURT: But who are you talking about, now?

MISS McCAULEY: Pam and Megan.

THE COURT: Okay.

MISS McCAULEY: I'm not sure if it's the same one, but I baby-sat a Megan Allred when she was like six months old.

THE COURT: And where did you do this at?

MISS McCAULEY: In Utah.

[p.29] THE COURT: In Utah?

MISS McCAULEY: Huntington, Utah.

THE COURT: Is this possible? Does anybody --

MR. SMITH: Yes.

THE COURT: Okay. Okay, now --

MISS McCAULEY: And it just clicked, because I didn't know her by the Pam Henle.

THE COURT: All right. How well do you know Pam?

MISS McCAULEY: I baby-sat for her, but that was like nine years ago.

THE COURT: When was the last time you saw Pam?

MISS McCAULEY: I saw her about a year ago, and just briefly spoke to her.

THE COURT: Okay. And so your knowledge of Megan -- when was the last time you Megan?

MISS McCAULEY: When she was about -- not even a year old.

THE COURT: Okay. And how many times did you baby-sit her?

MISS McCAULEY: Quite a few times. I don't know, maybe ten.

THE COURT: All right. All right, just relax. I'm going to have the attorneys ask questions, and then we'll go from there.

In this case I'll have you go first, Mr. Lockie.

MR. LOCKIE: Thank you. The only thing that I have any concern about at all, is whether that would make you unable to give Troy Brown a fair, fair trial.

MISS McCAULEY: I can still do my duty and be fair and keep an open mind.

MR. LOCKIE: All right.

[p.30] THE COURT: As I understand it, they're not contesting her testimony.

Is that fair, Mr. Lockie?

MR. LOCKIE: That's fair.

THE COURT: All right. So, she will not be targeted for, you know, like lying, or something like that, if that --

Anything else you'd like to go into, Mr. Lockie?

MR. LOCKIE: No, that's fine.

THE COURT: Mr. Smith?

MR. SMITH: Yes. How well did you know -- or would you say you know Pam Henle?

MISS McCAULEY: Pam? I just knew her from baby-sitting.

MR. SMITH: Do you have an opinion concerning her fitness as a mother based on your --

MISS McCAULEY: No, because --

MR. SMITH: -- based on your baby-sitting her and knowing her.

MISS McCAULEY: No. It was a long time ago. And that's the only time I really talked to her is when I baby-sat for her. And then when she came up -- when, I guess she moved up here and I spoke to her once at my work. So I was never really around her as a mother a lot. I just baby-sat for her.

MR. SMITH: How old were you when you were baby-sitting for her?

MISS McCAULEY: About 13, 14.

MR. SMITH: All right.

THE COURT: Where were you working at when you saw her?

MISS McCAULEY: The Red Lion.

[p.31] THE COURT: Counsel?

MR. LOCKIE: We'll pass for cause.

MR. SMITH: We'll pass for cause, too.

THE COURT: Okay. What I want you to do is not mention it again to anyone else, and there's no problem and we appreciate you bringing it to our attention, okay? Anything else you need to tell us?

MISS McCAULEY: No.

THE COURT: All right. Why don't you go back and have a seat with the jury and we'll bring the other juror, Jim.

Ma'am, come on up here and have a seat. Have this seat right here. Just have a seat and relax.

MISS FOREE: Right here?

THE COURT: Yeah. Have a seat in the witness box there. I would remind you, you're still under oath. You go by Tam, just T-A-M?

MISS FOREE: That's my full name.

THE COURT: That is your full name, okay. I got a note that you --

MISS FOREE: I just can't remember names. You know, I remember faces, but I don't remember names, and I was thinking -- because I know --

THE COURT: What school are you talking about?

MISS FOREE: Well, I teach at -- I've taught at Northside, what's that -- Northside, Southside, Grammar, and Spring Creek for the last six years.

THE COURT: Okay. Can anybody tell me what schools Megan's [p.32] been in?

MR. SMITH: It would have been during the time from February, I believe through March.

THE COURT: What, of this last year?

. . . . . .

MR. SMITH: Yes, of '94. And I don't know if I can get right to where she is now, or where she -- what specifically what school she is. She was in foster care, and Judge, I do have a photograph of Megan.

THE COURT: All right. Is that a fair, Mr. Lockie?

MR. LOCKIE: That's fine.

THE COURT: All right.

MR. SMITH: May I approach, Judge?

THE COURT: Okay.

MISS FOREE: I don't recognize her.

THE COURT: Okay. These little people change so fast, you know.

MR. SMITH: But she only would have been there, in Elko, for a very short period of time, and then she went to Utah.

THE COURT: Let me ask some more general question. We're talking a matter of a couple weeks, is that right?

MR. SMITH: That's right, Judge.

THE COURT: All right.

MR. SMITH: I can confirm that, Judge. I'm not sure and I don't want to misrepresent this --

THE COURT: That's kind of my recollection from the Welfare matter. But, I guess the most important question, do ever remember having a child in your class that you thought for some reason had [p.33] been the victim of sexual assault, or anything like this?

MISS FOREE: No, I don't -- I stay out of that. The counselor deals with that, and I never hear anything.

THE COURT: Let's assume that a child comes in, you do recognize her as being a former child. Counsel will confirm this for me, but I don't believe that they're contesting the fact that she brutally raped, it's a matter of who did it. So it's a little -- it's not a matter of no one's going to be attacking Megan. Mr. Lockie can confirm this for me, but even if you did recognize her as a former student, could you still be fair to the defendant, and -- Could you speak up, please?

MISS FOREE: Yes.

THE COURT: All right. Mr. Lockie?

MR. LOCKIE: That's fine with us, Judge.

MR. SMITH: I have no questions, Judge.

THE COURT: Pass for cause?

MR. LOCKIE: Yes, we do.

MR. SMITH: Pass for cause, Judge.

THE COURT: Will you just go back and have a seat and we'll call you right back in, and thank you very much.

We're just sitting right here, and bring everybody back in, and buzz me. Court's in recess.

(Court recessed while jury was brought in)

THE COURT: Please be seated. The record will reflect the presence of counsel and the defendant. Counsel, will you stipulate to the presence of the jury?

MR. SMITH: For the State, Judge.

[p.34] MR. LOCKIE: We do, your Honor.

THE COURT: Call your first witness, Mr. Smith.

MR. SMITH: Dr. Sherman.

THE COURT: Ma'am, please come forward. Have a seat right there. If you would face the clerk and raise your right hand.

MARION SHERMAN,

called as a witness by the plaintiff, was sworn and testified as follows:

THE COURT: Ma'am, have a seat right there.

Counsel, we haven't discussed the exclusion of witnesses. I think we should invoke it, do you have any thoughts on that?

MR. LOCKIE: It doesn't make any difference to us, your Honor.

MR. SMITH: I'd have no objection to the rule of exclusion.

THE COURT: I would just ask counsel to alert me if they ever see a potential witness in the courtroom. And then I would admonish the witness to wait outside. The purpose of this is so that witnesses come to us fresh, without hearing other witnesses. So if counsel would please inform me if they ever see another witness in the courtroom. I would take the matter -- take care of it at that time

Ma'am what's your name?

THE WITNESS: Dr. Marion Sherman.

THE COURT: Could you spell Marion for us?

THE WITNESS: M - A - R - I - O - N.

THE COURT: And your last name?

THE WITNESS: S - H - E - R - M - A - N.

THE COURT: Thank you. Mr. Smith?

[p.35] MR. SMITH: Thank you.

DIRECT EXAMINATION

By MR. MARSHALL S. SMITH:

Q: Doctor, will you state your occupation, please.

A: I'm a child and adolescent psychiatrist at the University of Utah Neuropsychiatric Institute in Salt Lake City.

Q: And would you please describe, for the jury, your educational and professional background.

A: I attended medical school at Case Western Reserve University in Cleveland, Ohio. I went on to a general medicine community internship at the University of Colorado in Denver, Colorado. I completed a general psychiatry residency at the University of Colorado in Denver. Then I completed a two-year child and adolescent psychiatry fellowship, again at the University of Colorado in Denver. With the completion of the training occurring in 1992.

Q: And what position do you hold at the Neuropsychiatric Institute?

A: Currently I am an attending psychiatrist and see patients in the hospital on the adult ward, the adolescent ward, then the children's wards. I am the medical director of all children's services, which includes three units: the children's in-patient service, the children's day treatment service, and the children's residential treatment center.

Q: And so the Neuropsychiatric Institute is a place where -- why do children go there?

A: Children who are experiencing significant disabling [p.36] symptoms or distressing emotional or psychological problems, which cannot be controlled or treated on an out-patient basis are brought to the hospital for one of the three units.

If they can be kept at home, they will come to the day treatment center for intensive 8:00 a.m. to 4:00 p.m. therapy -- multi-modal therapy. If it is not safe for them to be maintained at home, or if they -- a treatment that has been attempted while they're at home is not helping, if they're worsening, then they would come in to the in-patient facility.

Q: Now, you are also licensed to practice medicine, you're a medical doctor as well?

A: Yes, I am.

Q: And where are you licensed to practice medicine?

A: I'm licensed to practice in Colorado, in Utah, and Wyoming.

Q: And so, do you have a -- are you certified in any special sub-branches of psychiatry?

A: Yes, I am.

Q: And what would that be?

A: I am board-certified in general psychiatry, and I am board-certified in child and adolescent psychiatry.

Q: What is, briefly, what is board-certified mean?

A: Board-certified means that one has attended the required training. For general psychiatry it a full medical internship and general psychiatry residency. And then taken a series of exams over two years which include written and oral examination. That's for general psychiatry.

[p.37] For child and adolescent psychiatry, it means the completion of the general psychiatry boarding, plus two years of training in an accredited program, which was at the University of Colorado, followed by again, a written and oral examination.

MR. SMITH: Thank you. Judge, I'd move to have the Court recognize Dr. Sherman as an expert in child psychiatry.

THE COURT: Mr. Lockie?

MR. LOCKIE: She is.

THE COURT: All right. With that said, go ahead, Mr. Smith. I'll accept the witness as an expert in that field.

MR. SMITH: If I may ask the clerk to show the witness State's Exhibit number 1.

by MR. SMITH (continuing):

Q: Ma'am, I'm showing you a photograph, did you have an occasion to examine and treat this child?

A: Yes, I did.

Q: The person who is depicted in that photograph.

A: Yes, I did.

Q: And do you know that child's name?

A: Megan Allred.

Q: Would you please describe to the jury, when you first met Megan.

A: I met Megan in March of this year.

Q: And under what circumstances?

A: She was referred by Frank Hall, who is the social worker in this town. I had treated a prior patient who he had referred to the hospital, he was satisfied with the care, and he referred Megan [p.38] into the hospital and I treated her during her 12-day hospital stay.

Q: And, would you please describe to the jury what occurred, what did you do with Megan when she arrived at the Neuro Institute?

A: During a hospitalization the attending physician is the leader of a team. This treatment involves 24-hour care by trained professionals, nursing, mental health. It involves evaluations by myself, personally with Megan, and by multiple other disciplines. It involves individual and family therapy. It involves group treatment, a milieu treatment, which means that the child is in with other peer who she can feel comfortable with and begin to learn and express herself. And school treatment and evaluation.

Q: And so did you also engage in any testing of Megan -- psychological testing?

A: I requested that the psychology department perform psychological tests. I also, myself, used the tool which psychiatrists use, which is called the mental standards examination, which is a standardized interview technique to examine the thinking process of an individual.

Other testing which took place was to make sure that she did not have physical problems that required medical intervention. She had a number of physical complaints.

So that type of testing involved, for example, blood testing to make sure she did not have a sexually transmitted disease. They check her liver and heart and electrolytes, her status of infection by looking at her white blood cells, her urinary tract which was -- which is tested by a urinalysis where one examines urine by the [p.39] lab. That actually was repeated because of continued complaints of urinary problems. A throat culture because she complained of throat pain at one point. Physical examination.

So a number of medical tests and chemical, blood, urine, and culture tests to look at her physical being to see if there was any way in which we should intervene with a physical treatment.

Q: Were you able, as a result of -- Let me ask you this, how long was she in the hospital?

A: Twelve days.

Q: And as a result of your examinations in your experience and training and background, were you able to diagnose -- make a diagnosis as to what, if anything, Megan was suffering from?

A: Yes. She came in with a tentative diagnosis and this was confirmed without question. The diagnosis is called post-traumatic stress disorder, commonly called PTSD.

Q: What is that? Would you please describe to the jury what that is.

A: Post-traumatic stress disorder has a rigid set of criteria for definition. It requires somebody experiencing an overwhelming, frightening experience to which they respond with a hopelessness, helplessness, terror. It's an experience which may threaten their lives, may cause physical damage.

And then there are specific requirements involved in the diagnosis. The three main requirements are, one is a re-experiencing of the trauma in some way. And this can mean that somebody is just sitting there, guy might just be sitting here and suddenly I have memories of this awful thing that intrude upon my |p.40| thinking and keep me from being able to keep my train of thought in what I'm trying to say to you. That would be called an intrusive thought, a flashback as if suddenly I feel like I'm back there again. That's a flashback.

It may be experienced during sleep with the vivid nightmares in children. The nightmares are often more generalized with adults and the children may dream about monsters chasing them -- death,

dismemberment, horrible -- a violent, fearsome events and they wake up physiologically distressed. That's the first part which is re-experiencing the trauma.

The second part is a numbing, or an avoidance. So this terrible thing has occurred to a person and they try not to think about it. They try not to talk about things that remind them of it. They try not to talk to people or go places which might remind them of this awful thing that has occurred because it's too horrible to think about.

Sometimes it means that people actually don't remember parts of it. It's very common for important segments of a trauma where a person will just not remember it at all. Sometimes the entire trauma is not remembered. So that would be the second component.

And the third component is what's called the hyper-arousal. And what that is is, kind of the way I feel right now, where my heart is pounding -- boom, boom -- and my pulse is up and I'm probably talking too fast, and breathing quickly. If people startle -- if the door would slam, a person might jump. If a car goes by and backfires, a person might jump, when they wouldn't have beforehand. It's a physiologic state of increased arousal.

[p.41] It can also come out in other body sensations, which are -- feeling as if something's wrong, even when on examination you can't find anything wrong with those body parts. So people who have a trauma to some part of them may have -- and this is kind a part of number one, too, re-experiencing -- can be re-experienced with that body part.

For example, a rape. A person can re-experience vaginal pain, if there was a painful penetration. Now that's the re-experiencing, even though it's not happening right then, they can feel the pain, and then that third component of increased arousal that the pain keeps coming back along with a number of other common physical sensations for which there's not any current physical cause, there's no infection, there's no physical object that is now causing pain in that area. And the explanation that's left is that it has to do with after this trauma.

Also, with these three components, they have to be present for at least a month. So, if you have something awful that happens, but somebody can adjust to it. If somebody sees somebody get run over, it's awful, and these are experienced and they don't sleep, but then it evolves, that would not fit criteria. The symptoms have to continue.

And the other part is that the symptoms must be extremely distressing or disabling to some part of a person's life, emotionally distressing, disabling, or that it affects their functioning with other people or in school or work. That's what PTSD is.

Q: Thank you. Would you please describe to the jury what, if [p.42] any, signs you thought you found -- or determined Megan to be suffering -- with which would confirm that diagnosis.

A: Yes. If we go back to the three main components.

Well, let's start at the beginning, a horrible event which threatens death, she experienced this as an event which was felt as if she was threatened by death.

We also have gross physical evidence that a brutal, physical assault was made. So the first criteria is met without question. Her response was horror, fear, helplessness. That, again, fits that first criteria.

If we move down to those three parts that someone would have symptoms of, and must have symptoms of all three, the first part is the re-experiencing. When I met her, she was still having those re-experiencing images. She was having intrusive thoughts, she would say, "I can't stop thinking about that rape." She had nightmares.

Now, the nightmares had decreased in frequency over time leading up to her hospitalization, but at the -- after the assault, they had really jumped up in frequency. Every child will have some, but they had not only -- not only the quality of a nightmare, but followed by again, physiologic symptoms, where she would be crying and be afraid and not want to be left alone in the dark. So, intrusive thoughts and nightmares.

Re-experiencing -- oh, I mentioned the example of a rape with a vaginal pain continuing, and she had that. She had many somatic, which somatic -- soma just means body. So she had many body symptoms which kind of are more hyper-arousal. I'll talk about that a little later. So that's the first tripod of the diagnosis.

[p.43] The second one is the avoidance. And she, again, demonstrated this while she was at the hospital. She didn't want -- initially when she came in she wouldn't talk. She'd just say, "I don't know, I don't

know," -- wouldn't talk about anything -- her feelings or how things were going at home.

Over time, as she learned to trust the people and be in groups where kids were willing to talk about things and was in a support environment, was safe, she was able in trusted environments, to talk about things of importance for her healing.

She also expressed that she didn't like men and that she didn't like boys. This -- except for her stepfather -- and this was -- she said that -- things like, "When I get married I'm not going get married." And, let's see, what else? Well, that's all I can think of at this point about the avoidance and numbing.

Numbing -- another example of the numbing would be the ability to graphically describe events without becoming emotional. So, it's kind of numbing out the emotions to be able to intellectually, cognitively look at what went on. And that's the second portion.

And the third portion is the hyper-arousal. And she did have what we call hyper-vigilance, which just means that a person is constantly on the lookout, not going to trust before trust is proven. This went into her behavior, too, where she was -- would have to check the doors, check the locks, check -- are you sure it's locked? Are you sure it's safe? And this was a new behavior that, reportedly, had not been going on before.

The somatic symptoms, or body symptoms, were quite extensive. Talked about, I think when I mentioned the testing that was done, [p.44] where I could be called by nursing because she's got her --

complains of her throat. It'd be a little red, and we'd do a throat culture, nothing. Twice we did a urinalysis because she was complaining of burning on urination, which kind of a classic symptom of a bladder infection, and the frequency, where she'd be needing to urinate more often than normal. The results were negative there, no infection.

The complaints about her vagina were varied and it was that her vagina burned or stung or hurt. And again, this was significantly after she'd had her treatment, her repair vaginally, and although it's difficult to tell if there was a residual pain because of the initial physical trauma or not, there was probably some overlap there.

Throat. I think I mentioned that throat culture was negative. Headaches. At the time of the -- or after the time of the attack, reportedly her headaches frequency had gone up. I know when she was in the hospital, she was having them about every other day or so.

Stomachaches. And stomachaches again, are common with sexually abused people because that's where there's a lot of pain inside, and so they say stomachache, it kind of means abdominal pain. They point here, "I have a stomachache." And also at times, she would have other such as, "Oh, my arms hurt." Or, "My legs hurt."

Then I mentioned some of the -- after she would awaken with a nightmare, the nurse would note that she was restless; that she was afraid; that she was having difficulty breathing; that she was [p.45] sweating; complained of palpitations which is where

the heart is beating hard. So this is the third prong which is the hyper-arousal.

And then we get to the the last step of it, which is, are these out of the range of normal? Are these disabling? And they certainly are disabling. In her school work at the academy, at the hospital, they found in her testing that she showed an average I.Q., or intelligence. And yet her, for example, her math scores were very low, which can be due to poor concentration.

And the reason that I would not say -- it could also be due to some kind of a learning disability where somebody just can't do the math, but she had a history of getting A's in math, and she had a history of saying, "I like school, and I'm good at math. I like math." And yet here, she was not able to do the material.

She'd been refusing to go to school, afraid to go to school. Some talk about maybe the kids had been teasing her, and I'm not sure what that was about. So definitely disabling symptoms, disabling distress, interfering with sleep, and that's -- I guess that sums up why she would meet that diagnosis.

Q: Thank you, Doctor. Do you believe that the mental trauma that Megan was suffering from, could you isolate where the precipitating -- what the precipitating event of these symptoms were?

A: Well, in almost all of the symptoms, basically weren't present before this brutal attacks be report.

Q: I'm sorry, they --

A: By Megan's report and --

[p.46] Q: They weren't present, I'm sorry?

A: They were not present. She had had some bed-wetting, this came up in the preliminary trial because the psychology report had said she'd had some bed-wetting previously, and she had had some bed-wetting right along. And that increased in frequency. Also, the same with nightmares.

Q: So were you able to determine what the precipitating event of the symptoms that you saw at the hospital?

A: This brutal attack.

Q: Now, with the mental trauma and the symptoms that she was suffering from, do you have an opinion as to whether or not that would substantially impair Megan's ability to function within the normal range and performance of her behavior?

A: Yes. In fact any child who I admit to the hospital is already meeting the criteria. They have to be unable to function adequately, or even poorly in the outside environment in order to meet criteria to be hospitalized.

And based on all of these different symptoms that we went through you can see how someone who is suffering from these physical and emotional symptoms and the thoughts that keep coming up and not being able to sleep at night, that impairs one's ability to perform tasks that we all need to do, especially for a child.

If an adult has this occur, we can kind take a time-out and come back into life, because our personalities are formed and the way we handle things, and what our identities are, but for a child, this is a time of formation, of understanding how -- what does this mean about other people? What is this thing about the opposite [p.47] sex?

And for example, on one of the -- what was it? Oh, it was a cover sheet for some of the psychological testing, it said name, and she put her name down. Date, and it said sex, meaning male or female, and she wrote "rape." So, she's forming an identity that's warped. And she's saying, "Oh, I hate men. When I get married, I won't get married."

This is not something that is acceptable for a young girl who needs to grow up and be able to trust when appropriate. Needs to be able to relate to other people.

Q: Let me ask you one more question. Is it likely that a child who, of these tender years, who experiences a brutality of this type of act, that the child is unable to identify the person who did this them?

MR. LOCKIE: Your honor, we object. The question should be asked as to Megan, not a child hypothetically.

THE COURT: Well, why not a generalized question? What's the objection?

MR. LOCKIE: Well --

THE COURT: We have an evidentiary code.

MR. LOCKIE: The question should be asked whether that's true of Megan.

THE COURT: What's the evidentiary objection?

MR. LOCKIE: Speculation.

THE COURT: Overruled. Go ahead.

THE WITNESS: Could you please repeat the question?

By MR. SMITH (continuing):

[p.48] Q: Sure. Is it likely that a child that suffers this type of brutal act upon her, that she will not be able to -- or not want to remember who did this to her?

A: It is likely that when someone is so brutally attacked, that there will be pieces of information missing from the story. It can be important pieces of information.

Now, why this information is missing, it can be consciously omitted. For example, she told me --

Q: As far -- but, as far as what -- I'm asking now just generally.

A: Oh, generally?

Q: Yes.

A: It certainly happens --

Q: Okay.

A: -- that people omit important information such as who the person is if that's particularly threatening in some way, and they -- and it may be conscious, or it may be unconscious, the reason that they don't say.

Q: Very good. Thank you, Doctor.

MR. SMITH: That's all I have, Judge.

THE COURT: Cross-exam?

CROSS-EXAMINATION

By DAVID B. LOCKIE:

Q: Doctor, did you make any effort to elicit the identity of Megan's attacker?

A: No, I did not.

Q: None at all?

[p.49] A: No.

Q: All right. And then, was Megan able to describe with clarity to you, the events that occurred?

A: Yes, she was.

Q: And in this particular case did you find any evidence that, other than the emotional overlay that Megan was unable to describe with clarity, the events that occurred?

A: Could you repeat that again?

Q: Okay. As I understand it, that the thing that you testified to regarding post-traumatic stress --

A: Um-hum.

Q: -- was that she had an emotional numbing?

A: Um-hum.

Q: Is that right?

A: Um-hum.

Q: Other than the emotional numbing, was she cognitively attacked? Was she thinking all right?

A: Yes, she was.

Q: All right. And that would include the description of the events that occurred?

A: Yes.

Q: All right. Thank you.

MR. LOCKIE: I have no further questions.

THE COURT: Mr. Smith?

MR. SMITH: I have nothing further.

THE COURT: Well, where did you come from to see us today, Ms. Sherman?

[p.50] THE WITNESS: Salt Lake City.

THE COURT: Thank you very much for coming, and you may be excused. May this witness be excused?

MR. SMITH: Yes, Judge.

THE COURT: Okay. Thank you very much for coming.

THE WITNESS: Thank you.

THE COURT: Call your next witness, Mr Smith.

MR. SMITH: Thank you. Dr. Winch.

THE COURT: Sir, please come forward. Face the clerk and raise your right hand.

GEORGE ANTHON WINCH, JR.,

called as a witness by the plaintiff, was sworn and testified as follows:

THE COURT: Sir, have a seat right in that box there. Sir, what's your name?

THE WITNESS: George Anthon Winch, Jr.

THE COURT: And how do I spell your last name?

THE WITNESS: W-I-N-C-H.

THE COURT: Go ahead, Mr. Smith.

MR. SMITH: Thank you.

DIRECT EXAMINATION

By MARSHALL S. SMITH:

Q: And how do you spell your middle name, for the record?

A: It's A-N-T-H-O-N.

Q: Thank you. Excuse me. Doctor, what is your occupation?

A: I'm a physician.

Q: And where are you currently practicing?

[p.51] A: Elko.

Q: And will you describe to the jury, your educational background, please.

A: Well, I got my undergraduate degree in 1977 at Whitman College, and then I received my M.D. at Jefferson Medical College in Philadelphia in 1981. And then I had two years postgraduate training at Valley Medical Center in Fresno, California. And then I was clinical director of the Indian Hospital up in Owyhee for about two years. And subsequently finished my specialty training at Mount Zion in San Francisco, practiced in San Francisco about a year and then moved out here in 1989.

I have had a clinical instructor appointment with the University of California, and I currently have an assistant professorship with the University of Nevada.

Q: And do you specialize in any particular area of medicine?

A: Obstetrics and Gynecology.

Q: And what would you -- what is Obstetrics, and what is Gynecology?

A: Specifically, it's the medical care related to the health of women, focused primarily on reproductive health.

Q: Were -- both of those fields?

A: Yes.

Q: Do either of those fields include surgery?

A: Yes, both do.

Q: And are you a member of any professional organization -- medical organizations?

A: Yes. I'm a member of the local County Medical Society, [p.52] and the Nevada State Medical Society. And I have been a junior fellow of the American College of Obstetrics for about nine years, and have my fellowship status pending.

Q: And that is for -- is that board-certification?

A: Well, after you have achieved your board-certification and you're fully specialized, you can apply for fellowship.

Q: So you are board-certified --

A: Yes.

Q: -- in Obstetrics -- Gynecology?

A: Yes.

MR. SMITH: If I may ask the clerk to show the witness number 19, please.

THE COURT: While we're doing that, do you want to qualify the doctor, or are you --

MR. SMITH: I'm going to ask a few more questions.

THE COURT: Oh, okay.

By MR. SMITH (continuing):

Q: Doctor, what is that?

A: This is my C.V.

Q: And what is a C.V.?

A: Oh, curriculum vita.

Q: And what is that?

A: It's a summary of past training and experience.

Q: Is that current?

A: Yes, this is current.

MR. SMITH: At this time, your Honor, I'd move for the Court to recognize Dr. Winch as an expert in the field of Obstetrics and [p.53] Gynecology.

MR. LOCKIE: He is, your Honor.

THE COURT: The Court will so recognize him, and this C.V. thing is what we know as a resume, does that sound right?

THE WITNESS: I'm sorry, yeah.

THE COURT: That's okay, you just do -- lawyers usually do more of that than doctors, but that's okay. Go ahead, Mr. Smith.

MR. SMITH: Thank you.

By MR. SMITH (continuing):

Q: Drawing your attention to the latter part of January 1994, did you have an occasion to come into contact, professionally, with a young child by the name Megan Allred?

A: Yes.

MR. SMITH: I'm going to ask the clerk to show the witness number 1, please.

Q: Do you recognize who's depicted in that photograph?

A: Yes, this is Megan Allred.

Q: And where did you come into contact with Megan?

A: I was requested to consult on her after she had been brought into the emergency room --

Q: All right.

A: -- that morning.

Q: Would you -- aside from consultation, what were your -- please describe to the jury what your involvement with Megan was?

A: Megan had been brought into the emergency room with traumatic injuries to the vagina and the rectum. And after she had been stabilized by the emergency room physician, who had noted [p.54] there was persistent vaginal bleeding and he had packed it to provide pressure, I was asked to consult on the extent of her injuries and to try to rectify them with surgical repair.

Q: So some form of reconstructive surgery was necessary?

A: Yes.

Q: Other than the genital trauma which you just described, did your examination of Megan reveal any other injuries, or evidence of injuries?

A: I first saw her in her hospital room and wanted to make sure that she was stable for an anesthesia induction, and so did a heart-lung exam and just looked her over, other than doing a pelvic exam. And at that time she was noted to have bruising around both sides of her neck, and there were some excoriations, or scratches on her legs. Those were the injuries that I noted. I do know that the pediatrician noted some others.

Q: And did you -- while you were assessing Megan, did you ask her about those injuries?

A: Yes. I asked her -- I asked her how she came to get the bruising around the neck.

Q: And that was for purposes of your medical diagnosis?

A: Well, it's all trying to figure out why she's there and what has transpired.

Q: And what, if anything, did she say to you?

A: She had, if I recall correctly, she had told me that someone had tried to choke her.

Q: Now, what degree of -- and I'm not talking about foot pounds, or a specific measurement, but what amount of pressure [p.55] would be required to make that type of bruising on the neck -- that you saw?

A: Well, it varies with different people based on their coagulation status, but it takes a significant amount of pressure to break the blood vessels under the skin to cause a bruise. And one consideration would be if you're hitting somebody you have a lot of force in a small space and you can get -- you can get a bruise easier with a punch than with a squeeze.

If you're going to induce bruising with steady pressure rather than a volatile fast pressure like a hit, it's going to be a more continual, heavier pressure, I would presume.

Q: Now, let me ask you this, would you --

MR. SMITH: If I could ask the clerk, please, to show the doctor State's Exhibits 20 and 21, please. And these exhibits have previously been shown to counsel.

THE COURT: Okay.

By MR. SMITH (continuing):

Q: Directing your attention to Exhibit 20, what is that?

A: This is an exam showing, or it's -- what we are doing is we are opening the labia to try to show the extent of the vaginal mucosal tear, because it starts up right to the left side of her cervix and it ran down the entire left vaginal wall into the perineal body, which is the central posterior aspect, just below where the vagina closes.

Q: And that's a photograph showing that?

A: It's not a very good one, but it does -- you can see, if you look closely, you can see the edge of the mucosal rend just [p.56] underneath her cervix, but you cannot really see the apex of the tear, up lateral to the cervix.

Q: And how about number 21?

A: This is -- this is where we're showing the fissuring of the anal mucosa. And you can see where the skin is split in about five or six places.

MR. SMITH: And, Judge, if I may ask the doctor to go to the --

By MR. SMITH (Continuing):

Q: Would it be helpful for you to in -- to assist the jury in understanding what's going on, if you were to make a diagram?

A: I could do that.

Q: Would that be helpful?

A: Sure.

MR. SMITH: Okay. If I may, Judge?

THE COURT: All right.

By MR. SMITH (continuing):

Q: And, Doctor, if I could ask you with reference to -- if you could diagram, for purposes of explaining to the jury, the vaginal injuries that you noted.

A: I think what you have to consider first, would be what is normal. And if you're -- if you have the labia separated like this --

Q: And Doctor, I'm sorry. Also, if I could ask you to speak up just a little, please.

A: All right. If you separate the labia, normally you have -- you have the anus in this area here. This is the region of [p.57] the perineal body, which was lacerated in this patient. And then this area is the posterior fourchette. And then looking in there you will see the posterior vaginal wall will run back like this to a

cervix that's about here, and this would be presumptively what -- what's normal.

With Megan, what she had was a tear that came down like this and this was cut down like this into the perineal body. The anus had fissuring where the mucosa had been split, but was not actively bleeding.

And then, if you look at the cervix, up at the apex of the vagina here, her tear went from the lateral part of the cervix along this side wall. If this is the actual vaginal skin, would come down along this side and would sort of end right here, and then the skin from this side just came sort of straight down underneath the cervix and ends about here.

And then this was all open and gaping, and this was the perineal body. And this was split just about down to the sphincter capsule of the rectum, which is -- this sphincter is the muscle which allows the rectum to open and close. And it has a fascial capsule around it, which is the connector tissue sort of holds in place. It was split right down to that, but not into that. And then she also had -- so this was wide open and you have the submucosal area here, she had some arteries in here that were actively bleeding at the time.

And so, what this photograph shows is, initially what we did is, when we took the pack out we went in and did individual ligations on these bleeders so we could stop the bleeding. And [p.58] once the bleeding was stopped then we took this photograph to try to --

THE COURT: Which number is that?

THE WITNESS: This is number 20.

THE COURT: Thank you.

THE WITNESS: And in this photograph you cannot see this lateral edge, it's just hidden by the labia here, but you can see, coming underneath, the vaginal skin edge here. And in number 21 you can also see how the perineal body has been breached part way, which is this region here, which is -- it's like the, the fascia, it sort of holds things together underneath the skin.

By MR. SMITH (continuing):

Q: Thank you, Doctor. With reference to -- Well, let me ask you this, what -- would you please describe the procedures that you employed concerning treating these injuries.

A: All right. First off, what we wanted to do is I took a -- once we had the bleeding controlled, I wanted to exam the whole area and just assess how much we had to do. And I took a speculum and went up into the anus to see there was a tear up above the sphincter, and there was not. The only anal injuries were the split skin that you can see in this photograph.

And then after we'd ligated these, what we had to do was, the cardinal ligament holds the uterus in place, and it's underneath the skin here, and the ureter, which comes down from the kidney passes through this area and goes in front of the uterus to the bladder, so we had to be very careful, we did not ligate or tie off her ureter or she would lose a kidney. So I had to explore up [p.59] there a little bit to see if this was involved, and it was not. And then start with some deep suturing to bring the deep tissue together here before we could approximate the skin edges, otherwise,

you would potentially collect blood in there which could get infected, or then cause problems later.

So, after bringing the -- bringing the deep structures together with a interrupted-chromic suturing, then I did a locked running suture, starting up at the apex here, and bringing it down to the -- to the posterior fourchette and then I had to re-approximate the perineal body, because it -- this is not approximated then the sphincter of the rectum doesn't really have anything to contract against and it won't work quite as well.

So after some, after a few interrupted, I think I used Viperol in that spot there, then what I tried to do was to re-approximate the hymen, which on a -- most young girls, if you separate the labia, you'll see the, the urethra up here and then suburethra is here, and then the opening to the vagina is actually a small -- the actual vaginal skin's here, but you have this membrane, partially open membrane which is the hymen.

And with Megan, what I tried to do, she had hymeneal remnants around like this that had been disturbed by the prior incident, and I just tried to reconstruct these so that she would have something of a normal hymen. So that anatomically she would, well, look as normal as we could get her.

Q: Will she look as normal as --

A: Well, you could -- somebody with a trained eye would probably be able to look at her and tell you something had happened [p.60] here, but I would -- I mean I did the best job I could with this young girl,

and I think we, most -- I saw her six days post-operatively and it looked like it was healing all right at that point, but I have not seen it since, so I could not tell you exactly how it, how it has healed, finally.

Q: Thank you, Doctor, you -- take, resume the stand, please. And finally, do those photographs fairly and accurately, although you indicated there they could be clearer, accurately depict Megan's condition on the day that you saw her?

A: Well, they don't depict the active bleeding, because at this point we had stopped the bleeding before we got the pictures, although you can see some evidence of some continued blood in that one. But I think they are fairly representative of the major injury she had suffered physically.

Q: Thank you, Doctor. When was it that -- Do you know how much time transpired between the -- this assault and the time that you operated?

A: It was approximately six to eight hours.

Q: Was she still bleeding at that time?

A: Yes.

Q: In terms of the injuries to the, that you noted to the vagina, do you have an opinion, based on your reconstructive surgery and your examination, what could have caused that?

A: Yes, it was trauma secondary to insertion of a blunt object.

Q: And would that blunt object be consistent with an adult, erect penis?

[p.61] A: Yes.

Q: How about with the injuries to anus?

A: Yes.

Q: And why do you say that?

A: Well, she lacerates in the vagina because the vagina does not have -- in a prepubescent girl without the estrogenization, the vagina does not have the expansile capacity that it will have in later life. Whereas the rectum, not being under any hormonal influence, it does. And I believe this is why she did not have any upper tears in the rectum, but she did have evidence of the rectum being expanded, most likely forcibly, secondary to the fissuring that she has here. But I don't think she tore in the rectum because that has a greater expansile capacity.

Q: And would you describe what type of pain that you would expect to see with these type of injuries.

A: A perineal reconstruction hurts like hell, because you're taking structures that normally were not tight and you're having to re-approximate them with sutures that will make them tight. And when I have done fistular repairs on women that have developed rectovaginal fistulas from repairs after deliveries and things, they hurt exquisitely post-operatively, and these are adults that I'm describing, but most women, when you're operating in this area, it is quite uncomfortable.

Q: With reference to -- so you did some, also some work on the anus?

A: No. No, we examined the anus, but there was no active bleeding and the fissures were not large and if kept clean, they [p.62] should heal in on their own.

Q: And then the -- Well, what I'm asking, trying to ask you is what is the pain that would be suffered post-operatively as a result of the reconstruction to the vagina?

A: Could you rephrase that? I mean, she is going to have pain. With this patient, she's going to have pain with a bowel movement, she's going to have pain with urination until that suture line is completely healed. Usually burning is what's described. She'll have swelling, and often swelling alone will cause pain. And she was in pain six days later because she was brought back in to me for reevaluation.

Q: Now, in terms of the injury to Megan's vagina, do you have an opinion as to whether those injuries posed a substantial risk of death?

A: Considering that she was still bleeding eight hours after the incident, yes, I do believe they provided --

Q: And let me ask you this, do you have an opinion as to whether or not you'd characterize the injuries that she was suffering from as causing prolonged physical pain?

A: Yes.

Q: Let me ask this, if, in going to the marks and the bruising you saw on Megan, if someone is -- if there is a depravation of oxygen or blood to the head, what effect, if any, does that have on one's perceptions?

A: It can alter them, significantly.

Q: Thank you, Doctor, that's all I have.

MR. SMITH: I'd move to the admission of State's Exhibits [p.63] Number 19.

THE COURT: I think we only saw 20 and 21. Oh, 19 was the C.V.

MR. SMITH: Right. Nineteen is the resume, 20 and 21 are the two photos.

THE COURT: Mr. Lockie?

MR. LOCKIE: We don't have any objection to 19 and 20, but we believe 21 is cumulative and whatever probative value it has is grossly outweighed by it's prejudicial value.

THE COURT: Overruled. Exhibits 19, 20, and 21 will be admitted into evidence.

MR. SMITH: Thank you, Judge. That's all I have.

THE COURT: Cross-exam?

CROSS-EXAMINATION

By MR. DAVID B. LOCKIE:

Q: Other than the bleeding, was there a substantial risk of death to Megan due to her injuries?

A: The bleeding would represent the acute risk of death, and if infection were to set in, that would represent the delayed risk of death.

Q: And with respect to the choking in this case, can you say specifically that it did or did not impair Megan's memory?

A: I cannot say that because I was not doing the choking.

Q: All right. And can you even say that it's probable that it impaired her memory?

A: No, I can't say that.

Q: Thank you.

[p.64] MR. LOCKIE: I don't have any other questions for this witness.

THE COURT: Anything on that Mr Smith?

REDIRECT EXAMINATION

By MARSHALL S. SMITH:

Q: Well, if -- I understand you can't say it's probable, but, I believe I understood your testimony to be that if one is deprived of oxygen or blood, then one's ability to perceive is -- how would you describe that?

A: Well --

MR. LOCKIE: Your Honor, I object. It's irrelevant.

THE COURT: Overruled. Go ahead, answer the question.

THE WITNESS: I would -- I would think that in this particular instance where there is pressure on the neck significant enough to cause bruising on both sides, that there is going to be some oxygen deprivation of the brain and so, my prior response probably should have been that it is probable, considering the bruising that was caused by the squeezing.

MR. SMITH: Thank you, Doctor. That's all I have.

THE COURT: Recross?

RECROSS EXAMINATION

By DAVID B. LOCKIE:

Q: Would that be a deprivation of the memory that -- a memory of what was going on during the choking, or before the choking, or after the choking, or all --

A: When patients have amnesia, you can have different types, there can be anterograde and retrograde. But when I saw Megan [p.65] preoperatively, she seemed much calmer and much more together than I would have expected a nine-year-old girl, who had undergone something as brutal as this, to be.

Q: And are you in a position to state whether or not Megan had amnesia?

A: No, I don't think I'm in a position to state definitively whether she did or she did not.

Q: And what would be necessary, in terms of testing, to determine that?

A: That I do not know.

Q: Okay. And would the field of psychiatry be best suited to make that determination?

A: Much more so than Gynecology.

Q: All right. And if she had experienced amnesia, would you expect that to show up during a course of psychiatric testing?

A: I don't know that.

MR. LOCKIE: No further questions.

THE COURT: Mr. Smith?

MR. SMITH: Nothing further, Judge.

THE COURT: May this witness be excused?

MR. SMITH: For the State, Judge.

THE COURT: Mr. Lockie?

MR. LOCKIE: Yes, your Honor.

THE COURT: Doctor, thank you very much for taking your time. I know you're busy. Thank you very much for coming. You may be excused.

Call your next witness.

[p.66] MR. SMITH: Thank you, Judge. We were going to call at this time, Dr. Campbell. He is the only E.R. doctor on call right now, so I'm going to check to see if I have another witness here.

THE COURT: So you are going to call Dr. Campbell?

MR. SMITH: No, I'm going to check if I have another witness.

THE COURT: Okay.

MR. SMITH: If I have -- may I have just a moment?

THE COURT: Okay.

Ma'am, please come forward. If you'd face the clerk and raise your right hand.

RAQUEL LEE BROWN,

called as a witness by the plaintiff, was sworn and testified as follows:

THE COURT: Have a seat right here. What's your name, ma'am?

THE WITNESS: Raquel Lee Brown.

THE COURT: Why don't you spell your first name for me.

THE WITNESS: R-A-Q-U-E-L.

THE COURT: And if you could help us by, why don't you just pull the microphone up a little bit and try and stay a little closer to it.

Okay, Mr. Smith.

MR. SMITH: Thank you.

DIRECT EXAMINATION

By MARSHALL S. SMITH:

Q: Ma'am where are you presently living?

A: In Loa, Utah.

Q: And, where were you living during January of 1994?

[p.67] A: I was living in Carlin --

Q: And --

A: -- with my husband.

Q: I'm sorry. And what is your husband's name?

A: Trent Brown.

Q: And were you employed at that time.

A: No, I wasn't.

Q: And where were you living in Carlin?

A: We were living -- do you want my address?

Q: Yes, please.

A: At 1709 Puett Drive.

Q: And are you acquainted with a person by the name of Troy Brown?

A: Yes, I am.

Q: And is he in court today?

A: Yes, he is.

Q: Would you describe where he's sitting?

A: He's sitting next to David Lockie.

THE COURT: The record will reflect the witness has identified the defendant.

MR. SMITH: Thank you.

By MR. SMITH: (continuing):

Q: Now, how do you know Troy Brown?

A: He is my brother-in-law.

Q: And so your husband is his brother?

A: Yes.

Q: During your time you were living in Carlin, did you come [p.68] to know a person by the name of Pam Henle?

A: Yes, I did.

Q: And also a person by the name of Megan Allred?

A: Yes, I did.

Q: And how did you come to know Pam Henle?

A: My husband worked with her husband, and they were friends, and we went to their house a few times.

Q: All right. And did Megan ever come over to your house?

A: Yes, she did.

Q: And what would be the reason for her coming over to your house?

A: They played with my son.

Q: All right. Did Megan ever come over for any other reasons?

A: I had her baby-sit for me.

Q: Okay. And how old are your children?

A: Seven and my baby's a year old.

Q: And so you believe that Megan was able to properly take care of these two children?

A: Yes, I do.

Q: Now, directing your attention to the evening of January 28th, 1994, do you recall where you were that evening?

A: Yes, I do.

Q: Where?

A: Do you want me to go from the time I called to see if Megan could baby-sit or --

Q: Sure. Please, please.

[p.69] A: Okay. Approximately about 5:00 o'clock I called Pam, because she was my friend and I asked her if Megan baby-sat, because Megan come over to my house quite a bit, and she played with my baby, and she was very mature. And I asked Pam if she would be able to baby-sit for me for about an hour that evening.

And she said, "Well, let me talk to my husband and I will get back with you." And she called me back about a half hour and she said that her husband and her said it was fine if she come to baby-sit. I went to meet my husband and I invited Pam to go with me.

Q: And where did you go?

A: We went to the bar.

Q: And what -- was there -- this is an occasion of some sort?

A: Yes, it was my birthday.

Q: All right. And so, then you and Pam and Mr. Brown -- Trent Brown --

A: Um-hum.

Q: -- how did you all get to the bar?

A: Pam brought her two children over to my house, and I had dinner fixed for them -- for all the children. And we left to go meet my husband. He told me earlier that morning to meet him at the bar around 6:30, and this was approximately 6:30 that Pam brought the kids over.

And we left, and we were headed towards the bar and we passed my husband, and so me and Pam turned around and we went back to my home where Trent and Troy and Jason New, which is a roommate of Troy's and -- they were at the house, and they were eating the food that I had fixed for the kids.

Q: Okay.

A: And my husband says, "Well, we waited for you, but you didn't show up." And I says, "Well, you know, we were a little slow." So he says, "Well, I'll meet you at the bar in a few minutes." And I says, "Okay, I need to run to the grocery store."

So me and Pam left and we went to the grocery store. And that took maybe ten minutes, and we went back to the bar, and as we were pulling into the bar, Trent and Troy and Jason pulled into the bar.

Q: All right. Then, when did you return home from the bar?

A: About 7:30, 8:00 o'clock.

Q: And when you returned, what then did you do?

A: Well, me and my husband left from the bar.

Q: Okay. Thank you. Who are you saying left at that point?

A: Just me and my husband.

Q: All right. So Pam remained at the bar?

A: Pam remained at the bar.

Q: What was the name of that bar?

A: CG's

Q: All right. And that's in Carlin?

A: Uh-huh.

Q: And about how far away is the bar, just -- Well, I'll move on. So, you returned with your husband, home to the bar -- to your house, and then what, if anything, did you do with Megan and her sister?

A: They were watching a movie at the time and Megan asked if they could finish watching the movie, and I said yes. And my husband, he went in and took a shower and he went to bed.

|p.71| And after the movie, Megan wanted to play a little longer, so we let them go into my son's bedroom and play, and, you know, they cleaned it up, is what

they done. They cleaned, and they -- they -- it was like a surprise. They wanted me to come in and see. And after that it was around 9:30 and Megan, you know, wanted me to take her home.

Q: Okay. And then so you took Megan and her little sister, Dallas, to her house?

A: Yes.

Q: All right. And then you returned home?

A: Yes, I did.

Q: Did you or your husband leave then after that that evening?

A: No, we did not.

Q: Thank you. That's all I have.

THE COURT: Mr. Lockie?

CROSS-EXAMINATION

By DAVID B. LOCKIE:

Q: What time did you go to bed that night?

A: It was about 10:00 o'clock.

Q: And what -- at the time that you took Megan home, was anybody else there?

A: No, there wasn't.

Q: All right. Did you have any concerns of leaving Megan there alone?

A: No, because Pam had told me that she would be home within a half hour.

[p.72] Q: When did you receive that information?

A: When we left the bar I asked Pam if she was going home with us, and she claimed that she was going to stay a little longer, and I asked her, I says, "Well, do you want me to keep the kids until you get home, or do you want me to take them home?" And she says, "You can take them home. I'll only be a half hour. Just tell them I'll be home within a half hour."

Q: And you didn't hear from anyone else that night, did you?

A: No, I didn't.

Q: What color of hair does Trent have?

A: When I met him it was kind of a blondish brown, but it's gone darker.

Q: Okay. In January, what color was it?

A: A dark brown.

Q: Lighter or darker than Troy's?

A: Probably about the same color.

Q: How about the length of his hair?

A: His hair is short, but it's real curly in the back.

Q: Okay. Is it --

A: And he's kind of bald on top.

Q: Okay. And was -- was it curly in back last January?

A: Yes. He's got natural curly hair.

Q: Thank you.

MR. LOCKIE: I've no further questions.

THE COURT: Mr. Smith?

MR. SMITH: I have no questions on that, Judge.

THE COURT: May this witness be excused?

[p.73] MR. SMITH: Yes, for the State.

MR. LOCKIE: We'd like to retain her.

THE COURT: Okay. Then, you'll have to still stay outside the courtroom, or can she call -- Do you want her to stay in the courthouse, or can --

MR. LOCKIE: No.

THE COURT: -- she just stay in touch with your office?

MR. LOCKIE: Just subject to calling in.

THE COURT: Okay. So, you're free to leave and if you would --

You've know how to get a hold of her, Mr. Lockie?

MR. LOCKIE: I do.

THE COURT: Okay. You may be excused. Thank you for coming. You'll have to stay outside the courtroom, though.

Call your next witness.

MR. SMITH: Pam Henle.

THE COURT: Ma'am, please come forward. Face the clerk and raise your right hand.

PAMELA SUE HENLE,

called as a witness by the plaintiff, was sworn and testified as follows:

THE COURT: Would you pull that door open and have a seat right there. What's your full name, ma'am?

THE WITNESS: Pamela Sue Henle.

THE COURT: And how do I spell Henle?

THE WITNESS: H-E-N-L-E.

THE COURT: Mr. Smith.

[p.74] MR. SMITH: Thank you, Judge.

DIRECT EXAMINATION

BY MARSHALL S. SMITH:

Q: Ma'am, you are the mother of Megan Allred?

A: Yes.

Q: What is Megan's date of birth?

A: 9-8-84.

Q: And directing your attention to January of this year, of 1994, were you living in Carlin?

A: Yes.

Q: And who was living with you?

A: My husband, Wayne Henle, and my daughters Megan and Dallas Allred.

Q: Now is Wayne the natural father of Megan?

A: No.

Q: The stepfather.

A: Yes.

Q: And you are the natural mother of Megan.

A: Yes.

Q: All right. And where were you living at that time?

A: At 1637 Puett Drive in Carlin.

Q: And would you describe to the jury what -- was it a apartment house, or --

A: It's a trailer court, and we lived in a single-wide trailer.

Q: All right. And I'm sorry, what's the -- your other daughter's name?

[p.75] A: Dallas.

Q: Okay. And how old is she?

A: She's five.

Q: All right. And so the four of you were living in the trailer at that time?

A: Yes.

MR. SMITH: If I could show the witness number 1, please.

Q: Ma'am, what is that a photograph of?

A: My daughter Megan.

Q: And does that photograph fairly and accurately depict how Megan looked during the months of January or February 1994?

A: Yes.

MR. SMITH: I'd move for the admission of State's Exhibit number one.

MR. LOCKIE: No objection.

THE COURT: One will be admitted.

By MR. SMITH (continuing):

Q: Now, now 1637 Puett is in Carlin?

A: Yes.

Q: And when did you move to that address?

A: In September of '91.

Q: Were you working at that time?

A: Yes.

Q: And where were you working?

A: I had a job with Newmont Gold.

Q: In what capacity?

A: I was a sampler.

[p.76] Q: And how was your husband employed?

A: He was an equipment operator at Newmont Gold.

Q: All right.

MR. SMITH: Also, I'd like to show the witness a diagram. Judge, if I may just hold the diagram, so we don't have to bring out the easel, I think we can do that.

THE COURT: I -- think Stefanie can hold it? Let's try have her holding it.

MR. SMITH: That'd be fine.

THE COURT: Do you have a penlight, today?

MR. SMITH: I'm sorry?

THE COURT: Do you have that penlight?

MR. SMITH: Yeah, I do as a matter of fact.

THE COURT: Why don't you give that to Stefanie, and she can give it to your witness.

MR SMITH: If I may approach the witness, Judge.

THE COURT: All right. But next time we'll have Stefanie do that kind of stuff.

MR. SMITH: All right. To use this you just push that button and it's a little pointer so you can see it.

THE WITNESS: Okay.

THE COURT: Try not to hit Stefanie's eyes.

By MR. SMITH (continuing):

Q: Ms. Henle, if you would, please, does -- First of all, does that -- recognizing that as not drawn to scale, does that reasonably and fairly accurately depict the layout of your trailer?

A: Yes.

[p.77] Q: And so would you show where your bedroom was?

A: Right there.

MR. SMITH: For the record, she's depicting -- there's a --

THE WITNESS: The master bedroom.

THE COURT: The master bedroom.

By MR. SMITH (continuing):

Q: Master bedroom. And then how about the kitchen? And that's also already indicated on, and pointing to the kitchen area. And the living room. So you're pointing to the living room. And then where was Dallas and Megan's bedroom?

A: It's at the front of the trailer.

Q: All right. And so where's the front entrance, the front door to the trailer?

A: The only one we used was right here.

MR. SMITH: Okay. And for the record, that is just to the left of the girls' bedroom.

Q: All right. Thank you.

Would you describe where -- Let me ask you this, what kind of beds did you have in the girls' bedroom?

A: Bunk beds.

Q: And do you know who slept on the top, or generally who slept on the top and who slept on the bottom?

A: Dallas slept on the top, and Megan slept on the bottom.

Q: And do you -- while you were living in Carlin, did you come to know a person by the name of Troy Brown?

A: Yes.

Q: And is he in court today?

[p.78] A: Yes.

Q: Would you point to him, please.

A: He's right there.

THE COURT: The witness has identified the defendant.

By MR. SMITH (continuing):

Q: Thank you. And would you describe to the jury how you came to know Troy Brown?

A: He worked with my husband for Ledcor and my husband invited him over for drinks one night and he -- that's how he first started coming over.

Q: Can you -- About when was that that you'd say that he first met your husband?

A: Right before Christmas.

Q: So that'd be of --

A: Of '93.

Q: December of '93?

A: Yes.

Q: All right. And can you tell the jury about how many times Troy Brown had been over to your house?

A: Probably ten to twelve times.

Q: And where does -- at that time, where did Troy Brown live in relation to your trailer?

A: About ten trailers down.

Q: All right. Drawing your attention to the evening of January 28th, 1994, where was your husband that evening?

A: He was at work.

Q: And so had he been -- was that a regular shift that he was [p.79] working?

A: Yes.

Q: And so, he worked nights?

A: Yes. They'd just moved him to nights.

Q: All right. And how about you? What were your shifts at that time?

A: I wasn't working at the time.

Q: Okay. You indicated before you were -- you had been working. I might have misunderstood you.

A: Yeah. When I first moved over to Nevada --

Q: You were working.

A: -- I, yes.

Q: Okay. So at this particular time you weren't working?

A: No.

Q: All right. And what did you do that evening? Let's start in the early evening hours, if you can relate those to the jury, please.

A: Okay. Before my husband went to work, Raquel had called and -- to ask if I wanted to go up to CG's with them and have --

Q: Excuse -- And I apologize for interrupting, when you say Raquel, that would be --

A: Raquel Brown.

Q: All right. Thank you.

A: To see if I wanted to ride up there with them and have a drink with them while Trent cashed his check. And to see if Megan could watch her kids while they went up there. And I talked it over with my husband and he didn't mind, so we went up there.

[p.80] Raquel and I went in my car to the grocery store to get stuff for Trent's lunch. And Trent and Troy went up and we met them at the bar. And Troy went over to The Peacock, and Trent and Raquel sat there and they didn't even finish their beer, and they went home.

Q: Excuse me. Now, is -- how many bars are there in Carlin?

A: Four.

Q: And --

A: The last I knew.

Q: All right. And this, you're talking about CG's --

A: Um-hum.

Q: And how do you spell that?

A: C-G's.

Q: Okay --

A: Just a C and a G.

Q: All right. Then also, did at some point you go to the -- a bar called The Peacock?

A: Yes.

Q: Would it be fair -- describe if you would, are those gathering points for people in Carlin?

A: Yes.

Q: After work people --

A: Um-hum.

Q: -- gather there and they meet there?

A: Yeah.

Q: All right. So you went to the CG's --

A: Yes.

[p.81] Q: -- with Raquel?

A: Um-hum.

Q: All right. What happened then?

A: We, Trent and Raquel and I, sat in the bar and got a drink, and they had a beer. They didn't even finish their beer and they went home.

Q: What were you drinking?

A: Seagram's 7 and Pepsi.

Q: All right. And that's, okay. And did you have an occasion to see the defendant that night?

A: Yes.

Q: Would you describe what he was wearing?

A: Jeans and boots, a western shirt and a black cowboy hat.

Q: All right. And where was the first place that you had seen the defendant that evening?

A: At Trent and Raquel's house.

Q: And how was he dressed then?

A: He'd just got off work. Just in jeans and boots.

Q: All right. And so, excuse me, describe to jury, please, what transpired then at the bar as far as what you saw, you -- did you engage the defendant, or did he engage you in any conversation at the bar that night?

A: Yes. At CG's I was on the phone with Megan. She had called me to let me know she was home and to see if they could put in a movie while they went to sleep so they could have noise. And I told her, "Yeah, go ahead."

And Troy came in and told me that she was looking for me and [p.82] that she was home. And I said, "Yeah, I know I'm on the phone with her now."

Q: Okay. Let me back up a little bit. So the first conversation you had with the defendant was at CG's or was --

A: At CG's.

Q: All right. And he approached you --

A: Yes.

Q: -- and told you what?

A: That my daughter was looking for me and that she was home.

Q: And at that time Megan had already called you --

A: Yes, I was on the phone with her at the time.

Q: Okay. And that's when she talked about leaving the video on for having something there?

A: Yeah.

Q: All right. At that time did you know if Megan was -- had -- so as far as you knew Megan was home with Dallas?

A: Um-hum.

Q: And you've let Megan baby-sit for Raquel and Trent Brown?

A: Yes, for about 20 minutes.

Q: All right. Now, what other conversations, if any, did you have with the defendant that evening?

A: We all went over, the people that I was with, my neighbors, went over to The Peacock and I played Troy a game of pool. And I lost so I bought him a drink and then I went over and sat by all my neighbors, and Troy came over there and was talking with everybody.

Q: Would you describe the sobriety or level of intoxication [p.83] that you noticed in the defendant?

A: He was pretty drunk.

Q: Do you know what he was drinking?

A: Kamikazes. That's the drink that I bought him.

Q: Okay. Can you tell me what a kamikaze is?

A: I sure can't.

Q: It's alcohol?

A: Yes.

Q: Anything other than the kamikazes?

A: Not that I noticed.

Q: All right. Do you know about how many of those he had?

A: I have no idea.

Q: Do you have an opinion as to his state of sobriety?

A: He was pretty drunk.

Q: And you've seen him drunk before?

A: Um-hum.

Q: All right. Did -- your conversation with the defendant, was it in any way unusual that night relative to other times?

A: The conversation wasn't, no.

Q: Okay. Was there something that was unusual?

A: He'd put his hand on my shoulder, just right at the top of my shoulder, which he'd never done that before. It was different. It wasn't -- I didn't feel threatened, but it just was different.

Q: Did you ever make any comment concerning his demeanor that night?

A: Not that I recall.

Q: All right. Do you recall then, approximately, the last [p.84] time that you saw Troy Brown that night?

A: Yes.

Q: Do you recall about what time it was?

A: No, I don't.

Q: All right. What, was it -- can you give me approximate -- all right. Let me ask you this, about what time did you receive the call from Megan asking you about the video and the fact that she was at home?

A: That was about 10:00, 10:30.

Q: Relative to that time, was it a very short time frame, or was it a long time frame that --

A: It was about an hour, hour and a half later.

Q: All right.

THE COURT: What was an hour and a half later? What are we talking about?

MR. SMITH: When the defendant left.

THE WITNESS: The last time I saw Troy.

THE COURT: All right. Thank you.

By MR. SMITH (continuing):

Q: Now, did you have a -- did you have an occasion to speak with Megan again that night by telephone?

A: Yes.

Q: Would you please describe to the jury what that was about.

A: She called me at The Peacock and said, "Momma, some--some man was here looking for you and he hurt me."

Q: Okay, what if -- what did you do? What did you take that to mean?

[p.85] A: I took it that somebody come over and was looking for me and may have jerked her out of bed, pushed her against the wall, and scared her.

Q: Okay. What did you do as a result of that?

A: I hang up -- I hung up the phone and ran out of the bar and drove home.

Q: Okay. And describe to the jury what you saw when you got home.

A: Megan was waiting for me, watching out her bedroom window. And she opened the door for me and she was covered with blood. She had blood in her hair, on her face and her arms. She was covered with blood from the waist down. She was crying. There was blood on the floor.

Q: And let me ask you this, do have any pets at your house?

A: Yes, I do.

Q: What kind of pets?

A: A black and tan lab -- dog.

Q: This a small dog or a big dog?

A: She's large.

Q: And how did, how does your dog react to strangers?

A: She barks.

Q: And how about -- how does she react to someone that has been in the house on numerous occasions?

A: If she knows them she doesn't do anything. She may lift her head up and look at them.

Q: Okay. Let me ask you this, going back when you arrived at home, what did you do when you saw Megan in that condition?

[p.86] A: I held her in my arms and helped her walk over to the phone and sat down with her and wrapped my arms and legs around her and called 911.

Q: Where was the dog at that time?

A: She was on the couch.

Q: Do you recall that the times that the defendant had been in your house, did he ever barked at -- had your dog ever barked at him?

A: She did at the -- at the beginning when he first started coming around.

Q: And then later would you see the -- him come in with the dog and what would be the dog's reaction?

A: She wouldn't do anything.

Q: You then went to the phone and whom did you call?

A: 9-1-1.

Q: Then what happened?

A: I remember telling the lady on the other end of the phone that my daughter had been hurt. Some man had come in the house, my address, my name, and then the next thing I knew she told me I would have to get up and let the police officers in. And I told her the door's unlocked, just have them come on in, I could hear them outside.

Q: Was the doors generally locked at your house?

A: Yeah.

Q: Did you know if the door was locked that night? After you had left, or after Megan had gotten home, do you know that?

A: Megan told me she had left the door unlocked for me.

[p.87] Q: All right. So you could get in?

A: Yes.

Q: Prior to this incident, would you describe how Megan's grades were in school?

A: She was on the honor roll every quarter.

Q: And would you describe how her -- what changes in her demeanor -- the way she handled herself after this incident.

A: After the incident she was taken into foster care. She would not go to school. She would be sick. She wouldn't do anything unless it was just right there in the house.

When she came back home, I put her in school in Utah. She's very, extremely protective over other people, to the point where it's getting her in trouble now at school because other fourth grade boys don't want her to mother them. She'll do anything to keep anybody from being hurt.

Q: How about her sleeping habits?

A: She wakes up screaming in the night. She pees the bed almost every night now. She walks in her sleep. She will not sleep alone.

Q: All right. Thank you, Ms. Henle, that's all I have.

THE COURT: Cross-exam?

CROSS-EXAMINATION

By DAVID B. LOCKIE:

Q: Do you know what time you received that second call from Megan at the bar?

A: No, I don't.

Q: Okay. Have you previously told anyone what time it was [p.88] that you left?

A: That I left?

Q: Well, I'm sorry. Have you told anyone before, what time it was that you got the call?

A: It was about 12:00, 12:30, I think.

Q: All right. What I wanted to know is have you ever told anyone before that you received the call at a particular time?

A: No.

Q: You haven't? All right. Do you recall testifying at the preliminary hearing?

A: Yes.

Q: All right.

MR. LOCKIE: Your Honor, may the witness be shown the preliminary hearing transcript, page 15?

THE COURT: Page what now?

MR. LOCKIE: Page 15.

THE COURT: What lines?

MR. LOCKIE: Line 17. I'm sorry starting at line 14.

THE COURT: Anyway, just read this to yourself. Start at line 14 and just read down here with me. I'll hold it for you.

THE WITNESS: Okay.

THE COURT: Okay

By MR. LOCKIE (continuing):

Q: Do you recall that as being your testimony --

A: Yes.

Q: -- at the preliminary hearing? And what time did you testify at the preliminary hearing that you believed that you'd [p.89] received the phone call?

A: Pardon me?

Q: What time did you testify at the preliminary hearing that you believed that you had received the phone call?

A: What time --

Q: Correct.

A: -- at the preliminary hearing?

Q: When you testified at the preliminary hearing, what time did you testify that you believed that you received the phone call?

A: About, well it was about an hour and a half after her first phone call, that would be 12:00, 12:30.

Q: Okay. Do you recall, that I asked you -- do you recall approximately what time that was in reference to the phone call?

A: Yes.

Q: All right. And you recall your answer being, "I'm not really sure. About 12:30."

A: Yes.

Q: Why are you a little more hesitant now than -- to say the time?

A: Just nerves.

Q: Okay. So is there anything inaccurate about your 12:30 statement?

A: It was about approximately between 12:00 and 12:30, I don't really know. I didn't have a watch on that night.

Q: When you got home, where actually, was Megan?

A: She was in her bedroom, looking out the window.

Q: She had a towel between her legs at that time?

[p.90] A: I don't recall.

Q: Was there any way you could tell how much time had gone on between when she was attacked and when you got the call?

A: No. I'd have no idea.

Q: And then, where were you parked?

A: Where was my car parked?

Q: Right.

A: At CG's.

Q: At CG's?

A: Yes.

Q: So, when you got the call you had to leave the --

A: Leave The Peacock and run across the street to CG's.

Q: And then I take it, when you got home the police had not yet been called?

A: No. Megan just called me.

Q: Do you know roughly how long it took you to leave the bar and get home?

A: I'd have no idea.

Q: And after you called 911, how long did it take anyone to respond, do you know?

A: I was still on the phone with 911 when the police arrived.

Q: All right. Did you spend some time with them on the phone, or was it just a matter of seconds?

A: It didn't -- just a matter of seconds.

Q: And when you got home, was there blood on the floor?

A: Yes.

Q: In different places?

[p.91] A: Yes.

Q: Where did you see blood on the floor?

A: In the bathroom, in the foyer, as you walk in the front door. She had laid a towel out by the -- by -- in the living room by the phone so she could call me and wouldn't make a mess in the living room.

Q: Were there a number of -- and all that was done by the time you arrived?

A: Yes.

Q: Are there a number of clocks in your home?

A: Yes.

Q: How many clocks were in your house last January?

A: Approximately five.

Q: Were all those clocks, were they digital type clocks?

A: Three of them are digital and two of them are regular clocks.

Q: Okay. Where are the digital clocks located?

A: There's one in Megan's bedroom, and two in my bedroom.

Q: Do you know how much time went by between when you got home and when you called 911?

A: Long enough for me to grab a hold of her and walk her to the floor. Probably 30 seconds.

Q: All right. So it was right away?

A: Yes.

Q: Now, that night in the bar, did you notice anything unusual about Troy's behavior?

A: Yes. He walked in the bathroom when I was in there, in [p.92] the women's bathroom.

Q: All right.

A: Which that's strange for anyone to do.

Q: Okay. Are the cigarette machines located over near that area?

A: Well, there's a main room where the tables and the pool tables are, and just right around the corner is

a cigarette machine, and then you have to walk down a hall, maybe ten feet, and turn a -- turn and go in to the women's bathroom.

Q: Did Troy make any sexual advances towards you that night?

A: Not -- I didn't take them as that, no.

Q: I believe you said that he behaved as a perfect gentleman, is that right?

A: As a gentleman, yes. He's always treated me that way.

Q: All right. And up to this time, had Troy ever done anything at all that caused you any concern that he might be a danger to you or Megan?

A: No.

Q: And that night in the bar, did he seem angry or upset at all?

A: Not that I noticed.

Q: All right. Did he seem happy?

A: Yeah.

Q: Did you notice on Troy, any strong odor of cologne or aftershave?

A: No.

Q: And you did dance with him once, didn't you?

[p.93] A: Yeah. Yes.

Q: Did you notice if Troy was clean shaven that night?

A: I think he was.

Q: Do you testify that Troy had on a western shirt, is that right?

A: Yes.

Q: And you remember that?

A: I think he did.

Q: All right. Has that been on further reflection?

A: Pardon me?

Q: Well, have you -- is that something that came back to your memory recently?

A: I think so. Sometimes it all just runs together.

Q: Okay. Do you recall testifying that you did not remember the type of shirt that Troy had on?

A: I think it was a color of shirt that I didn't know.

MR. LOCKIE: Your Honor, may the witness be shown the preliminary hearing transcript at page 28, lines 7 through 14?

THE COURT: Okay. Well, just read this to yourself here. Through this area.

By MR. LOCKIE (continuing):

Q: Do you recall testifying at the preliminary hearing?

A: Yes.

Q: All right. And did I ask you, "Do you remember anything distinctive about his clothing?" And your answer was, "No." Is that right?

A: Maybe I just assumed that because that's what he usually [p.94] wore.

Q: All right. But your answer was no, though, is that right?

A: Yes.

Q: And then, I asked you, "Do you remember the type of shirts that he had on?" And your answer was what?

A: No.

Q: No, right? And actually your answer was, "No, I don't." Wasn't it?

A: Yes.

Q: Okay. And then, have you, like, reflected on that further since that time, is that why you're testifying now that he had on a western shirt, or don't you remember?

A: I think he did. I couldn't say for sure.

Q: You spent most of your time at CG's that night, right?

A: Yes.

Q: All right. And at what time did you get to CG's?

A: About 7:00 o'clock.

Q: All right. And was there any time that you were not at the bar between 7:00 and the time you left at 12:30?

A: I went to the grocery store with Raquel before we got to the bar.

Q: All right. And then what time did you get back to the bar?

A: Just maybe 15 minutes later.

Q: Okay. And do you recall how much you had to drink that night?

A: Probably five or six drinks.

[p.95] Q: Those were Seagram's and --

A: And Pepsi.

Q: -- Pepsi? Was it your intent to go home earlier than when you actually did?

A: Yes, it was.

Q: All right. What time did you plan to go home?

A: Well, I told Raquel that if she didn't want to watch the girls any more to call me and I'd come home.

Q: Okay. Why did you decide to stay later?

A: I just got to talking to people.

Q: Partying?

A: Yes.

Q: You had this Doberman dog, where was --

A: No, she's not Doberman.

Q: Oh, I'm sorry. What kind of dog is it?

A: Black and tan Lab.

Q: Oh, I'm sorry. Where did the dog normally stay?

A: Out in her pen.

Q: Okay. That night was the dog out in the pen?

A: No, she was in the house.

Q: Okay. Was she out in the pen when you left the house?

A: No. She was in the house.

Q: Was it Megan's custom, or habit, to sleep with a night light on in the bedroom?

A: Yes, it was. It was both of them that wanted the night light.

Q: Could you describe that night light?

[p.96] A: It was a make-up mirror that I had given them. There's three mirrors and two rows of lights on it.

Q: Okay. How did they normally arrange that night light?

A: It was positioned to where it would shine in the corner by the closet and light that area up.

Q: Okay. And when you came home, what was the condition of that light?

A: It was turned off and it was facing the window right by their bedroom door, which is the opposite corner of where they'd shine it on.

Q: All right. Did it look, then, that the light was moved from it would normally have been?

A: Yes.

MR. LOCKIE: Your Honor, may I have the clerk hold the Exhibit 1 for the witness?

THE COURT: Okay. Exhibit 1 --

CLERK: This is 2.

THE COURT: Two

MR. LOCKIE: Two. I'm sorry.

THE COURT: All right. Two. There's your pointer again.

By MR. LOCKIE (continuing):

Q: Where are the bathrooms located in the trailer?

A: There's one right here, and the other one -- the master bathroom is there.

Q: Okay. And is there a door to the bedroom that's near the bathroom that you just shined the light on?

A: To this one?

[p.97] Q: No. By Megan's bedroom.

A: By Megan's bedroom. This right here's the doorway, and there's the doorway to their bedroom.

Q: Are there two different rooms that are to the left there of the bedroom, or is that partition --

A: Right here?

Q: -- supposed to be there?

A: Is the foyer.

Q: Okay.

A: And then you go into the bathroom door.

Q: All right. So that whole room's the bathroom?

A: Yes.

Q: And what's that little line that you see in the middle of the bathroom?

A: Right here?

Q: Right.

A: That's -- the sink is right here and the bathtub is right here.

Q: There's not a wall?

A: And there's a shower. It's -- there's a full wall, but it doesn't go clear across.

Q: Okay. Is there a light in that bathroom?

A: Yes.

Q: Where is the light located?

A: About right there.

Q: Okay. And what type of light is it?

A: It's just an overhead light, a ceiling light.

[p.98] Q: Do you know whether it's one or two bulbs?

A: I think it's two, but I'm not sure.

Q: All right. Did Megan normally sleep with that light on?

A: Yes.

Q: And if that light -- Well, why, first of all?

A: She was afraid of the dark. Dallas was afraid of the dark. If they needed to get up in the night, they wouldn't trip over anything in the hall. That's where we kept our boots and --

Q: Did that light provide some illumination into Megan's bedroom?

A: Very little.

Q: Okay. But some?

A: Yes.

Q: Where is Megan's bed located in that bedroom?

A: Along this wall here.

Q: Okay. If the light from the living room is on, does that provide any additional illumination into Megan's bedroom?

A: Yes.

Q: Assuming her door's open, right?

A: Yes.

MR. LOCKIE: Thank you. That's all I have with that exhibit, your Honor.

By MR. LOCKIE (continuing):

Q: Did Troy show any particular interest to you that night, and the fact that your children were home alone?

A: No. He just told me that my children were looking for me and they were home.

[p.99] Q: And did he later discuss that with you at all?

A: No.

Q: Do you know a Dave Prescott?

A: I believe I've heard the name before, but I couldn't put a face to it.

Q: You don't know who he is?

A: No.

Q: Had Trent Brown been to your house before?

A: Yes.

Q: About the same number of times or less or more than Troy?

A: Probably about the same, maybe a little less.

Q: All right. And who was better friends, as far as you know, Troy or Trent, with your husband?

A: They were both about the same.

Q: Okay. Did Trent work with your husband as well?

A: Yes.

MR. LOCKIE: I have no further questions.

THE COURT: When you got that second phone call from Megan, did you leave immediately?

THE WITNESS: Yes. I hang up -- hung up the phone and ran out.

THE COURT: So between that time and you were calling 911, how much time, approximately, would have elapsed?

THE WITNESS: Not even five minutes.

THE COURT: Redirect, Mr. Smith?

MR. SMITH: Yes. If I could ask the witness to -- I'd like to have her mark on the diagram. Depart the stand and maybe put [p.100] the -- I'm asking for number 2 there. If she may depart the stand, Judge.

THE COURT: Well, we can -- just you want her to mark them?

MR. SMITH: Yeah.

THE COURT: Why don't we have the clerk mark them for her as she --

MR. SMITH: That'd be fine.

REDIRECT EXAMINATION

By MARSHALL S. SMITH:

Q: If -- You previously indicated where the bathroom was, would you point at that again, please.

THE COURT: There's two bathrooms.

By MR. SMITH (continuing):

Q: Yes. Where's the bathroom off of your bedrooms?

A: Off of my bedroom is right here.

Q: Okay. There? Where's the other bedroom -- bathroom?

A: It's right here.

MR. SMITH: Okay. Ms. Clerk, if I could ask you to draw a line from the center of the bathroom, down below the trailer and write in the word "bathroom."

CLERK: Is this, right here?

By MR. SMITH (continuing):

Q: Is that the bathroom where you're pointing to?

A: The whole thing is to the door.

Q: Back?

A: From here, that's where you go into the bathroom at, the sink is right here, and the bathtub is right there.

[p.101] MR. SMITH: Okay, So, Ms. Clerk, if you understand, just a line drawn up and then the word bathroom up off the line. Perfect.

By MR. SMITH (continuing):

Q: And the front door to the residence?

A: This door here is the only one we used.

MR. SMITH: And if you -- Ms. Clerk, if you could draw a line from that front door and write the word "front" -- two words, door.

By MR. SMITH (continuing):

Q: All right. And where was the light that you were indicating in the bathroom?

A: It's approximately right here.

MR. SMITH: And if you could just put a red circle there, please, Ms. Clerk.

CLERK: This area?

MR. SMITH: Yes. Thank you.

For the record, the clerk has indicated on that exhibit, in red, what we've just been discussing.

THE COURT: Okay.

MR. SMITH: Thank you.

By MR. SMITH (continuing):

Q: Now, were you able to -- did you notice what other clothing the defendant was wearing that night? Was it a cold night, hot night --

A: Yes, it was cold. He had his CG's jacket.

Q: What color is that?

A: It's black, satin.

[p.102] Q: All right. And, now, you indicated that you had made the statement that he had acted like a perfect gentleman?

A: Yes.

Q: Why did you say that? Was he doing something?

A: No. Every time I've ever been around him, he has never insulted women, called them names --

Q: Okay.

A: -- or degraded them for anything I've been around.

Q: All right. Had he ever touched you before?

A: No, he never had.

Q: Had he ever followed you into the women's bathroom before?

A: No.

Q: Now, he also -- how -- did he ever offer to take you home?

A: Yes, he did, after he walked in the bathroom and I walked out, and he followed me back out. He said he needed to go home before he got into trouble and asked me if I needed a ride home.

Q: What did you mean that to mean -- What did you take that to mean -- before he got in trouble?

A: That he was drinking too much and he had to go to work the next day.

MR. SMITH: Thank you. That's all I have, Judge.

THE COURT: Redirect -- Recross?

RECROSS EXAMINATION

By DAVID B. LOCKIE:

Q: When he asked if you needed a ride home, did you take that to mean that could have maybe arranged a ride home for you?

A: No, he didn't have a vehicle there and he knew I had my [p.103] car there.

Q: All right. But there's other possibilities as well. For example, what if you'd had too much to drink and maybe you needed a ride home.

A: And I needed a ride home?

Q: Right. Exactly.

A: I never took it as that.

Q: Okay.

A: He never said anything further.

Q: Well, did he tell you, do you want me to take you home? or did he ask you if you needed a ride home?

A: If I needed a ride home.

Q: And I take it that you didn't consider that to be a sexual advance at this time, did you?

A: No.

MR. LOCKIE: Thank you. I have no further questions.

THE COURT: May this witness be excused?

MR. SMITH: Yes, judge.

MR. LOCKIE: I'd like her retained, your Honor.

THE COURT: Okay.

MR. LOCKIE: Just subject to call.

THE COURT: When can -- how can we do that?

MR. LOCKIE: I'll notify the DA's office.

THE COURT: Would you stay near the District Attorney's office for the next few days and you could stay over there so they can get ahold of you. That's the main thing. So from the hours of 9:00 to -- I guess we're going to have to do this until tomorrow, right? [p.104] That the earliest?

MR. LOCKIE: That'd be the earliest.

THE COURT: So as of tomorrow at 9:00, if you'd stay near the DA's office in case they need to get hold of you.

THE WITNESS: Okay.

THE COURT: Thank you for coming.

Okay. We'll take our noon recess at this point. During this recess we're about to take the jury is once again admonished as follows:

Do not converse amongst yourselves or with anyone else on any subject connected with this trial.

Do not read, watch, or listen to any report of the trial, or to any commentary on the trial, or to any person connected with the trial. This includes any medium of information such as newspapers, television, and radio.

Do not form or express any opinion on any subject connected with the trial until the case is finally submitted to you.

Do not visit the scene or attempt to make any independent investigations concerning this matter.

A violation of these admonishments may result in a mistrial and the unnecessary expenditure of significant public funds and your name in the newspaper.

Please resume the same seats each time you return.

If you, we'll go until 1:30, if you would be back in your jury room by 1:30, I'll try and call you right back in and keep going. You can keep your notes with you, or you can leave them in your seats, we lock the courtroom and everyone's admonished not to look [p.105] through your notes, and nobody ever has or will, but you can keep them with you or you can leave them in your seats, either way. Please be in your jury room at 1:30.

Court's in recess.

(Court recessed at 12:05 P.M.)

[p.106] WEDNESDAY, SEPTEMBER 28, 1994, 1:25 P.M.

THE COURT: Please be seated. The record will reflect the presence of counsel and the defendant. Counsel, will you stipulate to the presence of the jury.

MR. SMITH: For the State, Judge.

MR. LOCKIE: For the defense.

THE COURT: Mr. Smith, call your next witness.

MR. SMITH: The State will stipulate to the full presence of the jury and the alternates, also.

THE COURT: Okay.

MR. SMITH: Megan Allred.

THE COURT: Didn't I do that? Did I miss that? Okay. I thought I did it. Is her mother going to come with her?

MR. SMITH: No, Judge.

THE COURT: Megan, if you'd come up here, honey. And just a second. Why don't you just stand there for a minute. Face this lady and raise your right hand.

MEGAN TARA ALLRED,

called as a witness by the plaintiff, was sworn and testified as follows:

THE COURT: Would you pull that door open, and have a seat right there. And you try and talk into that microphone for me, okay?

THE WITNESS: Okay.

THE COURT: All right. I'm just going to turn it over to you, Mr. Smith.

MR. SMITH: Thank you, Judge.

[p.107] DIRECT EXAMINATION

By MARSHALL S. SMITH:

Q: Will you -- Megan, will say what's your whole name -- your full name?

A: Megan Tara Allred.

Q: And how do you spell your last name?

A: A-L-L-R-E-D.

Q: Okay. Megan, how old are you today?

A: Ten.

Q: And what's your date of birth? What's your birthday?

A: September 8, 1984.

Q: Okay. Now, do you have any brothers or sisters?

A: Yes, I do. I have two.

Q: Okay. And what are their names?

A: Dallas and Ivy.

Q: How old is Dallas?

A: Five.

Q: Okay. And how about your parents, what are their names?

A: Wayne and Pam Henle.

Q: Okay. Now, was there -- Let me ask you this, did you go to school out in Carlin?

A: Yes, I did.

Q: And what grade were you in?

A: Third, second and first.

Q: And, let me ask you this, what was your teacher's name in third grade?

A: Mrs. Matosich.

[p.108] Q: Okay. And do you remember what kind of house you were living at, when you living in Carlin?

A: Yes. I was living in a trailer.

Q: And who all was living there in the trailer with you?

A: Me and my mom and my sister and my dad.

Q: Okay. Now, let me ask you this, so how old are you today?

A: Ten.

Q: And are you going to school now?

A: Yes.

Q: And what grade are you in now?

A: Fourth.

Q: And what's your teacher's name?

A: Mrs. Johansen.

Q: Okay. All right. Now, Megan, you just, that lady over there just asked you, when you raised your right hand and you indicated that you'd tell the truth. Do you know the difference between telling the truth and telling a lie?

A: Yes.

Q: What's the difference?

A: Telling the truth means that you tell the truth and don't lie about it, because if you lie about it you can get in more trouble than you already are in.

Q: Okay. All right. Now, Megan, was there -- let's go back to the time that you were living in Carlin, okay? And do know a person by the name of Raquel?

A: Yes, I do.

Q: Who's that?

[p.109] A: It's my dad's friend's wife.

Q: And how do you know her?

A: Because my dad and her came over one night and they were playing guitars and stuff. And then we met her.

Q: Do you know if Raquel has any children?

A: Yes, she has two.

Q: And do you ever take care of those children?

A: Yeah, I have once.

Q: Okay. Let's go to that time, all right, when you were -- what are Raquel's children's names?

A: Cheyenne and Skylar.

Q: And how old is Cheyenne?

A: She's somewhere around a year old, somewheres then.

Q: And how about Skylar?

A: Six, seven.

Q: Okay. And you had taken -- you were asked to take care -- baby-sit these two children?

A: Yeah.

Q: And so you know how to change diapers?

A: Yeah.

Q: Okay. All right. And where were you baby-sitting, then. Where they -- did these -- did Skylar and Cheyenne come to your house or did you go to their house?

A: I went to their house, me and my sister did.

Q: All right. And about how long were you there baby-sitting?

A: About 45 minutes to an hour.

[p.110] Q: Then what happened? How long did you stay at Raquel's house?

A: For at least two or three hours playing, and then -- two hours for playing, and then the other one was baby-sitting.

Q: Okay. How did you -- then how did you get back to your house?

A: Raquel took me home.

Q: And that's a trailer, right?

A: Yeah.

Q: And, now, do you have a bedroom in that trailer?

A: Yes, I do.

Q: And who sleeps in the bedroom with you?

A: Me and my sister.

Q: And is there -- do you each have a bed?

A: Yes, we do.

Q: Okay. And which bed do you generally sleep in?

A: In the bottom.

Q: So there's a bed on the bottom and a bed on the top?

A: Yeah.

Q: And where does Dallas sleep?

A: On the top.

Q: And, so you went home that night, who else was home when you got -- when Raquel dropped you off?

A: Nobody except me and my sister.

Q: All right. And do you have any pets?

A: Yes, I did have. I had a dog and a cat.

Q: What was the name of your dog?

[p.111] A: Shebubs.

Q: What was that?

A: Yeah.

Q: I'm sorry, what was the name?

A: Shebubs.

Q: Shebubs, okay. How about the cat?

A: Screwball.

Q: Screwball, okay. And was Shebubs home with you that night in trailer?

A: Yes.

Q: And Megan, did something happen to you that night?

A: Yes.

Q: Would you -- were you -- Where were you? Did you go -- What time did you go to sleep that night?

A: I went to sleep around 11:00.

Q: Did you let your mom know that you were home?

A: Yes, I did.

Q: How did you do that?

A: I called her.

Q: And where did you know how to -- where did you -- where was she?

A: She was at The Peacock bar, talking to some of her friends.

Q: All right. And how did you have the phone number to that place?

A: We had a thing up on the refrigerator of emergency numbers where they might be.

[p.112] Q: Okay. And you went to bed that night in the bottom bunk?

A: Yeah.

Q: All right. And then did something happen to you then, later that night?

A: Yes.

Q: What happened to you, Megan?

A: I got raped.

Q: Okay. What do you mean by that?

A: I got hurt in a very bad way.

Q: Okay. Megan, do you know who did this to you?

A: No, I don't.

Q: All right. Can you describe in any way what this -- what this person looked like?

A: No, I can't.

Q: How long did this go on? Or do you remember?

A: For at least two hours.

Q: All right. And did -- tell me about -- was the door locked at the trailer?

A: No.

Q: What did you do when this person left?

A: I got up, I went into my sister's bed because I didn't think it was a big deal because I didn't know what it was. And so, because I would tell my mom in

the morning about it, but then she woke up and said, "Don't pee the bed," Because I think she felt the blood or something.

And then I went to see if my mom was there and she wasn't, and I went in the bathroom to see what was running down my leg and [p.113] stuff, and it was blood. So I went into the bathroom and I got a towel and laid it out on the floor, then I called my mom.

Q: How come you laid the towel down on the floor?

A: So I didn't stain the carpet.

Q: All right. Now, when this person was there, did this person -- Let me ask you this, what kind of clothing -- what were you wearing that night?

A: I was wearing a pair of stretch pants, and I was wearing a kind of turtle-neck shirt.

Q: And did any -- did this person do anything else to you?

A: Yeah. He choked me.

Q: What did you do when he choked you?

A: He choked me with my dad's sock, and then I went like this so he wouldn't choke me to death.

Q: And then what did you do?

A: I ---

Q: When you thought he was choking you, what did you do, how did you act?

A: I acted like I was dead, because we had butchered some pigs in our lives and I saw what they look like when they were dead, so I acted like that.

Q: Okay. Thank you, Megan, that's all I have.

THE COURT: Cross-exam?

MR. LOCKIE: Thank you.

CROSS-EXAMINATION

By DAVID B. LOCKIE:

Q: Megan, Megan, my name is David, and I'm just going to ask [p.114] you a few question now, and if you -- if you need to take a break or something that's -- that's fine, too.

A: I think I do.

Q: Do you feel like you need to take a break right now?

A: Yes.

THE COURT: Okay. We'll just all take a five-minute recess, and during this recess we're about to take the jury is once again admonished not to discuss this matter amongst themselves or with anyone else on any subject connected with this trial.

Do not read, watch, or listen to any report of the trial, or to any commentary on the trial, or to any person connected with the trial. This includes any medium of information such as newspapers, television, and radio.

Do not form or express any opinion on any subject connected with the trial until the case is finally submitted to you.

Do not visit the alleged scene or attempt to make any independent investigations concerning this matter.

A violation of these admonishments may result in a mistrial and the unnecessary expenditure of significant public funds.

Just take a brief recess and wait in your jury room, and when we're ready we'll all come back. Court's in recess.

(Court recessed 2:17 for 5 minutes)

THE COURT: Please be seated. The record will reflect the presence of counsel and the defendant. Counsel, will you stipulate to the jury?

MR. SMITH: For the State, Judge.

MR. LOCKIE: We'll stipulate.

[p.115] THE COURT: Okay, Mr. Smith, continue.

MR. SMITH: That's all the questions I have, Judge.

THE COURT: And I'm sorry we were on cross. Mr. Lockie.

By MR. LOCKIE (continuing):

Q: Megan, did your dog -- was your dog usually inside?

A: Yeah. Sometimes, sometimes in the summertime he was outside.

Q: And did you bring him inside with you that night?

A: No, I didn't. He was already in.

Q: He was already inside when Raquel brought you back to your --

A: Yeah.

Q: -- trailer? Is your dog a nice dog or a mean dog?

A: Sometimes she was nice, but sometimes she was mean.

Q: Did your dog like to bark at people?

A: Yes.

Q: Did your dog ever bark at people that your dog even knew?

A: Now sometimes she would bark at me or my mom or somebody, but if they were total strangers she would bark.

Q: And then, we know that you called your mom down at The Peacock, right?

A: Um-hum.

Q: Did you try to call your mom at CG's earlier?

A: Yes.

Q: What happened then?

A: Troy got on the phone and said she wasn't here, she was at the other bar.

[p.116] Q: Okay. And that -- but did you ever try and call CG's and get a busy signal on the phone?

A: Yeah.

Q: Did you try and call anywhere else looking for your mom?

A: Yeah, The Peacock.

Q: Okay. And besides the bars, did you call anywhere looking for your --

A: Nope.

Q: Who is Raquel's husband?

A: Trent.

Q: All right. Did you know Trent?

A: Not really.

Q: Did you know Troy?

A: Not really.

Q: Did you know what both of them looked like, though?

A: Yeah.

Q: Can you remember at all, Megan, what the man's hair was like?

A: Yeah, because I mess with my dad's a little.

Q: All right. Did he have blond hair.

A: No, not really.

Q: Okay. Do you remember who Connie Walker is?

A: Yes, I do.

Q: Okay. Who is she?

A: She's the lady cop that works in Elko, and she's the only lady cop there.

Q: Okay. And do you remember that she asked you questions [p.117] about what the man looked like?

A: Yeah.

Q: Okay. Do you remember her asking you what color of hair the man had?

A: Yeah.

Q: Okay. And do you remember what you told Connie?

A: Either it had to be a dark black or brown, dark colored, because it wasn't blond.

Q: You told her that it wasn't blond?

A: Wasn't.

Q: Do you remember talking to an ambulance person?

A: Yes.

Q: Marilou?

A: Yeah.

Q: Do you remember that?

A: Yeah.

Q: And do you remember if she asked you what the man looked like?

A: No.

Q: Do you remember ever telling her what the man's hair looked like?

A: No, I didn't.

Q: Do you remember talking to a doctor who's a psychiatrist here in Elko, Dr. Murad?

A: Yeah.

Q: And do you remember whether you told him what color the man's hair was?

[p.118] A: No.

Q: Okay. When you told Connie Walker what color the man's hair was -- that you thought it was --

A: Yeah.

Q: -- were you telling Connie the truth?

A: What?

Q: Well, remember when Connie asked you what color the man's hair was?

A: She asked me, yeah.

Q: All right. And then when you told her what you told her, were you telling the truth then?

A: Yes.

Q: Do you remember a cop named Chris Murphy?

A: No, I don't.

Q: Okay. Megan, do you know the difference between what blond hair is and what dark brown hair is?

A: Kind of.

Q: Okay. What's the difference?

A: The shades of the color, and like some are -- feel different.

Q: All right. Which color hair is like a lighter color, blond or dark brown?

A: Blond.

Q: What's the lightest color of hair that a person could have, do you know?

A: Well, a light, light blond.

Q: Light blond?

[p.119] Megan, can you remember whether the man's hair was straight or curly?

A: It was curly at the bottom, kind of.

Q: Okay. And do you remember how long it was?

A: It was about to here.

Q: All right.

MR. LOCKIE: Your Honor, for the record, may it reflect that Megan touched her left collarbone.

THE COURT: Any objection?

MR. SMITH: No, that's fine.

THE COURT: The record will so reflect.

By MR. LOCKIE (continuing):

Q: Did you touch the man's hair?

A: No, I didn't.

Q: Okay. Not at all?

A: Actually, I can't remember.

Q: Do you remember if the man was wearing a coat?

A: Not really, but I think he was.

Q: All right. Did the coat have a zipper on it?

A: I'm not sure.

Q: Okay. I want to ask you again if you -- do you remember when you were talking to Connie Walker?

A: Yeah.

Q: The lady police officer? Do you remember if she asked you if the man had a black coat on?

A: She did.

Q: All right. Well, she asked -- do you remember that she [p.120] asked you whether the man was wearing a coat?

A: Yeah.

Q: Okay. And can you remember what you told her?

A: I think I said yes, I think.

Q: Okay. Well --

A: He was.

Q: Okay. And when you were talking to Connie then, were you telling the truth?

A: Yes, I was.

Q: And do you remember if Connie asked you whether the man's coat had a zipper on it?

A: No, I don't.

Q: You didn't tell Connie Walker any lies at all, did you Megan?

A: No, I didn't.

Q: Okay. Megan, do you know what it smells like when someone's been drinking alcohol?

A: Yeah.

Q: Okay. How do you know that?

A: Because my dad's drunk before, and my grandpa does, and my Uncle Mike does, and when they spill it, it stinks real bad.

Q: Okay. And have you ever smelled it just on a person when they've been drinking?

A: Yeah.

Q: Even if they haven't spilled anything?

A: It either had to be beer or cologne or something.

Q: All right. Did the man who -- that night, did he smell [p.121] like he'd been drinking?

A: Yeah. His breath did, and also, he stunk real, real bad.

Q: Did he smell like he had cologne on?

A: Either that or beer, one of the two.

Q: Cologne or beer?

A: Yeah.

Q: All right. Is beer alcohol, Megan?

A: Yes, it is.

Q: Do you remember talking to Connie Walker about whether the man smelled like he had alcohol.

A: Yes, I did.

Q: And do you remember what you told Connie about that?

A: Uh-huh.

Q: What did you tell Connie?

A: I told her that it either had to be some gross smelling -- or I mean cologne, or some beer or puke or something.

Q: Did you tell Connie that he didn't smell like he was drinking alcohol?

A: He -- he was drinking alcohol, I think.

Q: When you were talking to Connie --

A: Yeah.

Q: -- again, you remember that? Do you feel like you were able to remember stuff pretty well then?

A: Yeah.

Q: And that wasn't -- I'm sorry.

A: That's okay.

Q: That wasn't too long after this happened that you talked [p.122] to Connie, was it?

A: No. In fact it was only like three days, four days after.

Q: And do you think that you might have remembered everything that happened back then, better than you remember it now?

A: Yeah.

Q: Okay. So, well -- Did your face get scratched at all that night?

A: Yes, it did.

Q: Which side of your face did?

A: In fact it was right here and I still have a scar.

Q: And do you know what scratched it?

A: No, I don't.

Q: All right. Do you remember telling Connie that a watch scratched it?

A: No, I don't.

Q: Do you think that a watch scratched it?

A: I don't even know if he had a watch on.

Q: Okay. You don't know what scratched it then?

A: Huh-uh. I think it happened when I blacked out or something.

Q: Was it right at the end when the man choked you?

A: No, he had been choking me all the way through.

Q: Okay. You said that the thing that you were choked with was your dad's sock, right?

A: Yes.

Q: Okay. How do you know it was your dad's sock?

A: Because he's the only person in the family that wears a [p.123] big, old, long sock, that's fuzzy.

Q: Okay. Did you see the sock later?

A: No, I didn't.

Q: Did you ever actually see the sock?

A: No, I didn't.

Q: When you went to bed that night, did you leave any lights on?

A: Yes, I did.

Q: What lights did you leave on?

A: I left my mom's, the bathroom, the living room, and the TV one and the little mirror light in my room -- make-up mirror.

Q: And did you leave your -- was your door open?

A: It wasn't open, but it -- it was shut, but it wasn't locked.

Q: Okay. And did the man open the door as far as you know?

A: As far as I know, yes.

Q: Do you know if the door was open when all this was happening to you?

A: Uh-huh. No, he didn't, I don't think.

Q: Okay. Do you know if that little make-up mirror was on when this was happening to you?

A: Yes, I do know, it wasn't.

Q: It was not on?

A: No.

Q: So somewhere it got turned off?

A: Yeah, or the batteries had run down.

Q: Did you have the little light on when you went to bed, [p.124] though?

A: Yes.

Q: Did you bite the man, Megan?

A: I think I did.

Q: If you can remember, do you know how hard you bit him?

A: No, I don't, but I think I tried to do it very hard.

Q: Was the man skinny, Megan; do you know?

A: No, I don't.

Q: And do you remember telling Connie Walker whether he was skinny?

A: Not really.

Q: Did the man remind you of Trent?

A: A little.

Q: What was it about Trent that reminded you?

A: I don't know. I got close to him one time, or something, and he smelled kind of the same.

Q: Like the same type of cologne?

A: Yeah.

Q: And how about his hair? You have to answer out loud, Megan, because there's a tape recorder.

A: Yes.

Q: Did Trent have hair that's different than Troy?

A: Not too much.

Q: Okay. How, if any way, was Trent's hair different than Troy's hair?

A: One was kind rough and one was kind of smooth.

Q: Okay. And was it Trent's hair that was kind of rough?

[p.125] A: No, it was Troy.

Q: Troy's was kind of rough?

A: Um-hum.

Q: And Trent's was kind of smooth?

A: Yeah.

Q: Do you remember getting some flowers?

A: Yes, I did.

Q: Who sent you the flowers?

A: Raquel and Trent.

Q: All right. And did you think it was kind of funny that you got the flowers?

A: Uh-huh.

Q: Why did you think it was kind of funny?

A: I don't know.

Q: Did you think that it was Trent then?

A: Well, at first I thought that they were so nice and stuff for sending it to me, and then after I started to figure stuff out, then I thought it was kind of weird.

Q: And then, do you remember that you'd just happened to be watching TV when it came on the news that they'd arrested somebody?

A: They hadn't arrested anybody, it was just --

Q: A suspect?

A: Yeah.

Q: Okay. And then, do you remember telling somebody that you thought you knew who did it?

A: Yes, I did. I remember telling Connie.

Q: Telling who?

[p.126] A: Connie.

Q: Okay. And did they come over and show you some pictures?

A: Yes, they did.

Q: Okay. And was Troy's picture in there, then?

A: Yes, it was.

Q: All right. And at that time, did you say it was Troy who did it?

A: Yeah.

Q: You did? Oh. Are you positive about that, Megan?

A: Uh-huh.

Q: Okay.

A: But then I --

THE COURT: Why don't you just point out your -- Excuse me. You're asking kind of two questions. Is she positive it's Troy, or is she positive she said that to Connie. I think you ought to clear that up.

By MR. LOCKIE (continuing):

Q: Are you positive that you said that to Connie?

A: Yes, I am.

Q: Do you remember telling Connie that, no, that wasn't the man, when you looked at Troy's picture?

A: No, I don't.

Q: And do you remember telling Connie that it was Trent because he'd sent you flowers?

A: I kind of thought out of those two men -- I just thought even more.

Q: Do you remember it -- going and getting the card, the [p.127] little card that the flowers came on?

A: No, I don't.

Q: Do you know what I'm talking about when I say the little card?

A: Yeah, the little floral shop card.

Q: All right. Do you remember getting that card for the police to show them who you meant?

A: No.

Q: Did you know Trent and Troy's other brother, Travis?

A: No, I didn't.

Q: Do you think that what you told Connie would be the very best place to look to find out what you really, really remember?

A: Yeah. Yeah. Yes, I do.

Q: Even better than what you might remember now?

A: Yeah.

MR. LOCKIE: I have no further questions, Judge.

THE COURT: Redirect?

MR. SMITH: I have no questions, Judge.

THE COURT: Okay. May this witness be excused?

MR. LOCKIE: We'd ask that she be retained, Judge.

THE COURT: Okay. You're going to keep an eye on her, Mr. Smith?

MR. SMITH: No, Judge.

THE COURT: Who -- you want me to have them go send her to the defense office, or what do you want me to do?

MR. SMITH: This has been -- Yeah, I would, Judge.

THE COURT: Wait just a second.

[p.128] Honey, why don't you go sit outside and stay with your mom, and just have her wait outside for a minute. Thank you for coming today, honey. Bye-bye.

MR. SMITH: Judge, if you want her and her mother to be in contact with my office, I can do that.

THE COURT: Yeah. So tell them to stay in contact with the District Attorney's office, and where they can be gotten hold of right away, and if they need to to come back, they'll have to come back.

MR. SMITH: Okay, but not -- she doesn't have to stay at the office.

THE COURT: No. Well, no, just as long as you can get ahold of her. And you can clear that up with them after.

Let's call your next witness, Mr. Smith.

MR. SMITH: Thank you. Steve Pennino.

THE COURT: Please come forward. Face the clerk and raise your right hand.

STEVEN MICHAEL PENNINO,

called as a witness by the plaintiff, was sworn and testified as follows:

THE COURT: Sir, have a seat right here in this box there. What's your full name?

THE WITNESS: Steven Michael Pennino.

THE COURT: How do you spell your last name?

THE WITNESS: P-E-N-N-I-N-O.

THE COURT: Okay. Go ahead, Mr. Smith.

MR. SMITH: Thank you.

[p.129] DIRECT EXAMINATION

By MARSHALL S. SMITH:

Q: Sir, what is your -- where do you live?

A: Where do I live?

Q: Yes.

A: I live in Spring Creek mobile home section.

Q: And are you currently employed?

A: Yes.

Q: And what -- how are you employed?

A: I am employed with the Juvenile Probation Department in Elko County

Q: And how long have you been so employed?

A: Since March of this year.

Q: Prior to that, how were you employed?

A: I was a bartender at The Peacock Lounge in Carlin.

Q: And how long had you worked at that occupation?

A: From October 30th to end of February.

Q: Okay.

A: This year.

Q: And where were you living at that time?

A: Same place -- Spring Creek.

Q: Okay. So, is that your normal occupation, is a bartender?

A: I fill it -- I do it to make ends meet sometimes --

Q: Okay. You're --

A: -- between jobs.

Q: All right. Directing your attention to the end of January of 1994, were you working in the capacity as a bartender at the -- [p.130] at the bar?

A: Yes, I was.

Q: During your course of performing your duties in that capacity, did you come to know a person by the name of Troy Brown?

A: I did know -- I didn't know him, I knew of him, we conversed. I've served him sometimes. I didn't really know him.

Q: If you were to see him again, would you recognize him?

A: Oh, yes.

Q: Is he in court today?

A: Yes, he is.

Q: Would you point to where he is?

A: Right over there.

THE COURT: The witness has pointed out the defendant.

MR. SMITH: Thank you.

by Mr Smith (continuing):

Q: And what was your regular shift that you worked?

A: I worked from 12:00 midnight to 8:00 in the morning.

Q: And on the evening of January 28th, or actually the early morning hours of January 29th, what shift were you working?

A: Midnight to 8:00 in the morning.

Q: And what -- do you recall what time you arrived at the bar that night?

A: It was approximately 20 minutes, quarter to 12:00. About 20 till, I was a little bit early.

Q: What time do you -- would you generally arrive at the bar?

A: Quarter till.

Q: And why would you arrive early?

[p.131] A: So I could get my bank counted out and so the swing bartender could leave on time, instead of having to work past midnight.

Q: And does it also give you a chance to look at the bar and how busy it is at that time?

A: Oh, sure. Sure.

Q: Did anything, or anybody, catch your attention when you arrived at work that night?

A: Well, as I pulled into the parking lot there was a fight going on, and it was unrelated to Mr. Brown. But I caught my attention that it was a busy night and there was a lot going on.

Q: Okay.

A: Before I even walked in the door.

Q: Do you recall when you first -- or did you know whether or not Mr. Brown was there that night?

A: Yeah. As soon as I walked in the door I saw him standing in front of the bar.

Q: And what, if anything -- did you notice anything unusual about him?

A: He was intoxicated, in my opinion. I'm not -- seen a lot of intoxicated people in my time.

Q: You have?

A: Yeah. I'm sure he was very intoxicated.

Q: Do you know what he was drinking that night?

A: Do not.

Q: Did you serve him any drinks that night?

A: No, I didn't.

[p.132] Q: All right. So there's a lot of people there, and do you recall a time when -- or do you know when the defendant, Mr. Brown, left the bar?

A: Yes.

Q: And what time was that?

A: I -- it couldn't have been past a quarter after. It couldn't have been later than that.

Q: Let me ask you this, you indicated that the bar was pretty full that night. How is it that you can say that you noticed him out of anybody else leaving?

A: Well, because I -- I mean, when I walked in, I noticed he was intoxicated and in the past, when he was in this condition, I got -- sometimes got kind of tense with other people he might be playing pool with, or -- and I was kind of, kind of -- when I walked in I kind of went, oh, no, I don't need this. So I noticed him.

Q: So you then keep an eye on him and you don't look at the customers?

A: Yeah, I kept an eye. I kept an eye on him, and it was a rowdy night all around, you know, so I had a lot -- a lot on my mind. But he caught my attention, definitely.

Q: Well, let me ask you this, I'd suggest you were, but were you drinking that night?

A: No. No.

Q: All right. And that's part of your duties, is that you don't drink at the --

A: No. No. Not to say I never did. But when it was, it was [p.133] very rare. And I'm a diabetic and drinking is not good for me so I rarely even take a drink.

Q: Okay. But, at least that night you weren't drinking?

A: No.

Q: Okay. So you said that was about 12:15, late as 12:20?

A: Yeah. It couldn't have been past that.

Q: And do you know a person by the name of Pam Henle?

A: Like I said, I know who she is. I know her as just seeing her around, you know.

Q: As a patron of your bar, also.

A: Yeah. Not very often. Probably in the four months I worked there I'd say I'd seen her three times.

Q: Okay. Now, after you noted that the defendant left at about 12:15 or 12:20, do you know if -- Well, let me ask you this, at the bar where you were working, where's the phone located?

A: The phone is located where you walk into the front door and it's right all the way to the back, and there's the rest rooms, near the cigarette machine, near the back entrance.

Q: Do you know whether or not Pam received a -- Ms. Henle received a telephone call that night?

A: Yes, I do.

Q: And how do you know that?

A: Somebody at the end of the bar answered the phone, called for Pam, I remember this, she answered the phone and, boom, she was out, out the door. I remember the time, it was -- it was just before 1:00 o'clock.

Q: All right. And why is it -- how is it, again, that you [p.134] can recall that?

A: I have a good memory, for one thing. The way she left was pretty abrupt. And it just -- and I can remember the -- what cocktail she ordered that night.

Q: What was that?

A: It was a Seagram's and Coke -- two. I served her one, I served her another that somebody else had bought, and she never drank it. She was gone before she had a chance to drink it. And I don't know how I remember this.

Q: All right. And, so as soon as she received that telephone call she --

A: I remember her words, "I gotta go." And she went.

Q: All right. Thank you, that's all I have.

THE COURT: Cross-exam?

MR. LOCKIE: Thanks.

CROSS-EXAMINATION

By DAVID B. LOCKIE:

Q: Was Troy rowdy or obnoxious in any way that night?

A: Kind of not standing right. As I was counting out my bank before midnight, I do recall turning my head

to the side, over towards the cigarette machine, and it appeared to me that him and Pam were having some sort of words. I don't know what they were, if they were good or bad, they weren't smiling. Whether he was rowdy or not.

Q: Did he cause any problems in the bar that night.

A: Nah. Not with me he didn't.

Q: Other than what you just said, did he cause any problems [p.135] with anyone else -- that night?

A: Not that I recall.

Q: Nothing at all, right?

A: Not that night, no. He was gone in a hurry. He was there, and then he wasn't. I didn't see him leave. I assumed he went out the back door, because I didn't notice. But that's just an assumption.

Q: And it was an extremely busy night, right?

A: It was pretty busy. Nothing I couldn't handle. See, it can be very busy and I can handle it, but once it starts to get rowdy, you know, you're -- that's when you have the problems. But it wasn't so busy that I couldn't handle the bar and know what was going on.

Q: Okay. And I -- did you tell Mr. Smith that it couldn't be a minute after 12:15 that Troy left?

A: It couldn't have been much after. If it was 12:20, then I'd spaced out five minutes somewhere, but I remember he was gone because I remember going like

that, he's gone. And I remember thinking, well, that's one less problem I have to worry about.

And it was just after I counted out my bank, after I had served a few cocktails. And it was a very busy night, a very rowdy night almost all night long. I had to eject a few people.

Q: Didn't have to eject Troy?

A: No, he was -- he ejected himself.

Q: Okay. What do you mean by that?

A: He left.

Q: Yeah, but why do you say -- what's -- why do you say he [p.136] "ejected himself"?

A: Well, because he did it of his own accord.

Q: Okay. But ejected's a fairly strong word and I was just wondering why you used that?

A: It just came to me. I, honestly, I wouldn't -- I wouldn't have served him another cocktail. I wouldn't have. And for The Peacock, that's rare.

Q: Was Troy wearing a hat that night?

A: Yeah, I think so.

Q: What kind of hat?

A: Black -- cowboy hat.

Q: Anything unusual about the cowboy hat?

A: Not that I noticed.

Q: Did it have a band around it?

A: I can't recall.

Q: Can you remember anything else that he was wearing?

A: I believe a long-sleeve shirt, but, you know, when it -- I'm guessing.

Q: Did he have a coat on?

A: I don't think so. I really don't know, it was -- I don't know. It was cold out, so --

Q: Were you wearing a watch that night?

A: No, I wasn't. Take that back, I don't know if I was wearing a watch.

Q: Do you normally?

A: I don't ever wear this one. I might have been. I really don't know. When you're washing glasses and things, you know, [p.137] sometimes it gets in the way.

I was more aware of the time because of my starting my shift right then, counting out my bank, my relief going home, and that sort of thing.

Q: Did your -- who did you relieve that night?

A: Scarlet.

Q: Okay. And did she stay at the bar afterwards?

A: You know, I don't recall.

Q: Okay.

A: Probably not for long.

Q: So you do remember that she stayed for awhile?

A: I don't remember that. Sometimes she would have a -- a one of those phony-type of beers without alcohol, and she usually left right away. Whether she did that night, I'm not sure.

Q: Where was the clock located in The Peacock?

A: The clock is located at the end of the bar, up on the wall. It's in -- it's in my view, only when I'm down at the far end of the bar.

Q: When you're at the far end of the bar?

A: Yeah.

Q: And where is that in relation to the pool table?

A: You can't miss it if you're at the pool table. You just look up and it's right there.

MR. LOCKIE: May I just have a moment, your Honor?

By MR. LOCKIE (continuing):

Q: Now, did you ever have occasion, in the past, to have to throw Troy Brown out of The Peacock.

[p.138] A: Never threw him out. I did kind of put my arm around once say, "Come on, Troy, give me a break." Never had to eject him.

Q: Okay. And do you have to eject people from time to time?

A: Oh, yes.

Q: But never had to eject Troy?

A: I never ejected Troy. I think I warned him once, or put my -- like I say, come on Roy--Troy, give me a break. You know, you know, him and I, I'll tell you, we -- we've never had bad words. We've smiled at each other, he even come by, back behind the bar one time and, you know, we always laughed together, I mean -- No, I never personally had a problem with Troy.

Q: All right.

A: Worried me sometimes, though, when other guys come around, they're playing pool and the game isn't going right, you know. But I guess, you know, you're nice to the bartender.

Q: Did you ever see him behaving rudely to women in any way?

A: No.

Q: Do you consider Troy to have been a regular?

A: A Friday night regular, maybe?

Q: Yeah.

A: Okay. I never -- I don't recall really seeing him during the week, it was a weekend sort of thing. And it wasn't every weekend.

Q: Had you served Pam any drinks that night?

A: Yes.

Q: Okay. What was she drinking, if you remember?

A: Seagram's and Coke, to the best of my recollection. Now I [p.139] don't always remember every drink, I just do this.

Q: How much was she drinking?

A: I served her one, personally, and I believe somebody bought another one for her, which she did not consume. Left it on the bar.

Q: Okay. And what time did you actually start serving drinks? I know you got there a little early to count --

A: It was probably midnight, right on the nose. I didn't usually like to jump in too soon.

Q: You know a fellow by the name of Dave Prescott?

A: I know about two or three Daves, last names I don't.

Q: All right. You remember a fellow sitting at the bar that night talking to Scarlet after she got off?

A: I sure don't.

Q: Okay. And did you know Trent Brown?

A: Trent?

Q: Right. Do you know any of Troy's brothers?

A: I -- Travis.

Q: Okay.

A: Travis -- I'd see him like on Friday nights sometimes, too. Coors Light.

Q: Okay.

A: I don't know if I should --

Q: That's fine. Do you know a Jason New?

A: Jason?

Q: Jason New, N-E-W?

A: No, not by the name. I probably would recognize these [p.140] people if I saw them

Q: All right.

MR. LOCKIE: That's all I have, your Honor.

THE COURT: Redirect?

MR. SMITH: I have no questions, Judge.

THE COURT: May this witness be excused?

MR. SMITH: Yes.

THE COURT: You may be excused. Thank you for coming, Mr. Pennino.

THE WITNESS: Thank you.

THE COURT: Call your next witness.

MR. SMITH: Leah Doke.

THE COURT: Ma'am, please come up here. Please come forward. If you would please face the clerk and raise your right hand.

MADONNA LEAH DOKE,

called as a witness by the plaintiff, was sworn and testified as follows:

THE COURT: Have a seat right in this little box. What's your name?

THE WITNESS: Madonna Leah Doke.

THE COURT: Your first name's Madonna?

THE WITNESS: Um-hum.

THE COURT: And your middle name is Leah?

THE WITNESS: Yes.

THE COURT: How do you spell that?

THE WITNESS: L-E-A-H.

THE COURT: And your last name?

[p.141] THE WITNESS: Doke; D-O-K-E.

THE COURT: Mr. Smith.

MR. SMITH: Thank you.

DIRECT EXAMINATION

By MARSHALL S. SMITH:

Q: Ma'am, are you employed?

A: Pardon?

Q: Are you employed

A: Yes.

Q: And what do you do for a living?

A: I'm a butcher.

Q: And do you live -- Where do you presently live?

A: In Carlin.

Q: And how long have you lived in Carlin?

A: For three years.

Q: Are you married?

A: Yes.

Q: And do you have any children?

A: Yes.

Q: How many children do you have?

A: Three.

Q: Were you -- So you were living in Carlin during the month of January of 1994?

A: Um-hum.

Q: And where -- what -- where do you live? What's the address of your residence?

A: At this present time?

[p.142] Q: Yes.

A: 521 Fir Street.

Q: Is that where you were living in January of 1994?

A: No.

Q: Where were you living in January of 1994?

A: #15 Yorkshire Villa.

Q: Okay. And Yorkshire Villa, is that a development of some sort?

A: It's a trailer park.

Q: Okay. And whom were you living with at that time?

A: My husband, Jay.

Q: And your children?

A: Yes.

Q: Directing your attention to the -- January 28th, 1994, was that a day of some significance to you?

A: Yes, it was.

Q: Why is that?

A: It was my anniversary.

Q: All right. And what, if anything, did you do to celebrate your anniversary?

A: We went to watch a show at the Red Lion.

Q: And when you say "we" whom are your referring to?

A: My husband and I.

Q: And what did you do with your children?

A: Two of them were at the baby-sitter's and one was staying the night at a friend's.

Q: And where was the baby-sitter's house?

[p.143] A: On Muchler and Puett, in Irvingtown.

Q Okay. And when you say "Irvingtown" what do you mean by that?

A: It's a trailer park type area, neighborhood.

Q: Okay. And what were the cross streets?

A: Muchler and Puett.

Q: All right. And do you recall what time -- So you went to Elko to see this show, and then you returned. Do you recall about what time you returned to Elko.

A: I returned to --

Q: I'm sorry, returned to Carlin.

A: Carlin? I -- we pulled up to the baby-sitter's, it was 1:05 -- was what was on the clock in our vehicle.

Q: Now, let me -- let me ask you this, how do you know that it was 1:05?

A: Well, I looked at the clock.

Q: Was there any other reason that you would be concerned about looking at the time?

A: Because I was paying the baby-sitter and it was late.

Q: All right. What time did you anticipate coming back?

A: Before midnight.

Q: All right. And what I'd like you to do --

MR. SMITH: Judge, I would like to show the witness a diagram. It would be number 3. Yes. And if I could ask the -- that is kind of small -- if I could ask her to depart the stand, Judge, take a look at that?

THE COURT: All right, If you'd just go ahead and walk down [p.144] there for us.

By MR. SMITH (continuing):

Q: Ma'am, I'd like you to take a look at that diagram and see if you can recognize what that is a diagram of.

A: It's Carlin.

Q: All right. And where is it that your baby-sitter was at?

A: You mean point it out?

Q: Yeah.

MR. SMITH: And Ms. Clerk, if you could hand Ms. Doke a black Magic Marker. Red'll be fine.

THE COURT: Let's get some more colors when we get a chance. Somebody make a note.

By MR. SMITH (continuing):

Q: Okay. If you would -- now if -- do you recall the -- First of all, who is the -- what's the name of your -- What was the name of your baby-sitter?

A: Vicki Gillespie.

Q: All right. And do you recall her address?

A: She's just on the -- I don't know what her number address is, but she's on Muchler and Puett, on the corner.

Q: Can you -- looking at that diagram, can you find her address and where her house is?

A: Yeah.

Q: All right. What I'd like you to do, if you would, is circle that in red, and then put a line up and write in the name "Gillespie," or no, write in the name "baby-sitter." Do you understand what I'm saying? It may not be clear.

[p.145] A: Yeah.

Q: All right. And now if you'd --

A: A line up here, maybe?

Q: Yes, please.

MR. SMITH: And for the record, Ms. Doke is just drawing, in red, the name "baby-sitter" attached to a line and circling a residence.

By MR. SMITH (continuing):

Q: Now, when -- would you tell me, please, what the street that you drove in to to get to your baby-sitter from the main street. What's the name of the main street there?

A: Chestnut? This one here?

Q: Yes, Chestnut.

A: Chestnut.

Q: That's right. And did you -- what street did you take off of Chestnut to get to your baby-sitter's house?

A: Puett Drive.

Q: And where's that?

A: We came in right here.

Q: Okay. If you would just, in red, trace the -- direction and the line of travel that you took to that address -- to Ms. Gillespie's residence.

All right. And for the record, and would you put a directional arrow, and what I'm just saying is two little lines off to each side, showing the direction. All right.

Now, as you were driving -- Who was driving, you or your husband?

[p.146] A: My husband.

Q: Had you been drinking that night?

A: Yes.

Q: And what had you been drinking?

A: I had a kahlua and cream.

Q: A kahlua and cream? All right. And as you were driving from Chestnut on to Puett, did you see anything unusual?

A: Well, we seen a gentleman coming down the road towards us.

Q: Okay. Would you describe about where it was that you saw this person.

A: Oh, it was about -- about right in here.

Q: Okay, if you could put an arrow pointing right at the location where you saw this gentleman --

THE COURT: How about using that other color, now that we got another color?

By MR. SMITH (continuing):

Q: All right. Why don't you use -- what color -- why don't you use -- see if that purple works. And you understand what I -- just a little arrow at the point where you -- where you saw him.

A: Right about in here.

Q: Okay.

MR. SMITH: And for the record, she's put a circle or a dot about --

THE COURT: Purple dot.

MR. SMITH: Purple dot.

By MR. SMITH (continuing):

Q: And all right. Would you describe -- Ma'am, you can take [p.147] the seat again, I'm sorry.

Now, would you describe, to the best of your recollection, what this person was wearing.

A: He was wearing a black cowboy hat, a black satin jacket, and dark jeans. I'm not sure if they were black or dark blue.

Q: And was he walking on the sidewalk, in the street, or where was he?

A: He was more towards the middle of the road.

Q: And were you able to -- did you make any other observations concerning him?

A: He was staggering.

Q: And when you say "staggering" was he -- what do you mean by staggering?

A: Well, he was not walking a straight line, he was walking pretty off, like he had had a few drinks, or --

Q: Okay. And then -- and so you drove by him, what -- What, if anything, did this person do as you were driving by?

A: Well, when we approached him he was towards the middle of the road, so we had to come off to the right to avoid hitting him. And he turned and veered off to his right between a couple of cars.

Q: Okay. And where was the clock that you noted the time with?

A: In the truck.

Q: Is it an analog, or one with hands, or is it a digital?

A: It's a digital.

Q: And then you picked up your children?

A: Um-hum.

[p.148] Q: And then you went home?

A: Yes.

MR. SMITH: All right. Thank you, that's all I have.

THE COURT: Cross-exam.

CROSS-EXAMINATION

By DAVID B. LOCKIE:

Q: Do you know whether the man that you saw is the gentleman seated to my right?

A: No, I don't.

Q: For how much distance would you estimate that you saw the person walking?

A: Oh, 20 feet or so, I mean, we were coming down the road and then all of a sudden there he was.

Q: All right. Short distance, then.

A: Yes.

Q: And you testified, also, at the preliminary hearing in this case --

A: Yes.

Q: -- didn't you? And do you remember you were shown an exhibit that looked like that?

A: Yes.

Q: All right. And do you remember that you made marks on where you saw the gentleman at the preliminary hearing, as well?

A: Yes.

Q: Do you remember if the mark that you put on the exhibit when you testified at the preliminary hearing was in any different place as you see the mark here?

[p.149] A: I don't remember. It was just approximate where it was.

Q: Okay. It was approximate then, or it's approximate now, or both?

A: Both.

Q: Would either have been more accurate, or less accurate?

A: No. They're right about in that area.

Q: Okay.

MR. LOCKIE: That's all I have, your Honor.

THE COURT: Redirect?

MR. SMITH: Yes.

REDIRECT EXAMINATION

BY MARSHALL S. SMITH:

Q: If I could ask you --

MR. SMITH: And I apologize to Judge, if she could depart the stand again and indicate, in purple, which direction the man was walking. With the purple pen, please.

THE COURT: Ma'am, next to the purple dot make an arrow which way he was going. With the purple pen.

MR. SMITH: All right. Thank you.

And that's all I would, Judge.

THE COURT: Recross?

MR. LOCKIE: Nothing based on that.

THE COURT: May this witness be excused?

MR. SMITH: Yes. For the State, Judge.

MR. LOCKIE: We'd ask that she be retained, your Honor.

THE COURT: Okay. Have you been into contact with her? How can we do this?

[p.150] Where are you going to be working the next couple days?

THE WITNESS: Owen's Market in Carlin.

THE COURT: And you do work there -- are you going to be working there tomorrow and the next day.

THE WITNESS: Yes.

THE COURT: What hours are you going to be there?

THE WITNESS: I'll be there 8:00 to 4:00 tomorrow, and 11:00 to 8:00 on Friday.

THE COURT: Okay. What's the phone number there at Owen's Market?

THE WITNESS: 754-6211.

THE COURT: So, I'm going to assume that you're going to be there. If we need to get ahold of you, we can call you there. And how about --

MR. SMITH: Judge, I apologize for interrupting. Mr. Lockie and I have just did a brief discussion. Mr. Lockie would like to have Ms. Doke look at the preliminary hearing transcript diagram, and I've indicated I have no objection to that, and I would be --

THE COURT: You want to just go outside of scope and get it done now?

MR. LOCKIE: That's what I'd like to do.

THE COURT: Sure.

MR. SMITH: And I have no objection.

THE COURT: Have a seat back here, we'll just try and get you done.

MR. SMITH: We need to ask the clerk to get that.

THE COURT: All right. What is it we're going to get?

[p.151] MR. LOCKIE: It's the diagram from the preliminary hearing.

CLERK: It's not in here.

THE COURT: All right. We'll just pause for a minute and I'll stay here. We'll wait for Stefanie to come back.

Okay. Why don't you just hold that for us all to look at, Stefanie. Why don't you just hold it, I guess set it up there. Why don't you pull it over to the left more where it can be compared with the first notations. There you go. That's fine.

Now, we can just enter that as an exhibit also, Mr. Lockie, if that helps.

MR. LOCKIE: That'd be fine, your Honor.

THE COURT: Is that enough?

MR. SMITH: Should we do that as 3a?

THE COURT: Is that okay?

MR. LOCKIE: That's fine, your Honor.

THE COURT: All right. And the 3 is the exhibit that Ms. Doke marked today, and 3a is the corresponding exhibit that was marked at the preliminary examination. Did she make all the marks on 3a, also?

MR. SMITH: No, she didn't.

THE COURT: Maybe we better have her tell us which --

Why don't you tell us, Ms. Doke, which marks did you make on 3a, this left-hand one.

THE WITNESS: The ones down below.

THE COURT: Did you make the green marks?

THE WITNESS: Yes.

THE COURT: The red mark there?

[p.152] THE WITNESS: Yes.

THE COURT: Did you make any other marks?

THE WITNESS: I think the blue, because that's where my friend lives that we had -- that's the reason we came that way.

THE COURT: Why don't you --

THE WITNESS: No. No, wait, it's not. It's down further. It's right across from the road there.

THE COURT: Why don't you step down there and Mr. Lockie, you better make sure we know -- you ask her the questions and we should know which marks she made on that prior exhibit.

RECROSS EXAMINATION

By MR. DAVID B-LOCKIE:

Q: The red X that's on Exhibit 3a? That's the one you're looking at now.

A: This one here?

Q: Um-hum.

A: Yes.

Q: What's that red X?

A: That was the approximate of where he was.

Q: All right. And the Judge already asked you which other marks you made on there. Can you get a better idea, now that you're able to be right next to it? Let's circle that.

A: I'm not sure if I did these or not. Can't remember.

Q: What is that that's circled in the lower right-hand?

A: This here? I don't know.

Q: Okay.

A: I just said I'm not sure if I did these or not.

[p.153] Q: Can you read on the exhibit what it is that's circled.

A: A "d".

Q: You have it -- is there like an address or --

A: Oh, I'm sorry. 1717.

Q: All right. Does 1717 mean anything to you?

All right. Then looking at the other place that's marked, what's marked there?

A: 1637.

Q: And does that mean anything to you?

A: That's Pam Henle's house.

Q: Okay. And then, just looking at the two other little marks up there, can you remember whether you made those?

A: These here?

Q: No, upper left-hand.

A: Oh. No.

MR. LOCKIE: All right. That's all I have, your Honor.

THE COURT: So, but you did make the green and red marks for sure?

THE WITNESS: Yes.

THE COURT: Okay. Why don't you --

MR. SMITH: And Judge, then if I may ask her if on 3a, would you take the red pen, please --

THE WITNESS: This is 3a?

THE COURT: I hate to mark it again.

MR. LOCKIE: Could we have a different color?

THE COURT: If you could, maybe before you mark it, you can tell us what we're doing.

[p.154] MR. SMITH: Well, what I want to do is outline the fact that her -- where she put her green line at the preliminary examination, showing her entrance into Puett, and where she put her red mark where she saw the man matching the description, is almost in the exact place. And I'd like to make sure that the record reflects that.

THE COURT: Now, it seems to me that anybody looking at this, the jury's just going to look at the two and just come to that conclusion, true or not, themselves. Is there -- I don't understand --

MR. SMITH: As long as we have it on the record that at the preliminary examination she used a green pen to mark her direction and line of travel to Ms. Gillespie's house and then at the preliminary examination she used a red pen to indicate where she saw this man.

THE COURT: Is that correct, Ms. Doke?

THE WITNESS: Yes.

THE COURT: Okay.

MR. SMITH: That's fine, Judge.

THE COURT: Anything else?

MR. LOCKIE: No, that's what was on the record.

THE COURT: All right. Anything else?

MR. SMITH: No, Judge.

THE COURT: Okay. Then you may be excused, Ms. Doke. Thank you very much for coming today.

Call your next witness.

MR. SMITH: Officer Mike Terry.

[p.155] THE COURT: Sir, please come forward. Please come forward, face the clerk and raise your right hand.

MICHAEL JOSEPH TERRY,

called as a witness by the plaintiff, was sworn and testified as follows:

THE COURT: Have a seat right in this box. Sir, what's your name?

THE WITNESS: Michael Terry.

THE COURT: I'm sorry?

THE WITNESS: Michael Joseph Terry.

THE COURT: Terry?

THE WITNESS: Um-hum.

THE COURT: How do you spell your last name?

THE WITNESS: T-E-R-R-Y.

THE COURT: Okay. Go ahead Mr. Smith.

MR. SMITH: Thank you.

DIRECT EXAMINATION

By MARSHALL S. SMITH:

Q: What is your occupation?

A: I'm a police officer with the City of Carlin.

Q: For the City of Carlin? And how long have you been so employed?

A: Approximately 13 months.

Q: And what are your duties as a police officer in Carlin?

A: Preserve public safety and --

Q: Primarily a patrol deputy?

A: Patrol.

[p.156] Q: All right. And what is your law enforcement experience, if any, prior to working for Carlin?

A: I worked for the Wayne County Sheriff's Department in Utah.

Q. All right. You were on-duty for the Carlin Police Department in -- during the month of January 1994?

A: Yes, I was.

Q: And did you become involved in an investigation of an assault -- Let me ask you this, when were you notified of this incident in Carlin on January 29th?

A: Approximately 1:15 a.m.

Q: And what, if anything, did you do as a result of -- Well, tell me, what did you do after you got the call?

A: I responded to the call.

Q: And where did you respond to?

A: 1637 Puett.

Q: And that's in the City of Carlin, County of Elko, State of Nevada?

A: Yes, sir.

Q: Explain to the jury what -- Were you on patrol alone that night?

A: Yes, I was.

Q: And you were in -- Please tell the jury what happened when you arrived at that address.

A: I entered the front door of the residence where I found the victim and her mother on the living room floor. The mother was holding the victim.

[p.157] MR. SMITH: And, if I could ask the clerk to show the witness Exhibit 1, please.

By MR. SMITH (continuing):

Q: Do you recognize who's depicted in that photograph?

A: Yes, I do.

Q: All right. And you indicated that -- Who is in that photograph?

A: Megan Allred.

Q: Is that the child that you saw at 1637 Puett at approximately 1:15 a.m.?

A: Yes, it was.

Q: Where -- Who else was in the residence when you entered?

A: As far as I know it was only those two.

Q: So you were the first one to respond?

A: Yes, I was.

Q: Do you know who came after you?

A: Yes, I do.

Q: Who was that?

A: Mike Skinner.

Q: And who is Mike Skinner.

A: He identified himself as an EMT when he arrived.

Q: All right. And what did he do? What did you observe him do?

A: He assisted the victim with her injuries.

Q: Okay. Where was -- when you walked in, tell the jury, were they sitting down, standing up, where was Megan and where was Pam Allred -- Pam Henle, I'm sorry.

[p.158] A: Pam Henle was holding Megan by the top part of Megan's body, the head and shoulders. They were laying in the living room floor when Mr. Skinner assisted Megan with her injuries.

Q: Were you able to hear the questions that Mr. Skinner was asking?

A: Yes, I was.

Q: All right. What questions was he asking Megan?

A: The first question he asked was where was she -- where was she hurt at, and she said her vagina area.

And then he asked her what had happened, and she said a man with sandy colored hair came in and started rubbing her bottom and her front. And she said that she could feel her stomach and it hurt .

Q: And this is when he was assessing her for medical purposes?

A: Yes, sir.

Q: Now, what did you do, then, when you arrived? What else did you do? Explain to the jury what was transpiring as you saw it.

A: As I assessed the victim and seen what had happened, then I called Officer Chris Murphy, which is a supervisor, to come to the scene and assist.

Q: All right. At some point was Megan transported away from that residence?

A: Yes, she was.

Q: And how do you know that?

A: Because I watched her go out to the ambulance.

[p.159] Q: All right. What did you do after Megan was transported in the ambulance?

A: I stayed at the scene.

Q: And what did you do?

A: I stayed there to start collecting evidence.

Q: All right. And tell the jury what you did.

A: I also called another officer out to assist me, and at that time I stayed there until he arrived, and then at that point we started collecting evidence throughout the living room area, the bathroom and the front bedroom of the residence.

MR. SMITH: Judge, if I may, I have a couple of slides I'd like to show the officer, along with some photographs.

THE COURT: All right. So start pulling the drapes. Stefanie, why don't you turn the lights out. Here's your pen thing's up there.

MR. SMITH: Now, if I could ask the clerk to show the witness Exhibits 5, 6, 7, 8, and 9. We might as well give him 10 and 11, also.

By MR. SMITH (continuing):

Q: Directing your attention, Officer, to State's Exhibit number 5, can you -- First of all, do you know which one number 5 is?

A: No, I don't.

CLERK: It should be the top one.

By MR. SMITH (continuing):

Q: Try that first one. Look at the back of it. Look on the back of the exhibit. What's the number?

[p.160] A: It's number 5.

Q: Would you describe what that is a photograph of. Can you see it?

A: Yes. That's the doorway to the front bedroom.

Q: All right. And does that photograph fairly and accurately represent the scene as you saw it that night?

A: Yes, it does.

Q: All right. Now, looking over your right-hand shoulder, is that a slide of the photograph you're holding?

A: Yes, it is.

Q: All right. Now using the pointer, would you direct -- would you show where the bedroom is that you're talking about.

A: Front bedroom's right in there.

Q: All right. And what type of bedding arrangements were in that bedroom?

A: They were bunk beds.

Q: Are the bunk beds shown in that photograph?

A: Yes, they are.

Q: Would you point them out? All right.

Now, directing your attention to State's Exhibit number 6, what is that a photograph of?

A: Bunk beds.

Q: All right. Does that photograph fairly and accurately depict the bunk beds as you saw them during the early morning hours of January 29th, 1994?

A: Yes, it does.

Q: Now, there's a slide on now. Is that a slide of the same [p.161] photograph you're holding as number 6?

A: Yes, it is.

Q: And that shows the bunk beds?

A: Yes, it does.

Q: Showing you State's Exhibit number 7, what is that a photograph of? Can you see it?

A: I can't see with the light.

Q: All right. Maybe if you could -- just flip it up.

A: This depicts a pair of red pajamas and white panties and a blue sock that was found together that I put in evidence.

Q: And where did you find those items?

A: They were on the bedroom floor.

Q: Next to those beds?

A: Yes.

Q: Does that photograph fairly and accurately depict the scene as you saw it on that day?

A: Yes, it does.

Q: Looking over your right-hand shoulder, is that a slide of the photograph you're looking at?

A: Yes, it is.

Q: And where are the -- you indicated there's some underwear and P -- pajamas, where are those? Would you please describe, and point to the -- on the slide to the jury where the underwear are.

A: The underwear are right in here.

Q: All right. Do a little circle around it, if you would.

Okay. And how about the pajamas?

A: Pajamas are this right here.

[p.162] Q: All right. And showing you number 8, is that 8? No, showing you number 8 --

A: That's 7.

Q: What is number -- photo -- what is number 8?

A: That's a photograph of the bathroom.

Q: Okay. And the bathroom in the trailer?

A: Yes.

Q: And does that photograph fairly and accurately depict the bathroom, as you saw it, on that date and time?

A: Yes, it does.

Q: Directing your attention, now, to a slide. Is that a slide of the same photograph depicted number 8?

A: Yes, it is.

Q: And so the -- Now, is that entire room, which is shown on the slide, is that the entire bathroom? Or where's the bathroom?

A: Right in here. This whole thing in here.

Q: Okay. So the door to the very right of the picture is the bathroom door?

A: Yes, it is.

Q: Okay. All right. And if you'd look, please, at number 9. What is that a photograph of?

A: Looks like a pair of underpants.

Q: All right. And can you tell where that photo was taken? I know you have a little hard time seeing it.

A: I can't tell.

Q: Okay. All right. I'd direct your attention now to number 10.

[p.163] MR. SMITH: And Judge, that's all I would need for the -- have the lights out.

THE COURT: All right.

By MR. SMITH (continuing):

Q: Let me ask you this, looking with the light on, now, look at number 9, again. Can you tell where that is?

A: Kind of looks like it's in the bathroom.

Q: Okay. Does that fairly and accurately depict the scene as you saw it on that date?

A: Yes, it does.

Q: Is that a slide of the same photograph?

A: Yes, it does. Yes, it is.

Q: All right. Okay. Now, I direct your attention to State's Exhibit number 10. You have that in front of you?

A: Yes, I do.

Q: Would you look at the contents of that and tell me what is in there?

A: It's a pair of white panties.

Q: Is that -- are those the same panties that are depicted in that photograph and that slide?

A: They look like they are, yeah.

Q: All right. Now, with reference to number 11, take a look at what's inside number 11. Do you recognize what is in that package?

A: Yes. These are the red pajamas.

Q: Now, with -- as far as number 10 goes, the underwear, and number 11, who physically picked those pieces of evidence up?

|p.164| A: I did.

Q: And what specifically did you do with them?

A: I put them in a paper bag, together.

Q: All right. Then how do you know that those are the two pieces of evidence that you picked up on the floor?

A: Because I marked them on that bag.

Q: Okay. Is that is -- I say that bag, number 11, is that the bag you used to mark?

A: Yes, it is.

Q: And how do recognize that?

A: From my writing.

Q: All right. Now --

THE COURT: How about number 10, it's the same thing?

MR. SMITH: Yeah, and number 10. I was asking -- I thought I asked about both them.

By MR. SMITH (continuing):

Q: Number 10, similarly, you put into that bag?

A: Yes.

Q: Do you know when number 10 was removed from that bag?

A: Yes, I do.

Q: And when was that?

A: This was approximately two days before the preliminary hearing.

Q: All right. And you were physically present?

A: Yes, I was.

Q: And you saw number 10, or the underwear, or the panties, taken from that bag and put into that other bag?

[p.165] A: Yes, I did.

Q: All right.

MR. SMITH: Judge, may I unplug this cord?

THE COURT: Yep.

By MR. SMITH (continuing):

Q: All right. What, once you collected the underwear and those pajamas, what did you do with them?

A: I took them down to the Carlin Police Station, booked them into Evidence.

Q: And then do you know what happened to them after that?

A: From there they were transported to Washoe County Crime Lab.

Q: Do you know who transported them?

A: I did.

Q: All right. And after you cleared from -- after you left that scene, what, if anything, did you do?

A: After --

Q: What other investigation did you do concerning this case?

A: After I went to the police station, I took the item that I had in evidence, put them in Evidence, then I went back to the crime scene to do further work. And I was notified by Officer Murphy to go interview Troy Brown.

Q: All right. Now did you know Troy Brown before?

A: Yes, I did.

Q: Before this incident? Where did you know him?

A: I knew him from Wayne County.

Q: That's in Utah?

[p.166] A: Yes, it is.

Q: All right. So you went over to the defendant's residence, where is that located?

A: 1717 Puett.

MR. SMITH: Now, if I could ask the officer to move off the stand and go to the -- number 3, Judge.

THE COURT: Okay. If you want to step down there. What was the date you took those items to the -- to wherever you took them? Do you remember?

THE WITNESS: To the crime lab?

THE COURT: Yeah.

THE WITNESS: It's February 1st.

THE COURT: Thank you.

MR. SMITH: And Ms. Clerk, what color's do we have left?

CLERK: Well, we have purple, yellow, and green.

MR. SMITH: All right. If -- no blue.

CLERK: No blue.

MR. SMITH: Okay. If you'd please give the officer the green marker.

By MR. SMITH (continuing):

Q: Officer Terry, looking at State's Exhibit number 3 there, what is that a diagram of?

A: It's a diagram of the east side of Carlin.

Q: And does that fairly and accurately represent the street layout and residential sections of that part of Carlin?

A: Yes, it does.

Q: Would you please point, or circle, in green, where -- the [p.167] residence that you went to where the defendant was residing.

And what is that residence?

A: 1717 Puett.

Q: And would you mark a little line from that circle and then underneath it write "defendant." You understand what I'm asking?

A: Um-hum.

THE COURT: That's enough. D-E-F's enough.

By MR. SMITH (continuing):

Q: And then, would you please -- What was the residence that you -- where Megan Allred was living?

A: 1637.

Q: And is that depicted on that diagram?

A: Yes, it is.

Q: Would you please draw a circle around that and then a line from that and write on there "Megan".

MR. SMITH: All right. And for the record the officer, has in green, circled both of the residences I asked him to and has written in "defendant" and "Megan".

THE COURT: That's correct.

By MR. SMITH (continuing):

Q: Now, would you also -- are you familiar with a commercial establishment known as The Peacock?

A: Yes, I am.

Q: Where is that located? Is that shown on that diagram?

A: Yes, it is.

Q: Would you please circle that also, in green, and put a line from it and write in "Peacock," please.

[p.168] Similarly, are you -- know of a commercial establishment known as CG's?

A: Yes, I do.

Q: Do you know where that is located in Elko -- in Carlin?

A: Yes, I do.

Q: Is that depicted on that diagram?

A: It's one of these numbers right here. I'm not sure exactly which one.

Q: All right. From the -- your personal knowledge of the relationship of those two bars, would you circle where you believe that CG's is?

A: Okay.

Q: And then also write a -- circle it and then a little line with "CG's" by it, please.

MR. SMITH: And also, for the record, show that the officer's markings on the number 3 are in green.

THE COURT: That's correct.

By MR. SMITH (continuing):

Q: Thank you, Officer. If you'd resume the stand, please. Well, let me -- before you go up there, if I --

MR. SMITH: Miss Clerk, if you could show the Officer Exhibit 3a, please.

By MR. SMITH (continuing):

Q: Officer, do you recognize that exhibit?

A: Yes, I do.

Q: Do you recognize working on that exhibit before?

A: Yes, I do.

[p.169] Q: Can you describe what markings you put on that exhibit before, and when you did it?

A: I put the blue markings on during the preliminary.

Q: All right. The preliminary examination?

A: Yeah.

Q: All right. Thank you. You can take the stand.

Approximately what time did you go to the defendant's residence?

A: I didn't note the time in my report. It was between 4:00 and 5:00 in the morning.

Q: And that would be the morning of January 29th, 1994?

A: Yes.

Q: Was it -- What was the weather like that morning, was it cold, very cold, warm?

A: It was cold.

Q: All right. And were you wearing a jacket?

A: Yes, I was.

Q: Now, when you went to the defendant's residence, describe what happened. What did you do and why did you do it?

A: I went to the front door, knocked on it. Travis Brown, Troy's brother, answered the door. I told him I need to speak to Troy. And from that point I went into Troy's room and asked him a couple questions.

Q: Okay. What did you ask him?

A: I asked him where he'd been the night before in the early morning. He stated he'd been out to the bars.

Q: How was he clothed at that time?

[p.170] A: To the best --

Q: You know what I'm -- him -- Troy Brown?

A: To the best of my recollection, he had on a pair of, like, boxer shorts on, and that was all.

Q: And do know if he was asleep or awake -- when you arrived?

A: He was sleeping as far as I could tell.

Q: So did Travis Brown go and wake him up, bring him out?

A: No, I went ahead and went to the back bedroom myself.

Q: All right. You went -- was the door open or shut?

A: I can't recall.

Q: Then what happened?

A: I turned on the light and told him that I needed talk with him for a minute.

Q: Did he -- was he sleeping, or what was happening?

A: He appeared to be sleeping at that time.

Q: You could hear him snoring?

A: No. When I turned on the light, he appeared to have just woke up.

Q: All right. And then what happened?

A: Then --

Q: Did you stay in the bedroom or did you move from there?

A: I stayed in the bedroom.

Q: Then what happened?

A: And then I asked him if he had seen anybody on his way home. And he said that he hadn't. I also asked

if he'd seen my patrol unit running code three, and he said he -- he didn't..

Q: What is code three?

[p.171] A: Lights and siren.

Q: All right. How long did you stay then at the residence?

A: Approximately 30 minutes, maybe.

Q: Was there anything specific you were looking for when you were talking to him?

A: During the time when I was at the house with Megan, before she went on the ambulance, she stated that her attacker had tried to choke her and she -- she bit his hand.

Q: Okay.

A: And I was also looking for evidence pertaining to the case.

Q: When he was there, did you look at his hands?

A: Yes, I did.

Q: Did you see any evidence of there being any bites?

A: No, I didn't.

Q: Okay. Then you stayed there for about 30 minutes and then you left?

A: Yes, I did.

Q: All right. Who else was present at that time?

A: I was the first one over there. Maybe ten minutes after I arrived, Officer Gonzales arrived at the scene also.

Q: And, I'm sorry, when you went over to the defendant's residence?

A: Yes.

Q: Okay. Who else was present -- Who else was living there?

A: David Prescott, Jason New, and his brother, Travis Brown, besides Troy.

[p.172] Q: Okay.

MR. SMITH: I'd move for the admission of State's Exhibit 5 -- well, first of all 3, the diagram.

THE COURT: Mr. Lockie?

MR. LOCKIE: No objection.

THE COURT: Three, is admitted.

MR. SMITH: 3a.

MR. LOCKIE: No objection.

THE COURT: 3a's admitted.

MR. SMITH: Five, photograph of the bedroom.

MR. LOCKIE: No objection.

THE COURT: Five's admitted.

MR. SMITH: Six, photograph of the bunk -- bunk beds.

MR. LOCKIE: No objection.

THE COURT: Six is admitted.

MR. SMITH: Seven, photograph of the pajamas and sock and underwear on bedroom floor.

MR. LOCKIE: No objections.

THE COURT: Seven's admitted.

MR. SMITH: Eight, photo of the bathroom.

MR. LOCKIE: No objection.

THE COURT: Eight's admitted.

MR. SMITH: Nine, photo of the panties in bathroom.

MR. LOCKIE: No objection.

THE COURT: Nine is admitted.

MR. SMITH: Ten, wait on 10 and 11. That's all I have, thank you.

[p.173] THE COURT: Cross-exam.

MR. LOCKIE: May I have the clerk show the witness what's been marked as Defense Exhibit A? As well as A-1? Could you please show them to the District Attorney, first?

THE COURT: Are they both the same?

MR. LOCKIE: Yes.

CROSS-EXAMINATION

By DAVID B. LOCKIE:

Q: Are you able to recognize that document, sir?

THE COURT: What's the number, again?

MR. LOCKIE: A.

THE WITNESS: Yes, I do.

By MR. LOCKIE (continuing):

Q: What is it?

A: This is the request form I took with me on February 1st.

Q: Forensic request form?

A: Yes.

Q: Did you fill that document out?

A: Yes, I did.

Q: Why did you fill it out?

A: Because I was transporting the evidence.

Q: All right. Does that document request anything?

A: Yes, it does. Blood typing, possible DNA testing.

Q: Okay. And is that your name at the bottom of the form?

A: At the bottom?

Q: Right.

A: Over where it says "Officer requesting"?

[p.174] Q: Well, is it -- are you the officer requesting there?

A: Yes.

Q: All right. Why did you fill that form out?

A: Because I was transporting the evidence with me to Washoe County Crime Lab.

Q: Were you requesting DNA analysis?

A: Yes, I was.

Q: Okay.

MR. LOCKIE: May the witness be shown Exhibit B and B-1.

Would you please show the District Attorney, first?

By MR. LOCKIE (continuing):

Q: Showing you what has been marked as Defense Exhibit B, are you able to recognize that document?

A: Yes.

Q: What is that document?

A: A list of the evidence that was taken with me.

Q: What connection, if any, does that document have with Exhibit A?

A: I have number 15.

Q: Okay. Exhibit A says, "Per the attached form", right? Physical Evidence Form?

A: I'm not sure.

Q: Okay. Why did you fill out Exhibit B?

A: This is -- was told for me there was procedure, so this is the way I do.

Q: Did you transmit Exhibit B along with Exhibit A, the Forensic Request Form?

[p.175] A: To the best of my recollection, I believe I did.

Q: All right. And if you look again at Exhibit A, it requests "per the attached Physical Evidence Recovery Form," right?

A: I'm not sure on that.

Q: Well, look at the form. Look at your request form. Does it say "per the attached Physical Evidence Recovery Form"?

A: I don't see where it says that on this.

Q: Okay. Did you transmit Exhibit B to the crime lab?

A: Yes, I believe I did.

Q: Okay. What was the purpose of transmitting Exhibit B to the crime lab?

A: To give them a description of all the evidence that I was giving them.

Q: All right. So, then it'd be fair to say that you used Exhibit B to describe to the crime lab what evidence you wanted tested?

A: Yes.

Q: Okay.

MR. LOCKIE: At this time we'd move for the admission of Exhibits A and B.

MR. SMITH: Can I look at A, again? I didn't note the number on it.

THE COURT: The clerk will give it to you.

MR. SMITH: I have no objection to A.

THE COURT: A will be admitted. Did you offer B, too?

MR. LOCKIE: I offered B.

THE COURT: Okay, Have you seen B?

[p.176] MR. SMITH: Yeah, I've seen B and I have no objection.

THE COURT: I'm sorry, you had no objection to B either?

MR. SMITH: No objection.

THE COURT: B will be admitted into evidence.

By MR. LOCKIE (continuing):

Q: All right. On Exhibit B, does it show the panties?

A: Yes, it does.

Q: And have you given it a number?

A: I numbered the red pajamas, the white panties, and the blue sock all together because they were found together.

Q: All right. What number did you give them?

A: It was 14.

Q: Any other designation like 14-T or anything like that?

A: No.

Q: Just item number 14?

A: Right.

Q: And does 14 correspond to what you've identified as Exhibit 10? State's Exhibit 10?

A: Does item -- you'll have to rephrase that question, please.

Q: Do you need to see State's Exhibit 10, again?

A: Yes.

MR. LOCKIE: May the witness be shown --

THE WITNESS: Yes, it does.

By MR. LOCKIE (continuing):

Q: And so did you physically transport Exhibits A, B, and State's Exhibit 10 to the Washoe Crime Lab?

[p.177] A: Yes, I did.

Q: Now, on Exhibit 10, does it show a listing on there for chain of custody?

A: On this item here?

Q: Right. Number 10.

A: Well, it listed it was removed from item 14 on 7-2 of '94.

Q: All right. Did you do that?

A: Yes.

Q: You removed the underwear from item 14?

A: Yes, I did.

Q: When did you do that?

A: On July 2nd.

Q: For what purpose?

A: For the preliminary hearing.

Q: What was the date of the preliminary hearing? Do you remember?

A: I believe it was July 6th, I'm not sure.

Q: Okay. So why did you remove it on July 2nd?

A: For -- to prepare for court.

Q: Well, why did you need to remove anything from the exhibit to prepare for court?

A: That's what I was instructed to do.

Q: Who instructed you?

A: Marshall did.

Q: And then to do what with it?

A: Put it right back into Evidence.

Q: Okay, so just --

[p.178] A: After it was separated.

Q: -- to take it out to look at it to make sure that's what was in it? Is that what you're saying?

A: Just to separate the items.

Q: And then after the preliminary hearing, what happened to 10?

A: It was taken by me back and put into Evidence.

Q: Into Evidence where?

A: At the Carlin Police Station.

Q: Okay. And is that where it remained ever since?

A: Yes.

Q: Until you brought it to court.

A: Until I brought it.

MR. LOCKIE: That's all. Those are all the questions I have from the exhibit.

THE COURT: Redirect?

MR. LOCKIE: No. I've more questions -- just from the exhibits.

THE COURT: Okay. You have more questions?

MR. LOCKIE: Yes.

THE COURT: Okay.

By MR. LOCKIE (continuing):

Q: All right. When you first arrived on the scene when Megan was bleeding, how did Pam appear?

A: She appeared frantic.

Q: Excited?

A: Yes.

[p.179] Q: What did she say?

A: When I first entered -- actually, I didn't know the circumstances, the initial part I got was dispatch advised me that a nine-year-old was attacked and was covered in blood. And when I arrived, there was a dog in the living room, also with Pam and Megan, and I looked at the dog and I asked Pam if the dog did this and she just shook her head and after assessing the victim I --

Q: What did Pam --

A: -- presumed something else happened.

Q: But what did Pam say?

A: She just said she found her girl -- little girl this way.

Q: Did she say --

A: When she came home.

Q: Did she say anything else to you?

A: Not that I can recall.

Q: Would taking a look at your report refresh your memory as to what she may have said to you?

A: Yes, it may.

Q: All right.

THE COURT: Did you review your report before you came here today?

THE WITNESS: Yes, I did.

THE COURT: Go ahead.

By MR. LOCKIE (continuing):

Q: Having reviewed your report, is your memory refreshed as to what Pam said to you?

A: Yes.

[p.180] Q: What did she --

MR. SMITH: Judge, I'm going to -- I imagine Mr. Lockie's offering this for some state of mind exception, otherwise it'd be hearsay.

THE COURT: What's the -- why is it on hearsay?

MR. SMITH: It's an excited utterance.

THE COURT: I'll overrule. Go ahead.

By MR. LOCKIE (continuing):

Q: What did Ms. Henle say to you?

A: Her exact words is she -- she thought that her ex-husband may have been responsible.

Q: Those were her exact words?

A: Well --

Q: Did you write her exact words in your report?

A: Yes, I did.

Q: Okay. What do they say?

A: Can I read them out of my report?

Q: Sure, please do.

A: "Ms. Henle stated that her ex-husband has said that he would fuck her daughter in order to get back at her."

MR. LOCKIE: Ms. Clerk, can I please have the report?

THE COURT: I'm sorry, what did you say?

CLERK: He wanted the report back.

By MR. LOCKIE (continuing):

Q: Now, when you went over to Troy's trailer in the morning, all right, did you describe to Troy what had happened to Megan the night before?

[p.181] A: I only told him that a girl had got -- was a sexual assault had occurred on a small child.

Q: And did you ask him whether he knew anything about it?

A: Yes, I did.

Q: And what was his response?

A: He said he didn't know nothing about it.

Q: Did Troy have any blood on him?

A: No, I did not see no blood on Troy.

Q: And you were looking him over, right?

A: Yes, I was.

Q: Are you familiar with what are known as CG's jackets there in Carlin at all?

A: Yes, I am.

Q: What do they look like?

A: They're black, like satin jacket.

Q: Did Troy commonly wear one of those?

A: I really don't know.

Q: Okay. Have you actually handled and looked at CG's jackets before?

A: I've seen them before, yes, I have.

Q: Are they -- do they button or do they zip?

A: I really don't know.

Q: Did you at any time, search the residence -- Troy's residence?

A: No, I did not.

Q: Did you go back into Troy's bedroom at any time? Other than to wake him up?

[p.182] A: No, I did not.

Q: Did you ever move his bed aside?

A: No.

Q: Was the dog at Megan's residence when you went in?

A: Yes, it was.

Q: Did the dog bark at you?

A: No, it didn't.

Q: Later on, a few days after these events happened, did you ever receive a call from Troy?

A: Yes, I did.

Q: All right. When did you receive a call?

A: I believe it was on a Sunday, maybe a --

Q: How many days after this happened?

A: Maybe two days, three days after this happened.

Q: And where was your understanding of where he was when you received the call?

A: In Utah.

Q: Did it surprise you that he was in Utah?

A: No, it didn't.

Q: Why not?

A: I talked to Travis and he'd told me that he had left for Utah.

Q: All right. And Troy called you?

A: Yes, he did.

Q: All right. What did he say?

A: He said that there may be -- he heard that there was a warrant for him from the Carlin Police Department.

Q: [p.183] And was there at that time?

A: No, there wasn't.

Q: Okay. And he wanted to know what it was about?

A: Yeah.

Q: All right. Did you have his phone number at the time?

A: No, I didn't. I don't recall having his phone number.

Q: Did you ever call Troy back at a later date?

A: Yes, I did. I believe I did.

Q: Okay. How did you get his phone number to call back?

A: I don't know. I -- I may have had it from previous when he did talk to me.

Q: Okay. Did you ever believe that Troy was fleeing anywhere?

MR. SMITH: I'm going to object, Judge.

MR. LOCKIE: I'll withdraw the question.

THE COURT: Question's withdrawn.

By MR. LOCKIE (continuing):

Q: Did Troy try and hide from you at all?

A: No.

Q: The socks that you recovered from the Henle residence --

A: Um-hum.

Q: Was there just one sock there, or were there two?

A: I only took one sock.

Q: Did you see more socks?

A: Not that I can remember.

Q: All right. So there's just one man's sock in Megan's bedroom, is that right?

[p.184] A: I don't know if it was a man's sock.

Q: Oh, okay. How many socks did you see in Megan's bedroom?

A: One.

Q: Okay. Did you look around the house to see if you could find a match for that sock anywhere?

A: No, I didn't, I don't think.

Q: Did you look at Troy Brown's residence to see if you could find a match for that sock?

A: No, I wasn't looking for that.

Q: The sock that you observed, were you able to tell whether it was a man's sock?

A: To the best of my recollection, it was like a girl's -- girl's sock.

Q: All right. Like a little girl's sock?

A: Yes.

Q: Did you preserve it?

A: Yes.

Q: All right. Are you uncertain as to what type of sock it was?

A: Yes, I am.

Q: Do you recall the color of that sock?

A: It was a light blue.

Q: Did you notice a make-up mirror in Megan's bedroom?

A: Yes, I did.

Q: What drew your attention to it?

A: It was just one of the articles in the bedroom that I remember.

[p.185] Q: All right. Was your attention drawn to it for any particular reason?

A: Not for any particular reason, no.

Q: Did anybody point it out to you for any reason?

A: No.

Q: What was it's condition when you were there? Was it on, off, plugged in?

A: I don't recall it being plugged in.

Q: Okay. Did you ask for any forensics to take place on that make-up mirror?

A: I don't recall.

Q: Do you remember Bill Schultz coming?

A: Yes, I do.

Q: And that would have been Detective Schultz?

A: Right.

Q: Did you request him to come?

A: I don't believe I did.

Q: Did Officer Murphy?

A: I believe he may have.

Q: Do you remember what Bill Schultz did when he came?

A: He was looking for evidence, or picking up evidence.

Q: Do you recall him dusting the make-up mirror for a fingerprint?

A: Yes, I do.

Q: And do you recall him looking elsewhere for fingerprints as well?

A: I believe so, yes.

[p.186] Q: Did you see Troy's boots at his residence?

A: Yes, I did.

Q: Did you look at them?

A: Yes, I did.

Q: Why did you look at them?

A: For possible evidence.

Q: All right. What type in particular?

A: Possible blood splatter, maybe.

Q: All right. And what was the result of your examination?

A: I didn't see nothing on the boots.

MR. LOCKIE: No further questions.

THE COURT: Redirect?

REDIRECT EXAMINATION

By MARSHALL S. SMITH:

Q: You didn't take the boots for any further testing?

A: No.

Q: Officer, would it be fair to say this was a pretty stressful scene?

A: Yes, it was.

Q: That you were concerned about this young child who had been brutally injured?

A: Yes, I was.

Q: All right. And everybody was kind of tense there?

A: Yes.

Q: All right. Now, you indicated that you did take one sock --

MR. SMITH: I'd like, Ms. Clerk, if you could show the witness [p.187] number 7, please.

And Judge, if I may plug in the lamp again.

By MR. SMITH (continuing):

Q: Now, you're looking at 7? Yes?

A: Yes.

Q: And looking over your shoulder,

MR. SMITH: Judge, if I could just go turn off these two lights?

THE COURT: All right.

By MR. SMITH (continuing):

Q: Now, now you say that you -- it might have been a blue sock?

A: Yes.

Q: Where's the blue sock on that?

A: Right down here.

Q: All right. You got the pointer there.

A: Yes.

Q: All right. You see any other socks in that picture?

A: One right there.

Q: All right. But you didn't take that one, correct?

A: No, I didn't.

Q: All right. Do you know why you didn't?

A: I believe that there was hair on the blue sock, and that's the reason why I took it with the red pajamas and the white panties.

Q: All right. Would you agree that the grey sock is an adult sock?

[p.188] A: That top sock?

Q: Yes.

A: It looks like a small sock -- a child's sock.

Q: How about the blue sock?

A: To me, it's a child's sock, also.

Q: All right. Thank you.

MR. SMITH: You can turn the lights back on.

Okay. Now -- that's all I have. That's all I have, thank you.

THE COURT: Recross.

MR. LOCKIE: Nothing based on that.

THE COURT: May this witness be excused?

MR. LOCKIE: We'd like him retained.

THE COURT: Can we do this coat thing now or do you want him to come back?

MR. LOCKIE: I'd just like him retained in case I do need him to come back.

THE COURT: Okay. Are you going to be on-duty the next couple days, Officer?

THE WITNESS: Yes, I will be.

THE COURT: What time of day will you be on-duty?

THE WITNESS: 2:00 till 10:00 at night.

THE COURT: And does your department know how to get ahold of you?

THE WITNESS: Yes, they do.

THE COURT: Okay. So if you'd just -- if for some reason they can't, you check with the DA'S office, but we're going assume we [p.189] can reach you through the Carlin Police Department, okay?

THE WITNESS: Okay.

THE COURT: Thank you very much. You can be excused.

Let's take a brief recess. Do you have a couple more witnesses available?

MR. SMITH: I do, Judge.

THE COURT: All right. Let's take a brief recess.

During this recess that we're about to take the jury is once again admonished as follows:

Do not converse amongst yourselves or with anyone else on any subject connected with this trial.

Do not watch, read, or listen to any report of the trial, or to any commentary on the trial, or to any person connected with the trial. This includes any medium of information such as newspapers, television, and radio.

Do not form or express any opinion on any subject connected with the trial until the case has been finally submitted to you.

Do not visit the alleged scene or attempt to make any independent investigations concerning this matter.

We'll be in recess for 10 minutes. At 4:00, please be back in your jury room. Court's in recess.

(Court recessed at 3:48 for 19 minutes)

THE COURT: Please be seated. The record will reflect we're convened outside the presence of the jury with the exception of Ms. Thompson, and we also have counsel and the defendant present. We're going to interview Ms. Thompson briefly. In chambers the attorneys made me aware of a possible conversation between [p.190] Ms. Thompson and the last witness.

Miss Thompson, could you tell us what, if anything, was said outside?

MISS THOMPSON: I asked him if he was from Delta, Colorado. When he was sitting up here I noticed he had a scar on his chin. And I thought that I knew him from my, I guess I was about 10. When I was about 10 years old.

THE COURT: Okay.

MISS THOMPSON: When we lived in Delta, Colorado. And he said that he was from Delta, Colorado.

THE COURT: Okay. And he gave you his phone number?

MISS THOMPSON: And we -- yeah. He gave me his phone number and we thought we would get together. I said way after trial is over.

THE COURT: I thought I should talk to the officer, too. You want to talk to the officer first, or what?

MR. SMITH: He's en route, Judge.

CLERK: He's here.

THE COURT: He's outside?

So, I don't know. What do you want to do? We could have Rebecca come back a minute after we talk to the officer, or what?

MR. LOCKIE: I'm sorry. I didn't hear --

THE COURT: You go ahead and don't talk about this to the other jurors. You just go back to the jury

room and have a seat for a minute and we'll call you back if we need you.

MISS THOMPSON: Can I ask a question, first?

THE COURT: What?

[p.191] MISS THOMPSON: Were we not supposed to say anything at all?

THE COURT: Well, it's not a matter of doing something wrong. If you know one of the officers, it's just one of those things that maybe we're better off with people who don't know the -- it's the same thing we were going through before. We're not claiming you did something wrong or anything, we just want to make sure we have jurors that don't know the witnesses.

MISS THOMPSON: We haven't seen each other for over 20 years, though.

THE COURT: And we don't -- don't mention it to the jurors. We've had to talk to a couple others because of instances like this. Just go on back to the jury room and have a seat and we'll maybe talk to you again in a minute.

MISS THOMPSON: Okay.

THE COURT: Don't worry about anything.

And then bring in the officer.

Officer, please come forward and retake the stand. Have a seat right up here. Now, I'll just remind you,

you're still under oath. Officer, we were told that there was some sort of conversation between you and Ms. Thompson downstairs. Could you just tell us what that was about?

OFFICER TERRY: She asked me if I had a sister by the name of Cheryl, which I do. And then she explained to me that she used to be my neighbor back in, I believe it's about '77. Back when I was about 11 years old. That's about it.

THE COURT: How about the phone number?

OFFICER TERRY: Well, I gave her that because she said we can [p.192] talk about --

THE COURT: Go ahead, Mr. Smith, you asked him.

MR. SMITH: Officer, let me ask you this, when you gave her your phone number, is this to, like, talk about old times or talk about new times?

OFFICER TERRY: Talk about old times, only.

MR. SMITH: All right. Are you married, do you have a girlfriend, now?

OFFICER TERRY: I have a girlfriend, yes.

MR. SMITH: All right. So did your folks know her folks, something like that?

OFFICER TERRY: Yes.

MR. SMITH: So this is like your old neighborhood. You grew up together in the same neighborhood.

OFFICER TERRY: Yeah. She was my neighbor, yeah.

MR. SMITH: When's the last time you saw her?

OFFICER TERRY: 1977, when I was 11 years old.

MR. SMITH: Okay. I have nothing else, Judge.

THE COURT: Mr. Lockie?

MR. LOCKIE: Did you know she was a juror when you talked to her down there?

OFFICER TERRY: No, I didn't.

MR. LOCKIE: Okay. Did you find out that she was a juror before you came into court today -- this last time?

OFFICER TERRY: Oh, yes. When I was out, yeah.

MR. LOCKIE: When did you find out that she was a juror?

OFFICER TERRY: When I was out there. When I first came back. [p.193] When I got recalled.

MR. LOCKIE: All right. Did you know -- at any time before you just came back, did you know that she was a juror?

OFFICER TERRY: I had my suspicions that she might be, I couldn't -- I can't tell you --

MR. LOCKIE: When did you start thinking that she might be a juror?

OFFICER TERRY: I really wasn't thinking about that, to tell you the truth. I really wasn't thinking about her being a juror, in my mind, so --

MR. LOCKIE: I have -- that's all I have, Judge.

THE COURT: Why don't you touch base with your family member that told you this, in case you've missed something that you haven't asked about, to make sure that you've finished your questioning.

MR. LOCKIE: That's it, Judge.

THE COURT: Okay. Why don't you just have a seat outside and wait for us, okay? And don't -- you didn't do anything wrong, don't worry about it. Just have a seat outside for a minute.

OFFICER TERRY: Okay.

THE COURT: Okay, Mr. Smith, what do you want to do?

MR. SMITH: Well, I guess maybe bring her -- the juror back in and ask her -- look, if she has some romantic notions about this, is that going to sway her, as far as voting for the State, to try to please him?

THE COURT: Well, you notice we had to beat the phone number out of him. I guess --

[p.194] Well, anyway, Mr. Lockie, what are your --

MR. LOCKIE: We'd move to excuse the juror.

THE COURT: You want to excuse her.

MR. LOCKIE: Yeah. We really believe that that'd be proper. I don't have the law at my fingertips, but I -- clearly it's communication between witness and juror and there's some -- she wants to please him, obviously in some way, and that could influence her vote.

THE COURT: Well, I'm not going to go into that. Okay. I'm going to defer to you. Your client's on trial here. I'm going to excuse her. What we'll do -- can we still get a couple witnesses on?

MR. SMITH: You bet.

THE COURT: Now, my thought is to bring the jury back and just indicate that we found out that Miss Thompson knew one of the witnesses and we're just going to excuse her and then have somebody move over there to that seat.

MR. SMITH: That's fine with the State, Judge.

THE COURT: And the Alternate number one is who now?

CLERK: Pat Laughlin.

THE COURT: Pat Laughlin. Call all of the jurors back in and then give me a buzz.

(Pause to bring jury in.)

THE COURT: Please be seated. The record will reflect that we're reconvened and both counsel and the defendant are present. Counsel, will you stipulate to the presence of the jury?

MR. SMITH: For the State, Judge.

[p.195] MR. LOCKIE: We do.

THE COURT: Okay. During the little recess we found out that one of our jurors knew, distantly, one of the witnesses. And we just felt best if we just went on without her. Nothing was wrong here, it's just a matter of knowing one of the jurors -- one of the jurors knowing one of the witnesses.

Miss Thompson, I'm going to release you and you can leave. And thank you very much for coming today.

MISS THOMPSON: Thank you.

THE COURT: All right. And now, Mr. Laughlin is the next alternate. You'll just move right down into Ms. Thompson's seat.

Thank you very much for coming today, Ms. Thompson.

Okay. Ready to go? And that was done by stipulation, is that correct

MR. SMITH: That's correct, Judge.

MR. LOCKIE: That's correct.

THE COURT: All right. Call your next witness.

MR. SMITH: Travis Brown.

THE COURT: Mr. Brown, please come forward. Face the clerk, raise your right hand.

TRAVIS JAY BROWN,

called as a witness by the plaintiff, was sworn and testified as follows:

THE COURT: Sir, have a seat right here. What's your full name?

THE WITNESS: Travis Jay Brown.

THE COURT: All right. Mr. Smith.

[p.196] MR. SMITH: Thank you.

DIRECT EXAMINATION

By MARSHALL S. SMITH:

Q: Mr. Brown, you are the brother of Troy Brown?

A: Yes.

Q: And he's in court today?

A: Yes.

Q: He's sitting right over here? I presume you know what your brother looks like.

A: Yeah.

Q: All right. And let me ask you this, where were you living in January of 1994?

A: 1717 Puett Drive --

Q: And that --

A: -- Carlin

Q: -- is in Carlin? Who was living at that place with you?

A: There was myself, my brother Troy, and Dave Prescott was staying there temporarily.

Q: How many brothers do you have?

A: I have two older and two younger, four.

Q: What -- let's start with the top and go to the bottom, what's the --

A: My oldest brother's Trent and then there's Troy, and then I have a brother that's four years younger, and a brother that's eight years younger.

Q: Okay. Would it be fair to say you all bear a similar resemblance?

[p.197] A: Yeah.

Q: All right. And so it was you and Troy and David Prescott living at that residence?

A: Yes, sir.

Q: All right. And what kind of place was that?

A: It's a two bedroom, two bath, 14 x 70 trailer.

Q: And who were living in the bedrooms?

A: Troy was in the back bedroom and I was in the front bedroom.

Q: And then where'd Prescott live?

A: He was in -- on the couch in the front room.

Q: Okay. Now, drawing your attention to the evening hours of January 28th, 1994, did you see Troy during that time?

A: Earlier in the evening, in the late afternoon --

Q: Okay. Tell --

A: -- when I got off work.

Q: -- me about that. Were you working at that time?

A: Yeah.

Q: Where were you working?

A: I was working at ROTP for Commonwealth

Q: And what is that?

A: That's a new ball mill that Newmont has built. Six miles north of Carlin.

Q: Okay. So, for Newmont.

A: Yeah.

Q: All right. And was your brother Troy working at that time?

[p.198] A: Yes.

Q: Where was he working?

A: Ledcor Industries.

Q: And how about Prescott? Was he working?

A: Yeah. He was working for LeGarza Exploration.

Q: And -- all right, so you -- had you been working that day?

A: Yeah.

Q: And what time did you get back to your trailer?

A: It was around 5:30.

Q: And what -- tell the jury what happened from that point.

A: I was riding with a friend, he took me home to the house there and Troy was at the house and he asked me if I'd seen my older brother Trent. And I says, "Yeah, he's up at the bar."

He said, "Well, does he have my paycheck?" And I said, "Well I never went in the bar. I seen his vehicle sitting out front."

And Troy wanted a ride up to see if he could have his -- get his paycheck because it was payday that day and Troy was scheduled to go home early the next day. So we gave Troy a ride back up to the bar there and stuck around there for a few minutes. Then I returned back to 1717 to get back --

Q: Where do you pay -- where do you cash your paychecks?

A: There at CG's saloon.

Q: All right. And, okay. So you took Troy up to the CG's?

A: Um-hum.

Q: And then took him back, or you went back?

A: No, I -- he stayed there with my other brother and I returned.

[p.199] Q: And that was Trent?

A: Um-hum.

Q: All right. Then what did you do when you got home?

A: I just was waiting there for a friend to come over. I'd made some prior arrangements. I owed him

some money and he was coming over to settle up the deal that we'd made earlier in the year.

Q: Okay. And did you then stay at your house?

A: Yeah.

Q: The rest of that evening?

A: Yeah.

Q: Did you have anything to drink at CG's?

A: No.

Q: Now, where were you sleeping that night?

A: I was just there at the house -- just watching TV and after Greg Stacks come by, and settled up the deal with him, I fell asleep there on the couch.

Q: All right. And did you see Troy again that night?

A: Yeah. My couch is right next to my front door there -- within two feet of the front door was where my head was, I heard the front door open, my brother Troy comes walking in, he walks straight down to the kitchen, which is -- his back was directly to me and I was just -- was awake and watched him walk into the house.

He took his hat off and his coat, took his money and his chapstick and stuff out of his pockets, set it on the table, took his boots off, and I just got up off the couch and walked directly away from him into my bedroom. And that's when I went to sleep.

[p.200] Q: Okay. So he was wearing boots, jeans, what color was the jacket?

A: He had a black jacket.

Q: What color was the hat?

A: A black hat.

Q: And do you recall what time it was?

A: It was exactly 1:32.

Q: And how is it that you -- 1:32 a.m. on January 29th?

A: Yeah.

Q: And how is it that you recall that time?

A: Because when the door opened -- I had a clock radio on my entertainment system, and it was in red color there, and I thought, what time is it and how long have I got to sleep before I have to get up and go back to work. And so I looked right at the clock and it -- it vaguely sticks in my mind it was 1:32.

Q: Okay. And do you -- did you have an opportunity later to determine the accuracy of that clock?

A: Yeah. Me -- and Officer Mike Terry had come over the next day, later on in the day, and we was talking about times and stuff like that and according to his watch on his arm and the watch -- the clock there on the entertainment system, there was like six or seven minutes difference.

Q: Was it fast or slow?

A: I believe it was fast. Mine was fast compared to Mike's.

Q: Okay. All right. Well, do you recall now, if it was fast or if it was slow? Do you recall testifying at the preliminary examination on this matter? Remember the other -- the other trial?

[p.201] A: Yeah.

Q: That we had downstairs? You remember testifying there?

A: Mine -- mine was fast.

Q: Okay. You're sure about that?

A: Yeah. It was fast.

Q: Okay, so --

THE COURT: You did misuse the word "trial." There was no other trial, correct?

MR. SMITH: That's right, the preliminary examination.

By MR. SMITH (continuing):

Q: And so you're sure it was six minutes fast?

A: It was six or seven minutes there. Just, you know, we was just kind of talking about things and wasn't really paying that close attention, at the time.

Q: Okay. Now, would you -- how did -- what was his demeanor? Was he -- how would you describe -- was he -- did you notice if he was walking okay, or was he --

A: He just -- being respectful and courteous like we do there at the house. He was quiet. He wasn't slamming anything around. He just come right in and didn't make hardly much noise at all.

Q: Okay.

A: I was -- it was only a few, a matter of minutes, maybe a couple of minutes and then I went to bed.

Q: All right. Now, you went to bed and then what was the next contact you had with Troy?

A: Well, we got up just like we do on any other day and have our coffee and build lunches about 5:00 a.m. And there was a knock |p.202| on the door.

I answered the door and there was Officer Mike Terry. He asked if Troy was at home and I says, "Yeah, he's asleep," because he was scheduled to go to Utah, so he wasn't up to go to work.

He says, "Can I talk to him?" And I led him -- Mike through the house there to the bedroom, and woke Troy up and Mike says, "I need to talk to him alone." And I says, "Okay." And I just left the room at that time.

Q: All right. And you were getting up to go to work?

A: Yeah.

Q: What kind of clothes do you wear when you go to work?

A: Well, it was winter and -- coveralls and sweatshirt.

Q: And what, if anything, did you do with your coveralls?

A: I had left them in my brother's truck, previously, that night and I went to get them and put them in the dryer -- had frost on them.

Q: Okay. What, if anything, did you notice in the dryer?

A: There wasn't anything in the dryer when I put mine in there.

Q: How about in the washer?

A: I never lifted the lid in the washer.

Q: Okay. Did Troy ever tell you anything about his clothes?

A: Yes. Later when I pulled them out to get ready to go to work around 6:00, Mr. -- was it Rudy that come by?

THE COURT: Well, you can't be asking questions, so you just have to help as best you can.

THE WITNESS: Okay. Mike was there, what was the other one? [p.203] Anyway, after they'd left, I was pulling my sweatshirt and stuff out of the dryer and

Troy says, "Put my clothes in the dryer." And so I lifted the lid in the washer and put his clothes in the dryer.

By MR. SMITH (continuing):

Q: What clothes were there?

A: There were pants and a shirt.

Q: Okay. Had it already gone through the wash cycle?

A: Yeah.

Q: And then, you indicated that -- Were you aware of whether or not Troy had any plans -- that day?

A: As far as that date --

Q: Yeah.

A: -- starting of that day?

Q: Right.

A: That same day Prescott was -- Dave Prescott was going to give Troy a ride to Salt Lake. And from Salt Lake, Troy was going to catch a ride with other arrangements, on home.

Q: Okay. And as far as you know, he went ahead with his plans to go on to Salt Lake and wherever else he was going?

A: Yeah. I left to go to work and I figured things would just go on schedule there.

Q: Okay. And he -- so he'd previously -- Troy had previously arranged to leave to go to Utah --

A: Yeah.

Q: -- before all this?

A: Yeah.

MR SMITH: Okay. Thank you. That's all I have.

[p.204] THE COURT: Mr. Lockie?

MR. LOCKIE: Thank you.

CROSS-EXAMINATION

By DAVID B. LOCKIE:

Q: Do you know Dave Prescott?

A: Yes.

Q: How do you know him?

A: He was a -- just an acquaintance at the bar there for a while, got to know him, he was sleeping in his truck and I offered him a place to stay.

Q: All right. Did you see him that morning when Mike Terry came over to your residence?

A: Yeah, he was there.

Q: All right. Had he been sleeping there, that you know of that --

A: That evening?

Q: -- night? Right.

A: He wasn't home at 1:30 when Troy got home, but he was there when I woke up around 5:00.

Q: And without saying what he said, did you see him talking to the police at any time?

A: Dave?

Q: Yeah.

A: No.

Q: All right. Did Dave wake up, at all, when you were there?

A: Yeah. He was there. We all kind of, after -- Troy and Mike had come out of the bedroom later and we kind of discussed [p.205] what'd gone on that evening.

Q: All right. How did Dave Prescott look to you, physically?

A: They'd had a rough night on the town -- him and Troy both, I reckon.

Q: What pants did you take from the washer?

A: There was black jeans.

Q: Okay. What shirt?

A: It was a black pullover shirt.

Q: Would you characterize it as a western-type shirt?

A: No. It -- long-sleeved, long-john material, pullover.

Q: Were there any underwear in the washing machine?

A: No.

Q: I gather there's several guys bunking here at the trailer --

A: Yeah.

Q: -- over this time. All right. When Troy left for the week, who used his room after that?

A: I don't recall anybody sleeping in there.

Q: Did you ever notice any traces of blood anywhere around the house?

A: No.

Q: What time did you get back to the trailer?

A: The day after?

Q: No. That day, on the 28th.

A: Was this the morning that the cops --

Q: No. Let me back up a little. You said you went down to CG's for a little bit?

[p.206] A: Um-hum.

Q: All right. And then what time did you go back to the trailer?

A: It was probably around 6:00, 6:30.

Q: Did anyone else come to your trailer that night?

A: Greg Stacks had come over --

Q: All right. And what --

A: -- like it -- our arrangements.

Q: Who was that?

A: His name is Greg Stacks.

Q: How long did he stay?

A: Approximately 20 minutes.

Q: Okay. Anyone else come over?

A: No.

Q: Did you know a Pam Henle?

A: Yes.

Q: Did you know Wayne?

A: Yes.

Q: What's Wayne look like?

A: He's got shorter blond hair, like myself, kind of a -- he's probably 6'2", heavier set guy. Pretty good-sized guy.

Q: And you'd been over to their -- Henle house before?

A: Yeah. We -- we all -- both my brothers and I and Wayne all worked at Ledcor, previously.

MR. LOCKIE: Could I have the clerk bring, for the witness, what's been marked as Defense Exhibit L?

THE COURT: Okay. Where are they?

[p.207] CLERK: They're still in the office.

THE COURT: All right. We'll wait for you.

Can you ask a couple other questions maybe, while we're waiting? You don't have to if you don't want to.

By MR. LOCKIE (continuing):

Q: Was Jason New living at the trailer part-time then, too?

A: At the -- at that time?

Q: Right.

A: No, I don't recall him being there.

Q: Who is Jason New?

A: Jason New is a kid that we went -- Troy and I both went to school with. He lives there now.

THE COURT: Okay. The defense has been given L.

By MR. LOCKIE (continuing):

Q: Can you please look at what's been marked as Defense Exhibit L. Could you turn it around so the District Attorney can look at it, too? Are you able to identify that?

A: Yes. That was the shirt that was along with the pants the morning of --

Q: It looks just like the shirt anyway?

A: That is the shirt.

Q: Okay. How can you tell that it is the shirt?

A: Because Troy and I both got shirts like this for our birthdays. His birthday is the 21st of September, mine's the 22nd, and we both got one like this. Mine has two buttons and his had three.

Q: Does that look identical to the shirt that you pulled from [p.208] the washing machine?

A: Yeah.

MR. LOCKIE: Ms. Clerk, did you bring Exhibit M? Please show that to the District Attorney.

By MR. LOCKIE (continuing):

Q: Showing you what's been identified as Defense Exhibit M, do you recognize that?

MR. SMITH: I'm sorry. N or M as in Mary?

MR. LOCKIE: M as in Mary.

THE WITNESS: Yes, I recognize that.

By MR. LOCKIE (continuing):

Q: What is that?

A: That is my jacket.

Q: How long have you had that jacket?

A: I bought that jacket last December down in Vegas. I attended the NFR.

Q: Are you familiar with Troy's CG's jacket?

A: Yeah.

Q: And what does it look like?

A: It's similar to this, but it's a satin, and the back has got more a orange and yellow colors through it.

Q: And how about a zipper versus buttons?

A: His has snaps and mine has a zipper. His is a jacket, just a light, windbreaker jacket.

MR. LOCKIE: Move for introduction of Defense Exhibits L and M.

MR. SMITH: May I look at the jacket again, please? And is [p.209] there any pockets on the -- let me look at both of them for a minute.

I have a few questions on voir dire, Judge.

THE COURT: Okay. I'll reserve my ruling. I'll let you complete your --

MR. LOCKIE: No further questions.

THE COURT: All right. We'll just go cross-exam [sic].

REDIRECT EXAMINATION

By MARSHALL S. SMITH:

Q: When did you get this jacket -- what's been marked for identification as Defendant's M?

A: When did I get that jacket?

Q: Yes, sir.

A: Last December.

Q: Okay. What, were you wearing this jacket on the evening of January 28th, 1994?

A: No.

Q: Were you wearing it on the evening of January 29th, 1994?

A: No.

Q: It was hanging up in your closet?

A: What's that?

Q: Where was it?

A: It was hanging in the closet.

Q: Okay.

MR. SMITH: Object to relevance as far a M is concerned. Now, as far as --

By MR. SMITH (continuing):

[p.210] Q: Now, -- You say that the -- what color was the shirt that you got for your birthday?

A: Black, just like that one.

Q: But it had two buttons?

A: Right.

Q: The same manufacturer, do you know?

A: As far as material wise, or --

Q: Yeah. Who made this shirt?

A: I --

Q: You don't know.

A: I can't answer that.

Q: I understand. But, as far as you can determine, this is similar to the style of the shirt that you took out of the wash on that day?

A: That is the shirt.

MR. SMITH: Okay. I have no objection to State's Exhibit number L -- Defense Exhibit number L.

THE COURT: What's the relevance of M?

MR. LOCKIE: We -- I'll just retain the witness and move for it's admission again later.

THE COURT: It's -- are you going to --

MR. LOCKIE: I'll withdraw it's offer.

THE COURT: All right. L will be admitted and I'm not telling you I'm not admitting M, but I'll rule on it now if you want me to, but you wanted to wait?

MR. LOCKIE: I'd rather not explain my theory of relevance at this time.

[p.211] THE COURT: Okay. So you're withdrawing M, is that correct?

MR. LOCKIE: Right.

THE COURT: I want to get sure -- clear to you, I've not ruled against you on it. Do you understand what I'm saying?

MR. LOCKIE: Well, if the Court's inclined to let it in, I don't --

THE COURT: I didn't say that either, but I have not made a ruling on it.

MR. LOCKIE: All right. I'll still offer it.

THE COURT: All right. Well, I'll admit it. It will be admitted.

All right. Mr. Smith.

By MR. SMITH (continuing):

Q: Okay. So, let me go back. You went home that night, after taking Troy to the bar, and you went home and watched TV?

A: And then wait for prior arrangements.

Q: Waited for your friend. Well, what kind of transaction were you doing?

A: He borrowed me some money to put in a new transmission in an '89 Chev I had.

Q: All right. And then you stayed home for the rest of the evening?

A: Yeah.

Q: And you were home the entire evening from that point forward after you got back from talking with your friend.

A: That's correct.

Q: And -- that's all I -- and you never left the residence [p.212] then until the next morning?

A: Right.

MR. SMITH: All right. Thank you, that's all I have.

THE COURT: Mr. Lockie?

MR. LOCKIE: Just one question.

RECROSS EXAMINATION

By DAVID B. LOCKIE:

Q: Are you Troy's full blood brother?

A: Yes.

Q: All right. That's all I have.

THE COURT: Now, I'll excuse him and you have contact with him?

Okay. I'll excuse you and please stay in contact with Mr. Lockie. He may be excused.

Call your next witness.

MR. SMITH: David Prescott.

THE COURT: Mr. Prescott, please come forward. Face the clerk and raise your right hand.

DAVID EVERRETT PRESCOTT,

called as a witness by the plaintiff, was sworn and testified as follows:

THE COURT: Mr. Prescott, please come around here and have a seat. Pull that door shut. Sir, what's your full name?

THE WITNESS: David Everrett Prescott.

THE COURT: How do you spell Prescott?

THE WITNESS: P-R-E-S-C-O-T-T.

THE COURT: Thank you. Mr. Smith.

[p.213] MR. SMITH: Thank you.

DIRECT EXAMINATION

By MARSHALL S. SMITH:

Q: Where are you -- sir, where are you living, presently?

A: I live on Airport Road.

Q: And where's that? In Elko County?

A: Yes, it is.

Q: All right. Is that closer to Carlin, or is that closer to Elko?

A: It's so close to Elko it scares me. It's right out here at the end of the airport.

Q: Okay. And where were you -- are you employed presently?

A: Yes, I am. I'm employed with LeGarza Exploration.

Q: And what is -- and what do you do for LeGarza?

A: Heavy equipment operator.

Q: And how long have you been so employed?

A: A year and two months.

Q: All right. Now, were you living in Carlin during the month of January, 1994?

A: Yes, sir, I was.

Q: Who were you living with?

A: I was living with Troy and Travis Brown.

Q: All right. And is Troy Brown in the courtroom today?

A: Yes, sir, he is.

Q: Would you point to where he's sitting?

A: He's sitting there.

THE COURT: Witness has identified the defendant.

[p.214] By MR. SMITH (continuing):

Q: Thank you. And where -- what were you -- were you employed when you were living in Carlin?

A: Yes. I was employed with the same employer, LeGarza.

Q: And, directing your attention to the evening hours of January 28th, 1994, you were living in Carlin at that time?

A: Yes, sir.

Q: Do you recall what you were doing that evening?

A: Yeah. I'd been to dinner and down at the bar and then back to the trailer.

Q: And you say back to the trailer, your trailer where you were living?

A: No, it was with Troy -- but they'd invited me in. Let me -- let me clarify a little bit. I'd had a hard time finding my trailer and they'd invited me in to stay with them until I could. So it wasn't really renting, they was just helping me out a little bit.

Q: Oh, I see. But you were living there.

A: Yes, sir.

Q: Okay. And that evening you said you went out to have dinner, correct?

A: That's correct.

Q: Where'd you have dinner?

A: I think I -- Chinese take-out, if I remember right.

Q: Okay. And you took your dinner where?

A: Back to the -- I can't remember what I did exactly, but I did have dinner that night, so --

[p.215] Q: Okay. Fair enough. And then you returned to the bar?

A: Yeah. I went down to the bar, and that was somewhere, I don't know, I'm guessing 8:00, 9:00, 10:00, in that range.

Q: And then, were you drinking that night?

A: Yes, sir, I was.

Q: What were you drinking?

A: I had vodka and a couple Grey Bulls.

Q: I'm sorry.

A: Vodka water and a couple Grey Bulls, you know, a little tequila, kahlua, so on.

Q: Okay. Any beers?

A: No beer.

Q: About how many drinks would you say you had?

A: Somewhere -- in the course of the evening, maybe six, maybe seven.

Q: Okay. Would you consider yourself intoxicated?

A: No, I don't believe so. I pretty well remember what went on.

Q: Okay. And how often do you drink?

A: Lately, not so much. But I used to hit it pretty heavy.

Q: On a nightly basis?

A: Twice a week, once a week, whatever.

Q: And when you would drink once or twice a week, would it be fairly heavily?

A: Depends on the night.

Q: Okay.

A: Depends on the night.

[p.216] Q: Well, what I'm trying to get at here is, when you would drink, would drink to the point where you would consider yourself intoxicated? Well, let me ask you this --

A: Certain days, yeah. Certain days.

Q: Does -- would six drinks, in your opinion, render you intoxicated?

A: It depends how quick I drink them, you know.

Q: Okay. That night, how quick did you drink your drinks?

A: It was over the course of the evening.

Q: All right.

A: So it was -- I can pretty well say that I wasn't -- drunk out of my mind that night, or drunk, you know what I'm saying?

Q: How about -- was the defendant, Troy Brown, with you that night at the bar?

A: We'd seen each other at the bar that night.

Q: What was -- what was he drinking, the defendant?

A: I didn't really pay attention that much -- he was drinking some shots and so on. I didn't really ask him what it was or or so on.

Q: Would it be fair to say -- had you been out drinking with him before?

A: I think we'd been out once or so before.

Q: Okay. Could you --

A: Maybe twice.

Q: Could you tell whether or not, or do you have an opinion as to whether or not he was intoxicated?

A: He was working on it pretty good.

[p.217] Q: I understand that. Do you believe he was intoxicated?

A: I don't -- not an expert to say that or not, I mean, you know --

Q: Well, I'm not -- I'm asking simply for your opinion based on your experience in drinking and seeing other people drinking.

A: I think he was getting pretty -- pretty hammered.

Q: Okay. All right. What time did you leave? And what bar was this?

A: That was at The Peacock lounge or bar. What do they call it?

Q: What time did you leave The Peacock bar?

A: Somewhere around quarter to 2:00, 2:00 o'clock.

Q: All right. And where did you go -- how did you get home from there?

A: I drove up to the truck stop and got a bite to eat and went down to the first exit of the trailer -- first entrance of the trailer park and around in it.

Q: And then you went home?

A: Yeah. That's -- that's the path I took. I went from the bar to the truck stop, back to the highway, took a left, turned in the trailer court and went the wrong way in, the first exit.

Q: All right. And did you have an occasion to see the defendant that evening after you -- after you got home?

A: That morning.

Q: That morning?

A: That morning I did.

Q: Okay. And what -- where were you when you saw the [p.218] defendant?

A: I'd laid on the couch and went to sleep -- at the trailer, and the cops knocked on the door. And they come in and talked to him, and I seen him after that.

Q: How were you dressed at that particular time?

A: I think I still had the clothes on that I had on at the bar that night.

Q: So it would be fair to say you got home on the couch and fell asleep?

A: Yeah. I just covered up on the couch and went to sleep, yeah.

Q: And that's where you had been sleeping anyway?

A: Yeah, that's correct.

Q: Is it usual for you to go to sleep in your clothes?

A: Quite easily, yeah.

Q: Okay.

A: To be honest with you.

Q: All right. Is that -- why is that?

A: It's just what I do sometimes.

Q: Just a habit?

A: It's part of life, sometimes.

Q: What I'm getting at is -- did you have your clothes on, fall asleep because you passed out, you're too --

A: No. By no means.

Q: -- drunk to take your clothes off?

A: No, I just -- I just -- sometimes, now, I'll sleep with my clothes on.

[p.219] Q: All right. Okay. Now, after -- you said that a police officer arrived and then you had a chance to talk to the defendant. Is that correct?

A: That's correct.

Q: Well, let me ask you this, what did you talk to him about?

A: Well, the police had come and questioned him about the case, or whatever this is, what you want to call it. And I went up and forced him directly and asked him if he'd done it.

Q: Okay. Now, who -- was anybody else present at that time?

A: His brother was there.

Q: All right. And what, specifically, to the best of your recollection, did you ask Troy Brown?

A: Pretty well, point blank, if he'd done it, or if he had anything involved with it or whatever.

Q: And when you say "done it," done what?

A: Well, okay. Let me rephrase, if you would, please.

Q: Please.

A: I'd -- I'd ask him if he'd had anything to do with the rape of the little girl.

Q: Okay.

A: Or you know.

Q: And what, if anything, did he say to you?

A: He said that he -- I guess -- I need to be real careful how I word this, if you'll -- you'll be with me.

Q: I want you to tell me as -- the best of your recollection, as specifically what he said.

A: He says he -- wasn't sure what did happen, or he would [p.220] like to know what did happen. And I took that to be --

THE COURT: Well, wait a minute. Just answer the questions asked of you.

THE WITNESS: Okay.

THE COURT: Go ahead, Mr. Smith.

By MR. SMITH (continuing):

Q: All right. Now, he said -- okay. Your question was, "Did you do it?"

A: Was he involved with it.

Q: Okay. And he said what?

A: That basically he would like to remember what did go on, or what did happen.

Q: All right.

A: And that's -- that's pretty well --

Q: Do you recall making a statement about this?

A: Yes, sir.

Q: All right. And you recall when you made the statement?

A: Yeah. It was a few days after, after the -- but I'm not sure what day it was.

MR. SMITH: May I ask the clerk to hand the witness that document?

By MR. SMITH (continuing):

Q: Sir, what I'd like you to do is to look at that document and, directing your attention specifically to the second page of that document, and tell me when you have read it.

THE COURT: Okay. You're just refreshing his memory, is that correct?

[p.221] MR. SMITH: I am, Judge.

THE COURT: Why don't you ask him to identify it as his writing first?

MR. SMITH: We'll do that.

By MR. SMITH (continuing):

Q: Do you recognize that document?

A: Yes, sir, this is --

Q: What is it?

A: This is the statement that I gave the police a few days after.

Q: And all right. and so that would have been the 1st or 2nd of February?

A: Yeah. I think 2-1 is what it says on the document.

Q: Now, have you read that second page?

A: I haven't had a chance to yet.

Q: Now, I'm sorry, you have or you haven't?

A: I have not had a chance to, sir.

Q: Oh, please.

A: Okay.

Q: All right. After reading that and going back to my questions as to what the defendant's response was to the question, "Did you do this," what did he say?

A: Basically, he wished that he could remember what did go on. I can read exactly what I did say here. This is the talk:

"I asked him face to face if he did it. He said he wished that he could remember what did go on or what went on."

Q: Okay. And you made that statement two days after this [p.222] incident, is that correct?

A: That's correct.

Q: Would you agree that your recollection of the facts would be clearer at that point than they are now?

A: It's been a long time, you know.

Q: I understand. Would you agree that your recollection of the facts would have been clearer and fresher when you made that statement?

A: Well, sure they would be.

Q: All right.

A: Without a doubt.

Q: All right. Thank you.

THE COURT: Why don't you return that to Mr. Smith.

MR. SMITH: Thank you, Mr. Prescott. That's all I have.

THE COURT: Mr. Lockie?

CROSS-EXAMINATION

By DAVID B. LOCKIE:

Q: When you wrote out your statement, were you trying to just exactly record the words that were said, or were you summarizing?

A: I was -- I was trying to record exactly what was said.

Q: Okay.

A: In it's -- you know, that's got to be a -- kind of a vague thing, I think, you know.

Q: All right.

A: I think word for word's tough to -- tough to say.

Q: Tough to say?

A: Yeah.

[p.223] Q: All right. Now, let's see, what time did you get to the bar the night before?

A: I think I had one drink like at 6:00, and then went and had dinner and come back at about 9:00, something like that and maybe Troy can remember what time I got there for sure.

Q: And you were drinking vodka and water?

A: I had vodka and water and a couple Grey Bulls, yes sir.

Q: All right. Anything else in the vodka and water?

A: No, vodka and water's pretty well vodka and water.

Q: Singles or doubles?

A: It's pretty hard to recall back then. But I had --

Q: Normally --

A: I had been drinking, yes.

Q: Okay. Any twist in there or anything or just plain old vodka and water?

A: Usually just plain old vodka and water.

Q: Okay. And you had other kinds of alcohol that night, too?

A: Yeah. I think I had a couple Grey Bulls and so on.

Q: What are Grey Bulls?

A: Grey Bulls are tequila and kahlua.

Q: Tequila and kahlua?

A: Kahlua, yes.

Q: Is there anything else in those drinks?

A: No, that's, that's it.

Q: All right. Did you buy all the drinks yourself, or did people buy you drinks, too?

A: There may have been some difference going on -- that's [p.224] been a long time ago, you know. That's hard for me to say now.

Q: And you'd -- I guess you've changed your drinking habits recently, is that what I was getting?

A: Well, yeah. I want to keep my job, I have changed them, so --

Q: When did you -- when did you change your drinking habits?

A: I backed off here the past three or four months quite a bit.

Q: How about last January 28th, 29th, had you changed then?

A: It was after that that I really changed it, yeah.

Q: Okay. And do you remember Troy buying you any drinks that night?

A: You know, I can't recall.

Q: Remember drinking any Jim Bean -- Jim Bean and Call?

A: Could have been.

Q: All right.

A: I can't testify to that because that's been a long time, and I wasn't really paying attention, you know. We's down there having a good time.

Q: Okay. And then how late did you stay at the bar?

A: I stayed till almost 2:00 o'clock.

Q: All right. It wasn't until after 2:00?

A: No. I think the bartenders can pretty well -- pretty well testify to that.

Q: I'm sorry, I couldn't hear --

A: I think the bartenders can pretty well testify to that if need be. It was about 2:00 o'clock.

[p.225] Q: And what did you do after you left the bar?

A: Went up to the truck stop and I got a couple pieces of chicken and ate them on the way back to the trailer.

Q: And then you went to sleep on the couch?

A: Yes, sir, I did.

Q: Did you take your boots off?

A: I don't think I even took my boots off, to be honest with you.

Q: What time do you figure it was by the time you actually made it back to the trailer?

A: Real close to 2:00. It's not that far from the bar up to the truck stop and back.

Q: Remember writing what time you left the bar in your statement?

A: If I remember right, it was somewhere around 2:00.

Q: Can you remember writing 2:20?

A: Could have. You know it's a vague, it's just like they asked me when Troy left, it's a vague, it's close but, you know, I can't give you a specific second or specific minute on that.

Q: Okay. And then, any idea what time it was when you were rousted up in the morning?

A: 4:00 or 5:00, in that area.

Q: Pardon me?

A: 4:00 or 5:00 o'clock in the morning.

Q: All right. So we're looking at, what, two, two and a half hours of --

A: Roughly.

[p.226] Q: After you got home? Were you clear-headed at all, in the morning, do you think, like that?

A: Clear enough to know what was going on then, you know. And I did go to work the next day.

Q: Did you see the police at the Henle's house at any time that night?

A: As I went home, they was there. But I didn't, you know, I didn't know what was going on, didn't -- they just -- they was there and I just went home.

Q: When did you go by the Henle's house?

A: Somewhere around 2:00. On the way home from the bar and truck stop.

Q: Were you driving or what?

A: Yes, I was.

Q: You were driving?

A: Yes.

Q: Do you know Scarlet?

A: Yes, sir, I do.

Q: Who is Scarlet?

A: She's a bartender there at -- used to work at The Peacock.

Q: Were you talking to Scarlet after she got off work?

A: Yes, I was. That's how I know about what time I left and so on.

Q: Have you talked to Scarlet since to try and figure out those times?

A: No. I think I did see her one night and we vaguely talked about it, but it was more in conversation than it was trying to [p.227] figure times out.

Q: And did you leave before or after Scarlet left?

A: I'm not sure whether she stayed there or not. I know she started her car up and so on.

Q: All right. So you and Scarlet left at about the same time?

A: I'm not sure. To be honest with you.

Q: Well, you said she started her car up?

A: Yeah, she started her car up, but that's a common thing sometimes, when it's chilly.

Q: Okay. So that means that you two both left the bar at the same time and started -- and she started the car and you started a car, or --

A: That I'm not sure of, to be honest with you.

Q: Well, I just need to know when it was that Scarlet started her car.

A: She started the car before we'd left, you know. And before -- before I left she'd gone out and started her car and so on.

Q: Do you remember how much before -- just a few minutes, or --

A: I just -- No, I can't really put a time on it, to be honest with you.

Q: Did you go back into the bar after Scarlet started her car?

A: Possibility. You know I can't yea or nay either. I mean, that was, we was out partying and I probably come in and out of the [p.228] bar tens times that night.

Q: Where were you going?

A: Pardon me?

Q: Where'd you go?

A: Probably across the street, the other bar, that's all.

Q: You don't remember, though?

A: Oh, yeah. I mean I'd bounce back and forth and so on. I'd been back to Troy's trailer and showered, you know, after the first drink, too.

Q: Did you carry your drinks in your hand when you'd go back and forth?

A: Sometimes I do. I don't recall that I did that night, or not. It's a possibility, yes, it is.

Q: Who were you partying with at CG's?

A: I don't recall anybody over there much. I've seen Pam and Troy there earlier in the evening.

Q: Down at CG's?

A: I don't know whether it was Troy or Travis, but yeah, they was there early.

Q: What time was that, about?

A: That's -- that's a vague time. That was -- had been 5:00, 6:00, 7:00, 4:00, I don't know.

Q: Did you see Pam around 10:00 to 10:30?

A: Pardon me?

Q: Did you see Pam around 10:00 to 10:30?

A: At --

Q: At CG's?

[p.229] A: At CG's?

Q: Right.

A: I'm not sure of that. I seen -- I seen her at The Peacock. That I'm positive.

Q: Did you see Pam talking on the cellular phone to anyone?

A: On the cellular phone?

Q: In CG's?

A: No, I sure didn't.

Q: And you saw Pam later on at The Peacock, is that right?

A: Yes, I did.

Q: And do you remember about what time that was?

A: It was off and on later in the evening. I seen her talking to Troy and so on.

Q: Was Troy behaving unusually in any way?

A: By no means. He was drinking but, you know, he wasn't out of line.

Q: All right. Now, during this conversation that you had with Troy in the morning, you were the one that was there, right?

A: At the trailer?

Q: Right.

A: Me and his brother, yeah.

Q: And was you and Troy talking, right?

A: Right. He was sitting at the kitchen table in our little kitchen there.

Q: And it'd be fair to say you know the context of the conversation, right?

A: Yeah. In fact I was around when the cops was there.

[p.230] Q: All right. And when you -- when you asked Troy the question, did you ask, you know, with a specific purpose in mind?

A: Yeah. I wanted to know.

Q: Okay. All right. And when he answered you, that answer taking in context, what did it mean to you?

A: I've thought about this a lot. It's more the things were just foggy. Like I've been out drinking, things are foggy. Pretty well it.

Q: So you don't know what it meant to you?

A: Just basically, you know, it was like, hey, you know, I've been out drinking, it's -- things are a little foggy right now, you know. And that's -- that's the way I see it.

Q: Did he, at any time, say to you that he did anything to this little girl?

A: By no means. By no means.

Q: Had Troy asked you for a ride over to Utah?

A: Yeah. I was going to take him to Utah, next day.

Q: All right. And did those plans change for some reason?

A: Yeah. I think I got called back in to work, if I recall right. In fact I did work that day.

Q: You got called in to work that day?

A: Yeah.

Q: What time did you have to go to work?

A: I can go back and check, somewhere around 8:00 or 9:00 o'clock, something like that when I called in and --

Q: What did you do after the police left that morning, when they come and talked to you?

[p.231] A: If I remember right, I went and had breakfast and went down to the truck stop and gave my boss some paperwork and --

Q: So you didn't go back to sleep at all?

A: No, I don't think so.

Q: Didn't go back to sleep? All right. Then you went and you worked a whole day that day?

A: I'm not sure how many hours I did work. Our schedules vary -- some days it might 16, some days when I'll be 10, some days it might be five.

Q: All right.

A: You know, that's --

Q: Do you remember having any trouble working that day on two and a half, three hours sleep?

A: No, I don't.

Q: Then which day was it that the police came and had you give a statement as to what you had heard?

A: I believe the statement said the 1st, if I remember right.

Q: All right.

A: You've got the statement there.

Q: And do you remember approximately, what time the police came and talked to you then?

A: If I remember right, it was the afternoon.

Q: Okay.

A: I went in and we'd made --

Q: Had you worked --

A: I'd call them on the phone -- they called me and left a message and I called back or whatever, and we made arrangements for [p.232] afternoon, I don't know exactly what time it was.

Q: Had you worked that day, too?

A: Yes, sir.

Q: On the 1st?

A: Uh-hum.

Q: All right. What did you do the night before that?

A: I can't remember whether I been to Idaho that day or not. I did go home for a few days.

Q: All right. Is it possible that you'd been out partying again the night before the police talked to you that day?

A: It's possible, yes. I can't -- can't deny that. Yes, it is possible.

Q: Is it likely?

A: Depends on which day it falls on. I mean that's a long time for me to remember back, you know. Yes, it is.

Q: Had you already come home from work by the time you talked to the police on that?

A: Oh, yeah. You bet.

Q: How long had you been home from work?

A: If I remember right, I went over to Mike and Donna's for 30 minutes or so, and drove over.

Q: What'd you do over at Mike and Donna's?

A: That's where I was staying at the time.

Q: Did you have any beers there or anything?

A: No.

Q: Any -- anything to drink at all?

A: No.

[p.233] Q: Without saying what was said, did you and Scarlet talk about what time Troy left the bar that night?

A: Afterwards, yeah. After, we talked about it a couple times.

Q: You and Scarlet talked about that?

A: Yes, we did. Like I said, it was more in conversation than -- than trying to pinpoint a time. At least that's the way I took the conversation.

Q: Okay. Those are all the questions I had.

THE COURT: Mr. Smith?

MR. SMITH: I have nothing further, Judge.

THE COURT: May this witness be excused?

MR. SMITH: For the State, Judge.

MR. LOCKIE: We'd like him retained.

THE COURT: Do you -- are you in touch with him?

MR. LOCKIE: Not really.

THE COURT: How do you want --

MR. LOCKIE: I just --

THE COURT: Do you want to ask any questions now so that you can find him? I'll help you in any way I can.

By MR. LOCKIE (continuing):

Q: Is there a place where you can be reached within the next two days?

A: Yeah. I can -- I can be reached by cellular phone most -- most all the time.

Q: What's your cell phone number?

A: It's 778-5685.

[p.234] Q: Thank you.

THE COURT: Would you call -- are you working the next few days?

THE WITNESS: We work pretty well seven days a week, your Honor.

THE COURT: Would you, around noon time check in with Mr. Lockie's office the next two days. Why don't you give him your number, Mr. Lockie.

MR. LOCKIE: 738 --

THE WITNESS: I am pen-less here.

THE COURT: Okay.

MR. LOCKIE: I'm in the phone book.

THE COURT: He's in the phone book. Well, write it down here. 738-8084? About 12:00 o'clock here, just touch base with him at 12:00 o'clock. Anybody answer your phone at 12:00?

MR. LOCKIE: I'll make sure they do in the next couple days.

THE COURT: Well, let me -- let's put 11:00 o'clock, then. 11:00 o'clock that way we'd --

THE WITNESS: I have an answering service, your Honor, with my phone, too, that I can check in with if they leave a message and --

THE COURT: The little cellular answering thing?

THE WITNESS: Yes.

THE COURT: Okay. All right. We'll do both to make sure we stay in touch. Okay. You may be excused. Thank you for coming today.

THE WITNESS: Thank you.

THE COURT: Are we in a good shape now to take our evening [p.235] recess now?

MR. SMITH: I believe so, Judge. I've got another witness we could do, though.

THE COURT: Well, is it quick?

MR. SMITH: Well, how do you define quick?

THE COURT: Well, that's enough. I got my answer.

Okay. We're going to take our evening recess at this time. We're going to come back tomorrow at -- do you want to try and start at 8:00? I think the reason to work more hours is to save a day next week, if possible. So I think we look in terms of trying to get -- we're going to do the same number of hours no matter what, so let's try and have fewer days. Okay? So 8:00 o'clock tomorrow okay, Counsel?

MR. LOCKIE: That's fine.

MR. SMITH: That's fine -- that's fine with State, Judge.

THE COURT: All right. If you'd be in your jury room at 8:00, we'll try and start right right at 8:00.

The jury is once again admonished as follows:

Do not converse amongst yourselves or with anyone else on any subject connected with this trial.

Do not read, watch, or listen to any report of the trial, or to any commentary on the trial, or to any person connected with the trial. This includes any medium of information such as newspapers, television, and radio.

Do not form or express any opinion on any subject connected with the trial until the case is finally submitted to you.

Do not visit the scene or attempt to make any independent [p.236] investigations concerning these matters.

Do not read tonight's newspaper, local paper, and do not read or watch anything about the O.J. Simpson trial.

A violation of these admonishments may result in a mistrial and the unnecessary expenditure of significant public funds newspaper.

Please be in your jury room at 8:00 tomorrow morning.

Court's in recess.

(Court adjourned for the day at 5:08 P.M.)

127 (4)

No. 08-559

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MAY 1 - 2009
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SUPREME COURT, U.S.

In The
Supreme Court of the United States

E. K. MCDANIEL, WARDEN and THE ATTORNEY GENERAL OF THE STATE OF NEVADA,
Petitioners,

v.

TROY BROWN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX, Volume 2

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TABLE OF CONTENTS

VOLUME 1

Relevant Docket Entries United States District Court for the District of Nevada (Reno) . . . . JA 1

Relevant Docket Entries United States Court of Appeals from the Ninth Circuit . . . . . JA 19

Fourth Judicial District Court, Criminal Information, filed July 20, 1994 . . . . . JA 28

Fourth Judicial District Court, Jury Trial Transcript Day 2, September 28, 1994 . . . . JA 34

VOLUME 2

Fourth Judicial District Court, Jury Trial Transcript Day 3, September 29, 1994 . . . JA 330

Fourth Judicial District Court, Jury Trial Transcript Day 4, September 30, 1994 . . . JA 588

VOLUME 3

Fourth Judicial District Court, Trial Exhibit II, Renee Romero Report, February 11, 1994 . JA 746

Fourth Judicial District Court, Trial Exhibit I, Renee Romero Report, June 6, 1994 . . . . . JA 749

Fourth Judicial District Court, Trial Exhibit G, Renee Romero Report, September 15, 1994 . . . . . JA 752

Fourth Judicial District Court, Exhibit 31, RFLP picture 100.000000 - 99.999976% . . JA 754

Fourth Judicial District Court, Exhibit 28A (same as J10), Renee Romero Curriculum Vitae . . . . . JA 755

Fourth Judicial District Court, Exhibit K, Wayne County Medical Clinic, Inc., physicial examination report . . . . . JA 761

Fourth Judicial District Court, Instructions 1-18, filed September 30, 1994 . . . . . JA 762

Fourth Judicial District Court, Instructions 1-3, filed September 30, 1994 . . . . . JA 781

Fourth Judicial District Court, Verdict 1A, filed September 30, 1994 . . . . . JA 783

Fourth Judicial District Court, Verdict 2A, filed September 30, 1994 . . . . . JA 784

Fourth Judicial District Court, Verdict 3B, filed September 30, 1994 . . . . . JA 785

Fourth Judicial District Court, Verdict 4A, filed September 30, 1994 . . . . . JA 786

Fourth Judicial District Court, Verdict 1B, filed September 30, 1994 . . . . . JA 787

Fourth Judicial District Court, Transcript of Proceedings, Sentencing Hearing, June 23, 1995 . . . . . JA 789

Supreme Court of Nevada, Appellant's Opening Brief, November 9, 1995 ..... JA 812

Supreme Court of Nevada, Respondent's Answering Brief, December 18, 1995 .... JA 852

Supreme Court of Nevada, Appellant's Reply Brief with Exhibit A (9 fold-out pages), January 29, 1996 ..... JA 878

Fourth Judicial District Court, Sentencing Rough Draft Transcript of Trial Proceedings, March 13, 1998 ..... JA 923

Fourth Judicial District Court, Petition for Writ of Habeas Corpus (Post-Conviction), August 30, 2001 ..... JA 1036

Fourth Judicial District Court, Points and Authorities In Suppport of Petition for Writ of Habeas Corpus (Post-Conviction) (2 fold-out pages), August 30, 2001 ..... JA 1081

Fourth Judicial District Court, Answer in Opposition to Petition for Writ of Habeas Corpus (Post Conviction) and Motion to Dismiss Petition, December 14, 2001 ..... JA 1160

VOLUME 4

Fourth Judicial District Court, Rough Draft Transcript of Prodeedings Motion to Dismiss and Writ of Habeas Corpus Hearing, Febraury 21, 2002 ..... JA 1202

Fourth Judicial District Court, Findings of Fact, Conclusions of Law, And Order Denying Writ of Habeas Corpus, March 7, 2002 . . . . . JA 1489

Supreme Court of Nevada, Order of Affirmance, November 21, 2003 . . . . . JA 1500

United States District Court, Response in Opposition to Motion to Dismiss, April 15, 2005 . . . . . JA 1507

United States District Court, Petitioner's Reply, March 1, 2006 . . . . . JA 1530

United States District Court, Exhibits 196, 197 and 198 to Motion to Expand Record, March 1, 2006 . . . . . JA 1552

United States District Court, Reply to Opposition to Motion to Expand the Record and Motion to Strike, May 30, 2006 . . . . . JA 1587

United States District Court, Order, July 31, 2006 . . . . . JA 1595

United States District Court, Motion For Reconsideration of Leave to File Supplemental Answer, August 21, 2006 . . . . . JA 1599

United States District Court, Response in Opposition to Motion for Reconsideration of Leave to File Supplemental Answer, September 22, 2006 . . . . . JA 1606

United States District Court, Order, October 18, 2006 . . . . . JA 1614

The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

Appendix A: Ninth Circuit Order Amending Opinion and Amended Opinion, dated July 21, 2008 ..... 1a

Appendix B: United States District Court, Judgment in a Civil Case, dated December 15, 2006 ..... 29a

Appendix C: United States District Court, Order on Merits, dated December 14, 2006 . 31a

Appendix D: United States District Court, Order, dated July 22, 2005 ..... 55a

Appendix E: Fourth Judicial District Court, Amended Judgment of Conviction, dated March 18, 1998 ..... 63a

Appendix F: Nevada Supreme Court Opinion, dated February 26, 1997 ..... 68a

Appendix G: Ninth Circuit Order denying rehearing, dated July 30, 2008 ..... 97a

Appendix H: Statutes 99a

Appendix I: Nevada Supreme Court, Appellant's Opening Brief, dated November 20, 1995 .. 111a

Appendix J: Nevada Supreme Court, Appellant's Reply Brief, dated March 4, 1996 ..... 122a

Appendix K: United States District Court, First Amended Petition for Writ of Habeas Corpus By A Person In State Custody Pursuant to 28 U.S.C. § 2254, dated November 12, 2004 .. 130a

Appendix L: United States District Court, Motion to Dismiss, dated March 28, 2005 . 175a

Appendix M: United States District Court, Answer, dated October 19, 2005 ..... 186a

Appendix N: United States District Court, Motion to Expand Record, dated March 1, 2006 ..... 219a

Appendix O: United States District Court, Opposition to Motion to Expand Record and Motion to Strike, dated March 30, 2006 ... 222a

In the District Court of the Fourth Judicial District of the State of Nevada, in and for the County of Elko

[caption omitted in printing]

THURSDAY, SEPTEMBER 29, 1994
JURY TRIAL - DAY 3

[p.238] THURSDAY, SEPTEMBER 29, 1994, 8:10 A.M.

THE COURT: Please be seated. The record will reflect the presence of counsel and the defendant. Counsel, will you stipulate to the presence of the jury?

MR. SMITH: For the State, Judge.

MR. LOCKIE: Yes, your Honor.

THE COURT: Call your next witness.

MR. SMITH: Jennifer Bonaudi.

THE COURT: Ma'am, please come forward. Face the clerk, raise your right hand.

JENNIFER BONAUDI,

called as a witness by the plaintiff, was sworn and testified as follows:

THE COURT: Have a seat right here in the chair. What's your name?

THE WITNESS: Jennifer Bonaudi.

THE COURT: How do I spell your last name?

THE WITNESS: B-O-N-A-U-D-I.

THE COURT: Go ahead, Mr. Smith.

MR. SMITH: Thank you.

DIRECT EXAMINATION

By MARSHALL S. SMITH:

Q: Ms. Bonaudi, what is your occupation?

A: I'm a medical technologist.

Q: And what is a medical technologist?

A: Basically we work in the lab. We do blood drawing, but mostly we are running the blood tests that we -- that are ordered [p.239] by the physicians.

Q: All right. And that's -- and where are you employed?

A: At Elko General Hospital.

Q: And how long have you been so employed?

A: I've worked there for a little over two years.

Q: And so your function there -- one of your functions, then, is to draw blood?

A: Yes.

Q: All right. And were you on duty, or working for the hospital on January 29th, 1994?

A: I was on-call, yes.

Q: Okay. On that date did you have an occasion to draw blood from a child by the name of Megan Allred?

A: Yes, I did.

MR. SMITH: If I could ask the clerk to show the witness what's been admitted as State's Exhibit number 1.

THE COURT: Okay.

By MR. SMITH (continuing):

Q: Ma'am, do you recognize who's depicted in that photograph?

A: Yes.

Q: And who is that?

A: Megan Allred.

Q: Is that the person from whom you drew blood?

A: Yes.

Q: Where was it that -- where was she when you drew the blood?

A: She was in the emergency room.

[p.240] Q: All right. And you were called in specifically for this purpose?

A: Yes.

Q: Now, what did you do?

A: The doctor had ordered several lab tests to be done at the hospital and the -- one of the police agencies had requested that we consider it to be a forensic draw. And so we -- I drew both of them together at the same time so we didn't have to draw her at two different times, we put the needle in once.

Q: All right.

MR. SMITH: If I could ask the clerk to show the witness State's Exhibit number 15.

By MR. SMITH (continuing):

Q: Ma'am, do you recognize what that is?

A: Yes, I do.

Q: What is that?

A: This would be what we consider to be a forensic chain of custody envelope.

Q: All right. You recognize what the contents of that envelope?

A: It would be an EDTA 2.

Q: I'm sorry?

A: It's an EDTA 2. There's an anti-preservative in it -- anti-coagulant in it that keeps the blood whole, and it is just a regular blood tube.

Q: Okay. Is that based on -- now, how do you recognize that envelope?

[p.241] A: The envelope has my signature as the very first person in the chain of custody. Meaning that I would have drawn this tube of blood, put it in here, signed it, dated it, sealed it, and handed it to someone.

Q: All right. Do you remember who you sent -- you gave it to?

A: I gave it to, I believe, someone in the Carlin Police Agency.

Q: And it was sealed when you gave it to him?

A: Yes. It's sealed here and there's -- that's where the tape is put on it.

Q: All right. Now, did you sign the vial itself?

A: No, I did not.

Q: And why didn't you do that?

A: Because basically, this is considered the chain of custody for me when I'm in the emergency room. And I did not know where this was going.

We do quite a bit of blood drawing for a specific reference lab for DUI. They have very specific requirements of what they want on the tubes. This was

not for that purpose, I didn't know what they wanted on the tube, so the label was considered the chain of custody because it has her name on it.

Q: So, you then, put that tube into that envelope and sealed it.

A: Sealed it, right. And her name is on the envelope, that's considered the label for the tube.

Q: All right. Did you remember the date of that draw -- [p.242] what's the date on the envelope?

A: The date on the envelope is January 29th, 1994.

MR. SMITH: Thank you, I have nothing further.

THE COURT: Mr. Lockie?

MR. LOCKIE: Nothing based on that.

THE COURT: May this witness be excused?

MR. SMITH: Yes, Judge.

MR. LOCKIE: Yes.

THE COURT: Well, thank you for coming. You may be excused.

Call your next witness.

MR. SMITH: Chris Murphy.

THE COURT: Sir, please come forward. Face the clerk and raise your right hand.

CHRISTOPHER GLEN MURPHY,

called as a witness by the plaintiff, was sworn and testified as follows:

THE COURT: Have a seat in that chair there. What's your name, sir?

THE WITNESS: Christopher Glen Murphy.

THE COURT: How do you spell Murphy?

THE WITNESS: M-U-R-P-H-Y.

THE COURT: Go ahead, Mr. Smith.

MR. SMITH: Thank you.

DIRECT EXAMINATION

By MARSHALL S. SMITH:

Q: Let me ask you this, where are you currently living?

A: Carlin, City of Carlin.

[p.243] Q: And how were you employed during the month of January, 1994?

A: I was a senior officer for the City of Carlin.

Q: Were you involved in an investigation of a sexual assault to the young girl named Megan Allred?

A: Yes, sir.

Q: And what -- what was your -- Let me ask you this, when were you notified of this assault?

A: I was notified by dispatch at approximately 0121 hours. I was notified that there -- a little girl had been hurt, that Officer Mike Terry needed my assistance.

Q: You responded to the scene, then?

A: Yes, sir, I did.

Q: All right. Did you, at some point during the course of that investigation, go to the hospital with the child?

A: Yes, I did. There was evidence that needed to be collected at the scene, so I left Officer Mike Terry in charge. I then took a rape kit and gave it to the ambulance crew, Mary Tognarelli, who did work for the City of Carlin, and asked her to take that to the hospital and that I would soon be there. I then took Mrs. Allred [sic] -- Pam Allred [sic] -- and went to the hospital.

MR. SMITH: If I could ask the clerk to show Mr. --

By MR. SMITH (continuing):

Q: Now let me ask you this, excuse me. Is -- are you still with the Carlin Police Department?

A: No, sir, I'm not.

[p.244] Q: All right. How are you employed now?

A: I'm not employed.

MR. SMITH: All right. Now, would you please show the officer -- Mr. Murphy 16 and 15, please?

By MR. SMITH (continuing):

Q: Showing you what's been marked for identification as State's Exhibit number 15, do you see that?

A: Yes, sir.

Q: What is that?

A: This was the -- part of the kit, the rape kit, that the blood sample was put into.

Q: All right. How do you recognize that?

A: On the inside of the envelope, on the inside of this evidence envelope will be names on it which the technician signed and I signed after receiving it from her.

Q: Okay. And you received in a sealed condition?

A: I received it, made sure that the evidence was inside, and then it was sealed.

Q: Okay. And you were there when the blood was drawn?

A: Yes, sir, I was.

Q: All right. And you saw her put that vile into that --

A: I was with her, yes, sir.

Q: -- envelope? And then seal it?

A: Yes, sir.

Q: All right. What did you do then with number 15?

A: I then received this kit from the doctor and we both went over it, I made sure that everything was in the kit, I asked him |p.245| questions as to why certain things weren't in there and he stated why.

Q: Now, what is a rape kit?

A: A rape kit of this type is issued by Washoe Crime Lab in Carson City. They do all the forensics on these things, and they have a certain guideline that they want officers to follow when these rape kits are taken in to the hospital. Also, that the doctor should follow these same guidelines in obtaining evidence.

Q: And how do you recognize number 16?

A: Number 16 would have my signature on it, as well as the physician at the time.

Q: Okay. Then what did you do with 15 and -- both 15 and 16, did you ultimately take possession of those at the hospital?

A: Yes. After going through the rape kit and having the doctor sign it, I signed it. That kit was in my possession until I got to the City of Carlin where I put it in a refrigerator. As an employee of the City, I was

also the Evidence Officer, so everything came into my custody.

Q: Then what happens as the Evidence custodian to all the evidence which was taken at the scene and at the hospital?

A: At a certain time the chief decided it was time to take this evidence to the crime lab in Carson City. I then released all the evidence that I had in my possession, that needed to be gone through by the technicians in Washoe Crime Lab, and released it to Officer Mike Terry, who did transport it down to Washoe Crime Lab.

Q: Okay. Now, did you then continue -- or were you continued in -- did you maintain some involvement with the investigations?

[p.246] A: Yes. After a time, Officer Mike Terry came into the chief and explained to him that he knew the family that was involved and asked to be released from that case. At that time the chief asked me if I would take over that investigation, which I did.

Q: Now, who were the -- Let me ask you this, were you at the scene when suspects concerning this case were being developed?

A: I was at the scene during the whole time, and being senior officer there was questions asked of me by the younger officers. I did give them direction on which way to go and I was fully aware of everything that was going on within the case. I --

Q: Was there some concern about Pam Henle's first husband?

A: Yes. Evidently Officer Mike Terry had interviewed with Pam Henle, and Pam had stated that she'd had some problems with her ex-husband, and that she thought that there was some kind of threat. Again she iterated this to me on the way to the hospital.

When I got to the hospital, I phone Officer Mike Terry and I instructed him to find out exactly where this man was. Had the Carbon County Sheriff's Department have a deputy go find this man to make sure he was there. That I wanted an eyewitness account of this. I also instructed him to call up to the mines and ask where her present husband at this time was, too. It was also confirmed that he was on the job site.

Q: So the -- the first husband of Ms. Henle was in Carbon County. Where's that?

A: That'd be in -- in the State of Utah.

MR. LOCKIE: Your Honor, objection. There's lack of foundation.

[p. 247] THE COURT: Hearsay?

MR. LOCKIE: And it's hearsay, too.

THE COURT: Mr. Smith?

MR. SMITH: I'll withdraw that, Judge.

THE COURT: All right. Question's withdrawn. And any answer to that -- well, go ahead.

By MR. SMITH (continuing):

Q: All right. So you then -- well, that's enough.

MR. SMITH: I would at this time move for the admission of 15 and 16.

THE COURT: What is -- where did 16 come from?

MR. SMITH: I'm sorry.

THE COURT: Where did 16 come from? Is this the first time we've talked about 16?

MR. SMITH: Yes. That's the rape kit.

THE COURT: That he took with him to the hospital?

MR. SMITH: That was taken to the hospital.

THE COURT: He took it to the hospital.

THE WITNESS: May I elaborate on this, your Honor?

MR. SMITH: Marilou Tognarelli took that to the hospital, and then it was -- well, let, maybe a couple more questions.

THE COURT: All right.

By MR. SMITH (continuing):

Q: Was -- at the time that -- the rape kit is essentially to -- it's an envelope full of empty containers and whatnot, right?

A: That is correct.

Q: Specifically designed for the collection of evidence?

[p.248] A: That's correct.

Q: And that evidence is collected at the hospital with the victim?

A: That is correct.

Q: All right. So when Ms. Tognarelli transported it to the hospital, it was empty?

A: That is correct. Everything was sealed and intact.

Q: Okay. And then after the evidence was collected at the hospital, you then -- it was put into that envelope and then you took it back to Carlin?

A: That is correct.

THE COURT: Mr. Lockie.

MR. LOCKIE: May the witness be shown Defense Exhibit B?

THE COURT: Okay. Now, you want a voir dire on the exhibit, is that what you want to do? He's offering these two exhibits, have you got any objection?

MR. LOCKIE: No, I don't. No objection at all.

THE COURT: Now what is -- is this the end of 16, it's just empty stuff?

MR. SMITH: There is some -- primarily what I did that for is the chain, Judge.

THE COURT: Sixteen? Anyway, 15 and 16 will be admitted to evidence.

No, it's still Mr. Smith.

MR. SMITH: No, that's all I have.

THE COURT: Okay. Mr. Lockie.

MR. LOCKIE: May the witness be shown Defense Exhibit B?

[p.249] CROSS-EXAMINATION

By DAVID B. LOCKIE:

Q: Do you recognize Defense Exhibit B?

A: Yes. This would be an itemized list from Mike Terry's report.

Q: All right. Did you collect any of the evidence listed on B?

A: The only two things that I would have had any information on was the fingerprint that was later collected by the detective from --

THE COURT: The question is did you collect any of that stuff?

THE WITNESS: Yes.

THE COURT: Answer the question.

. . . . . .

By MR. LOCKIE (continuing):

Q: Which items did you collect?

A: The rape kit.

Q: All right. And were you present at the hospital when the rape kit was administered, if you will?

A: No, I was not in the room with Dr. Campbell when he collected --

Q: All right. What items were collected in connection with the rape kit?

A: I wasn't in there. There's a couple items that weren't collected that I asked him about.

Q: What was that?

A: Well, one was the pubic hairs. The doctor's response to me was that she was too young to -- to have collected anything like [p.250] that.

Q: Did you find some pubic hairs?

A: I don't -- I wasn't in on the examination.

Q: All right. Was there anything else that was not collected that you'd asked about?

A: I think there was a couple other things, but I'd have to go through the rape kit, that were not with the victim.

Q: Were you aware of any scrapings taken from Megan's teeth.

A: Yes. The doctor did come out and say he did find some scrapings on her teeth.

Q: All right. And did you put those into the rape kit?

A: No, the doctor did.

Q: All right. And were those then transported to the crime lab?

A: Yes, sir, they were.

Q: The -- are you familiar, generally, with the collection of evidence in connection with rapes?

A: This would be the first time I've ever collected anything.

Q: Okay. Did you conduct any searches in connection with this case?

A: Yes, I did.

Q: And what -- where did you search?

A: I searched Troy Brown's living area, his house.

Q: Did you take anything into evidence?

A: Yes, I did.

Q: What did you take into evidence?

A: I took in some personal clothing, magazines, personal [p.251] items of that nature, bedding, pillow case.

Q: All right. And did you cause the bedding and pillow cases and other items that you'd collected to be transmitted anywhere?

A: I wrapped them in a -- everything was in the bedding -- in the bedding, then I transported it down to PD where we did wrap it up and ship it down to Carson -- the crime lab.

Q: All right. That would be Reno or Carson?

A: Carson.

Q: Is that a different crime lab than the Washoe County Sheriff's Office Crime Lab?

A: I'm not familiar, I've never been to there. I assumed it was in Carson.

Q: All right. Are those items listed in Defense Exhibit B at all?

A: No, sir.

Q: All right. What record did you make of the items that you transmitted?

A: I made a record, with my report, of the things that I collected in his personal bedroom.

Q: All right. Do you have that with you today?

A: No. This is Mike Terry's.

Q: What I'm asking is, did you bring your report with you to court?

A: I brang some of my statements, but I don't think I brang everything.

Q: All right. Did you personally take the items over or did you have someone --

[p.252] A: Yeah. Everything went into my custody.

Q: All right. And did you personally take anything into Washoe Crime Lab?

A: No, sir.

Q: Who brought the items to the Washoe Crime Lab that you had collected?

A: Officer Mike Terry would have transported everything down.

Q: In connection with your search of Troy Brown's residence, did you collect a jacket?

A: No, sir.

Q: All right. Did you ever collect a jacket?

A: Yes, sir, when we had an interview with him in Loa, Utah.

Q: All right. What jacket did you collect?

A: It was a black, satin jacket from CG's.

Q: Okay. And did it have an emblem on it?

A: A CG's on it. Don't know what type of emblem.

Q: All right. Was it a snap jacket or a zipper jacket?

A: I don't remember.

MR. LOCKIE: May I just have a moment, your Honor?

THE COURT: Sure.

MR. LOCKIE: Your Honor, may I have the clerk show the witness what's identified as State's 13?

MR. SMITH: You may need to give them the bag also. And for the record, the jacket was contained in the plastic bag.

By MR. LOCKIE (continuing):

Q: Is that the jacket that you collected from Troy Brown?

A: Yes, it is.

[p.253] Q: What did you do with it after you collected it?

A: I put it in this plastic bag to preserve it from getting dirty within the trunk of the car.

Q: All right. And what did you do with it after that?

A: I transported it to Carlin where I kept it in Evidence.

Q: All right. And it was kept in Evidence until it came to court?

A: That is correct.

MR. LOCKIE: Move for admission of State's Exhibit 13.

MR. SMITH: No objection.

THE COURT: Thirteen will be admitted into evidence.

By MR. LOCKIE (continuing):

Q: Could you hold the jacket up for the jury to look at both sides? Thank you. Justify that you went to Loa?

A: That is correct.

Q: Why did Lou go to Loa?

A: They were -- we'd asked Elko Police Department to assist us, they had more experience in these type of

cases, and Officer Connie Walker and Lieutenant Roy Ladd were going to go down and interview him. The chief felt that it would be better if I would be there to advise them of anything that might be a question to them. I did so. The interviewing was left up to Connie Walker and Lieutenant Ladd.

Q: Did you have any trouble locating Troy Brown over there?

A: No. We -- they did go out to a different city, the deputies there, to locate him. He wasn't out of the area.

Q: Okay. But once you found the right city, did you have any [p.254] trouble locating him? Did he run from you at all?

A: No.

Q: And were you present during an interview with him?

A: Yes, I was.

Q: And he agreed to talk to you?

A: Yes, he did.

Q: Did he admit or deny that he committed these crimes?

A: He never admitted to them and he never denied it.

Q: He never denied that he committed the crime?

A: He stated the fact that he couldn't have done something like this is all he said.

Q: Okay. Did he ever admit doing anything at all?

A: No.

Q: And you were not the interviewing officer, is that right?

A: No, sir, I was not.

Q: Who, specifically, was the interviewing officer?

A: Lieutenant Ladd was.

Q: And was the interview tape recorded?

A: Yes. Lieutenant Ladd recorded it.

Q: And a transcript made of that?

A: I believe so.

MR. LOCKIE: Like the witness to be shown State's 16, the rape kit.

By MR. LOCKIE (continuing):

Q: In the rape kit, are you able to find the teeth scrapings?

A: I -- once it was sealed and the doctor and I went through it, I didn't open it until it was at the crime lab. I just [p.255] remember the doctor saying that he did obtain samples.

Q: What is the Saint's Team?

A: Saint's Team, from what I understand, is a program set up by the DA's office to bring officers in to train them so that they can deal with these certain situations and know which way to go. I was on the Saint's Team, but I had not had the training and that's why I called in Connie Walker.

Q: You called Connie Walker?

A: That is correct.

Q: And when you saw Megan, who else was present?

A: When I seen Megan, Alan Christensen, one of the ambulance attendants, and Mary Tognarelli were taking her out on a gurney, first time I seen her.

Q: And did you specifically hear Megan make any statements regarding the identity of her attacker?

A: I went into the ambulance after I'd learned that she had --

Q: Well, did you hear Megan make any statements regarding the identity of her attacker?

A: No, I don't believe I did.

Q: Okay. And were you present the entire time with Megan, or was there a time that Marilou Tognarelli was with her and you were not present?

A: Mary Tognarelli was with her most the time. I'd seen her briefly at the incident, and then she was transported to Elko.

Q: All right. And I take it it was not your desire to interrogate Megan at all?

[p.256] A: No, it was not,

Q: Okay. And I take it then, you wanted to defer to the specialty of the Saint's Team?

A: That is correct.

MR. LOCKIE: I have no further questions.

THE COURT: Redirect?

REDIRECT EXAMINATION

By MARSHALL S. SMITH:

Q: Now, with reference to the evidence that you did take from the defendant's residence, you made a report of that, then, didn't you?

A: Yes, sir, I did.

Q: And, in fact, you put together an Evidence Control Log.

A: That is correct.

Q: Of all the evidence that you received, then. So you did make a record of all of that?

A: Yes, sir, I did.

MR. SMITH: I have nothing further.

THE COURT: Recross?

MR. LOCKIE: Nothing based on that.

THE COURT: May this witness be excused?

MR. LOCKIE: Yes.

THE COURT: Mr. Smith?

MR. SMITH: Yes, Judge.

THE COURT: You may be excused. Thank you for coming.

Call your next witness.

MR. SMITH: Laurie Robinson.

[p.257] THE COURT: Please come forward. Please come forward. Face the clerk and raise your right hand.

LAURIE ROBINSON,

called as a witness by the plaintiff, was sworn and testified as follows:

THE COURT: Have a seat right in this box. What's your name, ma'am?

THE WITNESS: Laurie Robinson.

THE COURT: How do you spell Laurie?

THE WITNESS: L-A-U-R-I-E.

THE COURT: All right. Do that once again for me.

THE WITNESS: L-A-U-R-I-E.

THE COURT: Okay. And your last name?

THE WITNESS: Robinson.

THE COURT: How do you spell Robinson?

THE WITNESS: R-O-B-I-N-S-O-N.

THE COURT: Mr. Smith.

MR. SMITH: Thank you.

DIRECT EXAMINATION

By MARSHALL S. SMITH:

Q: What is your occupation?

A: Medical lab technician.

Q: And what is a medical lab technician?

A: We run blood tests in the laboratory and we draw blood from different people.

Q: All right. And where do you work presently?

A: At Elko General Hospital.

[p.258] Q: Were you working as a medical lab technician during January of 1994?

A: Yes, I was.

Q: Did you have an occasion to draw blood -- Were you working there in February of 1994?

A: Yes.

Q: All right. Did you have an occasion to draw blood from a person who is identified as Troy Brown?

A: Yes.

Q: And who else was present during that -- when you drew that blood?

A: Detective Roy Ladd.

Q: All right. And what did you do with the blood after you drew it?

A: I labeled it with Troy's name, I put my initials on it and the date that it was drawn. Then I handed it to Detective Ladd.

MR. SMITH: If I could ask the clerk to hand the witness State's Exhibit number 17, please.

By MR. SMITH (continuing):

Q: Ma'am, do you recognize what that is?

A: Yes.

Q: What is that?

A: Inside here -- these are the tubes of blood that I drew from Mr. Brown on that date.

Q: And how do you recognize those tubes?

A: It has my handwriting, and also my initials on here.

Q: And then after you drew the blood, what did you do [p.259] with it?

A: I gave the tubes to Detective Ladd and he was to package them and take them to the lab.

Q: Okay. Thank you.

MR. SMITH: That's -- I'd move for the admission of number 17, please.

THE COURT: Did she identify the person she took the blood from?

By MR. SMITH (continuing):

Q: Could you identify the person you took the blood from?

A: No, it's --

Q: All right. All right, that's fine. I'll wait for Roy.

THE COURT: Mr. Lockie?

MR. LOCKIE: No questions.

THE COURT: Thank you. May this witness be excused?

MR. SMITH: Yes, Judge.

THE COURT: Okay. Thank you.

Call your next witness.

MR. SMITH: Roy Ladd.

THE COURT: Officer Ladd, please come forward. Face the clerk, raise your right hand.

ROY LADD,

called as a witness by the plaintiff, was sworn and testified as follows:

THE COURT: Have a seat. What's your full name, sir?

THE WITNESS: Roy Ladd. L-A-D-D.

THE COURT: I'm sorry. Your last name?

[p.260] THE WITNESS: L-A-D-D.

THE COURT: Thank you. Mr. Smith.

DIRECT EXAMINATION

By MARSHALL S. SMITH:

Q: What is your occupation?

A: I'm a police officer with City of Elko.

Q: And what are your duties presently?

A: I'm administrative assistant to the chief of police.

Q: And what is your rank?

A: A lieutenant.

Q: And during the month of January, 1994, did you have an occasion to become involved in an investigation concerning the sexual assault of a child?

A: Yes, sir.

Q: Let me ask you this, first of all, were you present when blood was drawn from -- First of all, do you know, during the course of your duties, did you come across a person by the name of Troy Brown?

A: Yes, I did.

Q: Is that person in court today?

A: Yes, he is.

Q: Would you point to where he's sitting.

A: It's the gentleman in the grey jacket next to Mr. Lockie.

THE COURT: Witness has identified the defendant.

By MR. SMITH (continuing):

Q: Were you present during a time when blood was drawn from the defendant?

[p.261] A: Yes, I was.

Q: And do you know who drew the blood.

A: Laurie Robinson with the hospital.

Q: And you observed her draw the blood?

A: Yes, I did.

MR. SMITH: If I could show the witness number 17, please.

By MR. SMITH (continuing):

Q: Do you recognize what that is?

A: Yes, I do.

Q: How do you recognize that?

A: It's got my handwriting on the evidence label, and my name's on the -- on the blood vials.

Q: All right. Do you recall approximately when that was drawn?

A: That'd be February 6th.

MR. SMITH: I'd move for the admission of number 17.

MR. LOCKIE: No objection.

THE COURT: Seventeen will be admitted.

By MR. SMITH (continuing):

Q: All right. Let me ask you this, what, after you took possession of those two vials and packaged it, what did you do with the contents of number 17?

A: I secured them in the police department's evidence system until the next morning, then I removed them and took them to the Reno -- to the Washoe County, which is the Washoe Crime Lab.

Q: Okay. Do you know approximately what date you transported them?

[p.262] A: The 7th, the following day, Monday.

Q: Now, you also had some other involvement with the case is that -- as far as the investigation of the case is concerned?

A: Yes, I did.

Q: Would you describe to the jury what your involvement -- what involvement you had with the case.

A: Along with obtaining the blood samples, I walked the distance from The Peacock lounge to the victim's home in Carlin.

Q: Okay. If I could ask you to --

MR. SMITH: Judge, if I could ask the witness to depart the stand and look at what's been admitted as number 3, please.

THE COURT: Why don't you step down there, Mr. Ladd.

By MR. SMITH (continuing):

Q: Now, Lieutenant, you indicated that you had -- First of all, do you recognize what that's a diagram of?

A: Yes. It's a diagram of the City of Carlin.

Q: And on that, do you recognize where a bar called CG's is located?

A: Be right here.

Q: And how about The Peacock?

A: Across the street.

Q: And do you know what the address is of Megan Allred's residence was?

A: I believe it was 1637.

Q: All right. How about the residence of the defendant?

A: 1717 Puett.

Q: Are those depicted on that diagram?

[p.263] A: Yes, they are.

Q: All right. Now, you indicated that you had timed the amount of time it takes to walk from a certain point to a certain point?

A: Yes.

Q: Describe to the jury what you did.

A: Well, starting at The Peacock, with a stop-watch, I walked, just normal paced, from there down Chestnut to Puett to the victim's front step.

Q: And how much time -- and you say at a normal walk?

A: Yes, sir.

Q: What's normal? In other words, were you walking slowly, or were you walking fast, or --

A: Just my normal pace.

Q: All right. And how long did it take you to get from The Peacock to Megan Allred's residence?

A: Twelve minutes and 35 seconds,

Q: And then, from Megan Allred's residence to the defendant's residence, how much time?

A: Four minutes.

Q: Thank you. You can take the -- resume the stand, please. Did you have an occasion to then speak with the defendant about this case?

A: Yes, I did.

Q: And where was that?

A: Loa, Utah.

MR. SMITH: May I ask the witness -- the clerk, please, to [p.264] show Lieutenant Ladd 13 and 14, please.

By MR. SMITH (continuing):

Q: Showing you what's been marked as Exhibit number 13 -- admitted as 13, what is that?

A: It's a black, satin jacket.

Q: And where did you get that from?

A: From the defendant in Loa, Utah.

Q: How about the -- number 14?

A: Black, cowboy hat.

Q: And where did you get that?

A: From the defendant in Loa, Utah.

Q: And how do you recognize them?

A: The evidence tag, or the exhibit tag.

Q: There's also the bag is inside for that one, if it will help you. You recognize that as being the same hat?

A: Yeah.

MR. SMITH: I'd move for the admission of number 14.

MR. LOCKIE: No objection.

THE COURT: Fourteen will be admitted.

MR. SMITH: That's all I have. Thank you.

THE COURT: Cross.

CROSS-EXAMINATION

BY DAVID B. LOCKIE:

Q: Lieutenant Ladd, did you participate in an interview with Megan?

A: With -- I was present during one of them.

Q: All right. Was that you and Connie Walker?

[p.265] A: Yes.

Q: How was it that you and Connie Walker were involved in the interview?

A: Connie Walker was the initial officer that interviewed the victim after the event.

Q: Why you, I guess, is what I'm asking.

A: Monday morning after the event, I was asked to meet with -- by my chief, asked to meet with Chief

Kranovich from the Carlin Police Department and to assist them in this investigation.

Q: Do you have any special training in the investigation of child assault cases?

A: Yes, sir.

Q: All right. Is that the reason that you were participating in this case?

A: I assume so, yes.

Q: And are you a member of a certain team?

A: Yes. The Saint's Team that we investigate these type of incidents.

Q: What's the Saint's Team?

A: It's a group of investigators that are on-call, that are trained in forensic interview of children and, basically, these type of crimes that exploit children.

Q: Is Connie Walker also a member of the Saint's Team?

A: Yes, she is.

Q: And is it important to have a training person who interviews a child victim?

A: Yes, sir.

[p.266] Q: Why is that?

A: To elicit as much information out with as very few interviews as you can with the victim, to be able to elicit this information without leading the -- without leading questions and so forth.

Q: All right. And would that include eliciting information as to the identity of the attacker?

A: Yes, sir.

Q: Okay. Now, at some point later on, were you also called to go interview Megan again?

A: Yes, sir.

Q: Okay. Could you describe the circumstances that led up to that interview?

A: Apparently she had -- this is after returning from Loa, Utah -- she became upset at a news broadcast and wanted to talk to both Connie and I.

Q: All right. So what did you do?

A: I prepared a photo line-up and took it to Megan at where she was staying.

Q: What pictures did you use in the photo line-up?

A: I used a photograph of the defendant and then five other comparables.

Q: All right. Can you remember any of the other comparables?

A: No, I can't.

Q: Okay. They were -- where did you get the comparables from?

A: From our files.

[p.267] Q: And are you trained in the administration of photographic line-ups?

A: Yes.

Q: Okay. What do you have to be careful of when you're doing a photographic line-up?

A: Again, not to lead the witness in any way, to include comparables. For example, you know, you'd include persons of the same race, same sex, same type of facial hair, things like that.

Q: Did you put any pictures of Travis Brown in the line-up?

A: No, I did not.

Q: All right. Or Trent Brown?

A: No. I didn't have photos of them.

Q: Okay. And then you showed the photo line-up to Megan?

A: Yes, I did.

Q: And which picture number was Troy Brown?

A: I don't recall.

Q: Okay. Do you recall whether Megan was able to identify any of the pictures?

A: I don't think she was.

Q: All right. Did she look at Troy Brown's picture at all?

A: It was in the group of pictures.

Q: Okay. Did she point out that picture at all?

A: I don't recall.

MR. LOCKIE: Your Honor, I have no further questions at this time. I want to retain the witness and call him later.

THE COURT: Mr. Smith?

MR. SMITH: Yeah. I will also, Judge.

[p.268] THE COURT: You want --

MR. SMITH: For a possible rebuttal.

THE COURT: Any redirect?

MR. SMITH: No. No redirect.

THE COURT: Okay. Are you going to be on-duty the next few days?

THE WITNESS: Yes, sir.

THE COURT: So, if you'd stay in contact with your dispatch in case we have to have you come. If dispatch could always know where to get a hold of you during the day. Thank you for coming.

Call your next witness.

MR. SMITH: Maria Fassett.

THE COURT: Ma'am, please come forward. Face the clerk and raise your right hand.

MARIA FASSETT,

called as a witness by the plaintiff, was sworn and testified as follows:

THE COURT: Ma'am, if you'd have a seat right in this box. What is your name, ma'am?

THE WITNESS: My name is Maria Fassett.

THE COURT: How do you spell Maria?

THE WITNESS: M-A-R-I-A.

THE COURT: And your last name?

THE WITNESS: F-A-S-S-E-T-T.

THE COURT: Mr. Smith?

MR. SMITH: Thank you.

[p.269] DIRECT EXAMINATION

By MARSHALL S. SMITH:

Q: Ms. Fassett, what is your occupation?

A: I'm employed as a criminalist for the Washoe County Sheriff's Office, Forensic Science Division in Reno, Nevada.

Q: What is a criminalist?

A: A criminalist is a person who by training, educational background, will examine physical evidence and draw conclusions concerning that evidence based on scientific principles.

Q: What is the Washoe County Crime Lab?

A: A collection on criminalists and crime scene investigators.

Q: All right. And what are your primary duties at the lab?

A: Currently I've been assigned to the area of forensic serology and I've been in that area for approximately ten and a half years.

Q: And what is forensic serology?

A: It's examination of the physical evidence for primarily, bodily fluids, which include mostly, semen and blood.

Q: And would you describe to the jury, your educational background.

A: Yes. I received my Bachelor of Science degree in 1977 from the University of California at Davis in Biochemistry. And then I've taken a couple of graduate courses. One from the FBI academy in Quantico in basic serology, and the other course I took at University of Nevada in Reno in molecular genetics.

Q: Now, are you a member of any professional associations [p.270] related to that field?

A: Yes. I'm a member of the American Academy of Forensic Sciences, and also the Northwest Association of Forensic Scientists.

Q: Have you ever testified in any courts in Nevada as an expert in the area of forensic serology before?

A: Yes, I have.

Q: Which courts?

A: I don't know them by district, but the ones in Reno, Douglas County, Pershing County, Churchill County, Mineral County, Elko County, and White Pine County.

MR. SMITH: If I could ask the clerk to show the witness what's been marked for identification as State's Exhibit number 22.

By MR. SMITH (continuing):

Q: Ma'am, do you recognize what that is a -- what is that?

A: It is a copy of my resume.

Q: And is that current?

A: Yes, sir, it is.

MR. SMITH: I'd move that Ms. Fassett be recognized as an expert in Forensic Serology.

MR. LOCKIE: No objection.

THE COURT: She'll be so recognized.

By MR. SMITH (continuing):

Q: In the course of working at the crime lab, were you involved in examining evidence which -- wherein the suspect was listed as Troy Brown?

A: Yes, sir.

[p.271] MR. SMITH: And if I could ask the -- Ms. Clerk, if you would show -- let's see -- there's going to be a number up in here -- it's 15 -- 23?

CLERK: I don't have that, yet.

By MR. SMITH (continuing):

Q: Do you have that with you? Did you bring some evidence with you today?

A: Yes, sir, I did.

Q: Oh, okay. Good. All right. 10? 11? Those are the only ones right now.

Now, showing you, first of all, what's been marked as number 15. I believe that's in the -- yes.

A: Yes, sir.

Q: Do you recognize what that is?

A: Yes, sir.

Q: What is that?

A: It is -- 15 contains the envelope which originally contained a liquid blood sample that was obtained from Megan Allred.

Q: All right. And when did you come into possession of that?

A: On the 2nd of February, this year.

Q: That would -- and where was that?

A: At the Washoe County Sheriff's Office Crime Laboratory.

Q: All right. And what did you do with that?

A: With the liquid blood sample, I withdrew a portion of that sample and I prepared a stain on a white cotton cloth. And that stain is kept in the laboratory for comparison purposes. And the [p.272] original vial that contained the liquid blood sample was then returned to the submitting agency.

Q: All right. You then, I believe you brought what has been previously marked as Exhibit number 23?

A: Yes, sir.

Q: And what is that?

A: This is the stain that I prepared in the laboratory from the liquid blood sample that -- from Megan Allred.

Q: So now, when you say you prepared a stain -- I'm not sure if I understand what you mean by that, do you -- please explain to the jury what you -- more specifically what you did.

A: Yes. I, again, I take a portion of that liquid blood sample, in the liquid form --

Q: And excuse me. A portion -- how much are we talking?

A: Approximately a couple of milliliters, which is maybe a tablespoon or so.

Q: Okay.

A: And then I apply that to the white cotton cloth, which is labelled with the source of the blood sample that I obtained, in this case it's Megan Allred. And then I dry that sample down and so it becomes a stain. And then the biological markers in that blood sample are very stable in the stain form. And the stain is kept in the freezer so that no further degradation occurs.

Q: And what is the reason for making the stain?

A: It's just a more stable form than keeping the liquid blood sample. You get the same markers, the

biological markers, out of the liquid blood as you do the stain form. The stain form you can [p.273] freeze and maintain the integrity of the biological markers for a longer time.

Q: And when you say biological markers, what do you mean by that?

A: Primarily DNA. However, in the forensic lab we do look at other, historically, we look at other enzyme markers and ABO type.

Q: All right. And so, number 23, that you're holding in your hand, that is the stain that you made from Megan's blood?

A: Correct.

Q: All right. Now, show you number 10. You look at the contents of that, please.

A: Yes, sir.

Q: Do you recognize what is contained in number 10?

A: Yes, I do.

Q: What is that?

A: It is the pair of panties that were submitted in this case, that I examined.

Q: And how do you recognize those?

A: On the panties, on the label, I put my laboratory number, the date that I examined the item, and my initials.

Q: All right. Now, what did you do with those panties?

A: I examined the panties for the presence of semen, and I detected semen in the crotch area of the panties. I then removed the stain that contained that semen in there, and I placed that stain in another envelope and kept this stain in the freezer, and returned the original item to the submitting agency.

Q: And showing you what, I believe, has been previously [p.274] marked, which you brought with you, number 24?

A: Yes, sir.

Q: What is that?

A: This is the stain that was removed from the crotch area of the panties and kept in the laboratory in the freezer.

Q: And similarly, when you make a stain, you can do that with semen just as you can do it with blood?

A: Correct.

Q: And again, it's for the same purpose of further biological marker testing?

A: Correct.

Q: Which is also for DNA testing?

A: Correct.

Q: All right. Then, showing you what's been marked for identification as number 11, would you look at the contents of that, please.

A: Yes, sir.

Q: And what is that?

A: It's a pair of red, with white polka dot, cotton knit pants or pajama pants as they were --

Q: And how do you --

A: -- originally described.

Q: I'm sorry. How do you recognize those?

A: I recognize this item by the marks on the back which include my laboratory number, date that I examined it, and my initials. And by special marks that I placed on the item itself.

Q: And what did you do with those -- with those pajamas?

[p.275] A: I examined the pajamas for the presence of semen. There were two areas -- in the crotch area and also toward the rear, center seam that gave positive results for the presumptive presence of semen. I then removed those two areas and kept those in the freezer in a similar small coin envelope.

Q: And showing you what, I believe, you -- was previously marked as exhibit number 25 --

A: Yes, sir.

Q: And what is that?

A: It is the -- one of the stains that I removed from the pants. It was from the center back seam -- rear, center back.

Q: From the pants or the pajamas?

A: Well --

Q: Or whatever -- whatever was in that.

A: Yeah. What is contained in item number 11.

Q: Very good. Then how about number 26?

A: Twenty-six is the crotch area of the pajama pants.

Q: Okay. And and similarly, you made stains from those also?

A: I didn't prepare the stains, those stains were already there, I just merely cut the stains away from the pants --

Q: I'm sorry --

A: -- and kept those in the freezer

Q: Okay. And showing you number 27, which I believe you have with you --

A: Yes.

Q: What is that?

A: These are the two vaginal swab tips that were collected [p.276] from Megan Allred during her examination -- her medical examination. These were contained in a sexual assault evidence collection kit.

Q: And all of that that you have there in front of you, you received at the Washoe County Crime Lab?

A: Correct.

Q: What procedures are taken at the crime lab to insure the integrity of the evidence once it's arrived?

A: We make sure that everything, as they arrive in to the laboratory, is sealed properly with evidence, tamper-proof seals, and also the chain of custody is maintained to document that whoever had custody of the evidence, their name by signature's listed on that chain of custody.

Q: And all of that appeared to be in order in this case?

A: Yes, sir.

MR. SMITH: I'd move for the admission of State's Exhibit number 10, that's the underwear.

THE COURT: Well, okay, Mr. Lockie?

MR. LOCKIE: No objection.

THE COURT: Ten will be admitted in evidence.

MR. SMITH: Eleven?

MR. LOCKIE: No objection.

THE COURT: Admitted.

MR. SMITH: Twenty-two, the resume.

MR. LOCKIE: No objection.

THE COURT: Admitted.

MR. SMITH: Number 24, stain from the panties.

[p.277] MR. LOCKIE: No objection.

THE COURT: Admitted.

MR. SMITH: I believe that's all.

Thank you. That's all I have.

THE COURT: Mr. Lockie?

MR. LOCKIE: May the witness be shown Defense Exhibit C.

THE COURT: So several of those things we just talked about, you did not offer yet, is that correct?

MR. SMITH: I'm sorry. Twenty-three.

THE COURT: You're offering that?

MR. SMITH: Okay. That's the stain from 15. Mr. Lockie?

MR. LOCKIE: I'm sorry, I was watching the clerk.

THE COURT: Twenty-three. He's offering 23, which is the stain from number 15, Megan's blood.

MR. LOCKIE: No objection.

MR. SMITH: And 25?

THE COURT: This is the stain from number 11, the semen from the PJ's.

MR. LOCKIE: No objection.

MR. SMITH: Number 26?

THE COURT: Same thing, but a different area.

MR. LOCKIE: No objection.

THE COURT: Twenty-five, twenty-six are admitted.

MR. SMITH: And 27.

MR. LOCKIE: No objection.

THE COURT: Admitted.

MR. SMITH: May I take a look at that, please, Ms. Clerk, [p.278] first?

CROSS-EXAMINATION

By DAVID B. LOCKIE:

Q: Show you what's been marked as Defense Exhibit C, do you recognize that document?

A: Yes, I do.

Q: What is it?

A: It is a copy of the original report that I generated in connection with my examination of the evidence in this case.

Q: Does that appear to be a true and exact copy of your report that you prepared?

A: Yes, sir. It appears to be so.

MR. LOCKIE: Move for admission of Defense Exhibit C.

MR. SMITH: No objections, Judge.

THE COURT: C will be admitted to evidence. How about a date -- is there a date on there?

THE WITNESS: It is dated the 14th of February, 1994.

THE COURT: Thank you.

By MR. LOCKIE (continuing):

Q: C-1? Would you look at C-1 that's there -- in front of you -- it's the thermofax.

A: The overhead?

Q: Right. Does that appear to be a exact copy of C?

A: Yes, sir, it does.

MR. LOCKIE: Move for admission of C-1.

MR. SMITH: No objection.

THE COURT: C-1 will be admitted. And C-1 is just a deal [p.279] you're going to project up on the screen?

MR. LOCKIE: Right.

THE COURT: Okay. C-1 will be admitted.

By MR. LOCKIE (continuing):

Q: The report that you prepared seems to indicate that there were two kind of series of evidence that you received, is that right?

A: Two groupings, right.

Q: Two groupings of evidence, all right.

A: Yes, they were kind of grouped together.

Q: And what was the first grouping?

A: The first group would be, what I would consider, items obtained out of the Allred residence, out of the

bedroom and other associated items that may have been used by the victim, and the sexual assault kit from the victim.

Q: All right. And then what was the second grouping?

A: The second grouping would be items, in my opinion, items obtained from the suspect's residence including clothes, underwear, washcloth.

Q: All right. Now, in this case you're numbering system's just a little bit different than the norm, isn't it?

A: I'm not sure what you mean by numbering system.

Q: Well, is there anything about the way that this evidence was collected and inventoried and assigned numbers that's different from your normal laboratory policy?

A: Yes, sir.

Q: What's different?

[p.280] A: Normally each item, each package that comes into the laboratory is assigned a W number or a laboratory control number.

Q: And that didn't happen in this case?

A: No, sir. It came into primarily two groups and with two -- each group having several packages.

Q: Do you know why that difference occurred in this case?

A: It would be my opinion that it is the unfamiliarity of the Carlin Police Department with the laboratory procedures.

Q: Okay. Now, looking at your report, item number -- what is item number 15 under your control number?

THE COURT: Can I just make it clear that what you, I guess, said is that her numbers are different than the numbers we're using here today. Is that correct? Am I correct in that?

MR. LOCKIE: No.

THE COURT: You have exhibits numbers here. Now you're saying 15, is that exhibit 15?

MR. LOCKIE: Exactly.

THE COURT: Oh, okay.

MR. LOCKIE: That's what I'm getting at.

THE COURT: Then let's assume that you're going to use the same numbers we have here in court and if you're not for some reason, you'll let us know.

MR. LOCKIE: That's what I'm trying to do now is --

THE COURT: Okay.

MR. LOCKIE: -- correlate that -- all the numbers.

By MR. LOCKIE (continuing):

Q: Looking at number 15 on your report, what is that?

[p.281] A: Item number 15, as listed on my report, is the sexual assault evidence kit.

Q: And that would be the rape kit?

A: Yes, sir. That's another name for it.

Q: All right.

MR. LOCKIE: And may the witness be shown what's been identified as exhibit -- State's Exhibit 16?

By MR. LOCKIE (continuing):

Q: Is State's 16 your number 15?

A: Yes, sir.

Q: Okay. Thank you. That's all I have with that for right now. What did you do with your item number 15, State's 16?

A: I go through the items of evidence, and in this particular case I'm -- I was looking for semen to be present on perhaps the panties, the vaginal swabs, the rectal swabs, in certain cases on the oral swabs. I process the liquid blood sample. I observe if there is any other evidence that was collected in connection with the case.

Q: All right. And your report indicates, under your item number 15, that the remaining items in the kit were not examined. Is that right?

A: Correct.

Q: All right. Did you look at any teeth scrapings that were contained in there?

A: I'm sorry -- teeth scrapings?

Q: Right. Right.

A: I don't recall any teeth scrapings being in there.

[p.282] Q: Well, your -- okay. Under 15, you say what you did, right?

A: Correct.

Q: All right. What all did you do with number 15?

A: I examined the vaginal swabs, the vaginal smear, the rectal smear, and rectal swabs. There was a gauze pad used at the hospital, on the victim. I examined that for the presence of semen. There was a pubic hair brushing packet, which I examined the contents of.

Q: And then what's your last sentence?

A: That the remaining items in the kit were not examined at this time.

Q: What remaining items?

A: Well, that would be the saliva sample that I did not examine, which is a reference sample for saliva.

Q: From who?

A: Also --

Q: From who?

A: Victim. There was a head hair standard. And package of reference head -- head hair -- getting tongue-tied. Excuse me. Head hair samples from the victim that I did not examine. And I believe there were some fingernail scrapings from the victim that I did not examine at this time.

Q: Why didn't you examine any of those items?

A: Well, primarily the -- the head hairs are for a reference standards if trace examination was to be done on the case.

Q: Okay.

[p.283] A: And also the saliva sample, historically, that was used to do ABO typing on semen samples. And the fingernail scrapings are a microscopic examination, which is outside the area of my expertise.

Q: All right. In your experience with the crime lab, are fingernail scrapings ever useful?

A: In a very limited number of case they are useful.

Q: All right. How about teeth scrapings?

A: I've never observed teeth scraping in a forensic setting.

Q: Now, did you examine a fleece pullover?

A: Yes, sir.

Q: And which group of evidence did the fleece pullover come from?

A: That would be in my first grouping, which was concerned with the evidence collected from the Allred residence.

Q: Did you find anything interesting in the fleece pullover?

A: Yes. There were a couple of hairs which I determined in -- just in a visual observation, to be of probable pubic origin.

Q: All right. And are pubic hairs interesting to one who is a criminalist examining a rape situation.

A: Yes, sir, they can be.

Q: All right. And particularly when it involves a nine-year-old girl?

A: Yes, sir.

Q: All right. Did you do anything with the pubic hairs?

A: I collected them and packaged them and they went back with the original item.

Q: Did you do anything else with them?

[p.284] A: No further examination.

Q: Never examined, never analyzed?

A: No, sir.

Q: All right. Why is it interesting to analyze pubic hairs for rape purposes?

A: Because they can yield forensically important evidence.

Q: And can you explain why there was no further examination of the pubic hairs done in this case?

A: Traditionally, in our laboratory, we do hair exams only when there is an absence of the biological evidence, which would be semen in this case.

Q: All right. You examined the panties, is that right?

A: Which panties?

Q: The panties from Megan.

A: Yes, sir.

Q: All right. And that would be your item 14, is that right?

A: Correct.

Q: All right. And does your item 14 correspond to State's Exhibit 24?

MR. LOCKIE: May the witness be shown 24?

THE WITNESS: Twenty-four is the stain that I removed from -- and it's Carlin PD's item number 14, I did not issue that --

By MR. LOCKIE (continuing):

Q: All right.

A: -- particular number.

Q: What I'm asking, did you cut State's Exhibit 24 from the panties, which are referenced in your report, as item number 14?

[p.285] A: Correct.

Q: All right. Thank you, that --

THE COURT: Now is that our Exhibit number 10?

MR. SMITH: Yes.

MR. LOCKIE: Twenty-four is what she cut. Ten -- well, can the witness be shown State's Exhibit number 10?

THE COURT: All right. You've got to bring this back somehow to our exhibit numbers.

THE WITNESS: Yes, sir. The State's Exhibit 24 is the stain that I removed from State's Exhibit number 10 --

THE COURT: All right.

THE WITNESS: -- the panties obtained from Megan Allred.

By MR. LOCKIE (continuing):

Q: And were both of those referenced in your report as item number 14?

A: Correct.

Q: What did you do with 10, the rest of the panties, after you cut the stain from them?

A: They were replaced in the original package, sealed, and then sent back to the submitting agency, which was Carlin PD.

Q: So those did not remain in your lab?

A: No, sir.

Q: Would it be fair to say that you undertook a very careful examination of those panties?

A: Yes, sir.

Q: Now, did you prepare the stain from those panties, or did you just cut the stain from them?

[p.286] A: I cut the stain from the panties. The stain was originally there when I examined it.

Q: All right. So you did no preparatory work on that stain at all, other than cutting it from the panties?

A: Well, I cut the stain out, and also, I extracted a small portion of that stain, and I determined that there was semen present in that stain.

Q: All right. What did you do with the small portion after you extracted it?

A: I prepared a microscope slide and I repackaged the microscope slide, after I examined it, with the original item.

Q: All right. And what did you do with the microscope slide?

A: I repackaged the microscope slide with the original and the panties.

Q: All right.

A: And that was sent back.

Q: Is that in Exhibit 10 -- I'm sorry, Exhibit 24?

A: No. It's not in Exhibit 24, it was sent back with the panties. And --

Q: The slide was?

A: Yes. It's not in this particular bag.

Q: All right. So the slide went back with the panties to the Carlin PD?

A: Correct.

THE COURT: So is it there, or isn't it?

THE WITNESS: It is not in this particular bag. This is a repackaging of the original bag that I obtained.

[p.287] By MR. LOCKIE (continuing):

Q: Okay. And so, just to be clear, what exactly, then remained for your use in the lab?

A: In the laboratory?

Q: Right.

A: Would be --

Q: From the panties.

A: From the panties, would be State's Exhibit 24 --

Q: All right.

A: Which is the stain that I removed from the panties.

Q: Did you also find some head hairs in your examination?

A: On what particular item?

Q: In your item 14?

A: Yes, sir. I observed that there were a couple of loose, what I determined to be, probable head hairs.

Q: Okay. Where did you find the head hairs?

A: Associated with the panties.

Q: Are head hairs useful, in your experience, for rape investigations?

A: Not typically in rape investigations, no.

Q: Okay.

MR. LOCKIE: Judge, may the witness be shown Defense Exhibits A and B?

THE COURT: Okay.

By MR. LOCKIE (continuing):

Q: Looking first at Defense Exhibit A, what is that?

A: Is that A-1?

[p.288] Q: Well, A is the copy and A-1 is just the overhead.

A: Oh. A is a copy of one of the request for examination forms that was filled out by Carlin PD and submitted with one group of the evidence that came into the laboratory.

Q: All right. Then looking at Exhibit B?

A: Yes.

Q: What is that?

A: It is a copy of an evidence list that was prepared by Carlin PD and submitted in conjunction with the request for examination form.

Q: All right So A and B go together?

A: Yes.

Q: All right. And do you recall receiving those items?

A: Yes, sir, I do.

Q: All right. Now, moving to this second group of evidence that you received, did you take a look at those items?

A: Yes -- No, there were some items that I did not look at in that second group.

Q: Please take a look at Exhibit C. What items did you receive that you believed came from the defendant?

A: Would be Carlin PD's number 2a, which consist of nine pairs of men's briefs; Carlin PD's number 3a, five washcloths; number 4a, one pair of blue briefs; number 5a, one pair of gray shorts; number 6a through 10a would be bedding, blankets, sheets, etc., obtained from the suspect's bed; number 11a would be one pair of tan cowboy boots; and number 14a, lint from the dryer at the residence.

[p.289] Q: Okay. Which of those items did you not examine?

A: I did not examine numbers 6a through 10a, the bedding from the suspect's bed; nor did I examine number 14a, the lint from the dryer.

Q: Why didn't you look at the bedding from the suspect's bed?

A: Because it would have limited forensic value in doing so.

Q: And what led you to that conclusion?

A: Information provided to me on the activities that were supposedly attributed to the suspect; the lack of pubic hairs being present on the victim due to her age.

Q: Okay.

THE COURT: I'm sorry. I thought there were pubic hairs. Were there or weren't there pubic hairs?

THE WITNESS: The victim would not have pubic hairs of her own, so that there would be no transfer of her pubic hairs to the suspect and then to the suspect's bed.

THE COURT: What were the pubic hairs you were talking about earlier that you didn't examine?

THE WITNESS: There were pubic hairs associated with a particular item at the victim's residence, and due to the victim's age, they would not be hers.

THE COURT: Okay. Go ahead,

By MR. LOCKIE (continuing):

Q: All right. Just to follow up on what the judge has just asked you, you recovered pubic hairs from some of Megan's clothing, right?

A: Correct. Well, I assume it was Megan's clothes, it was in [p.290] the Allred residence.

Q: That was a fleece pullover?

A: Yes, sir.

Q: You looked at the cowboy boots?

A: Yes, sir.

Q: All right. Why did you look at them?

A: I looked at them for the presence of blood, in case there was any transfer of blood onto them, and I did not find any.

Q: Well, if a person walked, wouldn't that rub the blood from the boots?

A: I didn't hear the first --

Q: If a person walked, wouldn't that rub any blood off of the boots?

A: It would depend where the blood was at.

Q: All right. Is leather a good absorbent of blood?

A: It's pretty good, yes.

Q: All right. And did you find any blood on those cowboy boots at all?

A: No, sir, I did not find any blood on the cowboy boots.

Q: Okay. If a person's stepped in blood, would you expect the sole of the cowboy boots to absorb that blood?

A: I would expect some transfer to occur, yes.

Q: All right. And would that pertain if the person walked some distance?

A: Well, again it would depend on how much blood was initially transferred onto the sole, how far the person walked, there are a lot of variables in that particular case.

[p.291] Q: Did you look at the lint from the dryer?

A: No, sir, I did not.

Q: Why not?

A: Limited forensic value. The same reason why I did not look at the sheets.

Q: Is there any value to dryer lint at all?

A: Well, there might be.

Q: What might be?

A: If a person had, for example, head hairs, pubic hairs from the victim, and somehow they were put into the dryer and then collected onto the lint collector, then examining that would have some value. But you wouldn't be able to tell, you know, from what particular set of clothes they came from or anything.

Q: All right. How long would it have taken you to look at the lint?

A: I personally would not have done that examination. That would have been assigned to the trace evidence, and probably weeks.

Q: Now, you didn't look at the suspect's bedding items either?

A: That's correct, I did not.

Q: All right. Where was your understanding of where the bedding items were collected from?

A: It was information provided to me that the items were collected off of the bed normally used by the suspect.

Q: Okay. And why didn't you look at them?

A: Again, information was provided to me that the suspect did not go into the bed --

[p.292] Q: That he didn't go into his bed?

A: At that -- after the incident.

Q: Okay.

A: And that there would be no pubic hairs to be examined or looked for from the victim.

Q: Okay. If you had been provided with the information that the suspect had gone to his bed after the incident, would you have been very interested in examining the bedding items?

A: Yes.

Q: Why?

A: I would be looking at them for possible blood stains that would have been transferred from the victim to the suspect and then to the bedding.

Q: And how about for hairs?

A: For hairs, that would be very limited value.

Q: Okay. And why -- the blood would be extremely interesting to you, wouldn't it?

A. Yes, sir.

Q: And then you did examine the gray shorts, the blue briefs, the washcloths, and the nine pairs of men's briefs?

A: Yes, sir.

Q: And did you find anything of significance on them?

A: No, sir.

Q: All right. Thank you.

MR. LOCKIE: I have no further questions, Judge.

THE COURT: Redirect.

MR. SMITH: Thank you.

[p.293] REDIRECT EXAMINATION

By MARSHALL S. SMITH:

Q: Does the fact that -- Let me ask you this, how many agencies submit evidence to the Washoe County Crime Lab for analysis?

A: Almost 60 agencies.

Q: All right. And does the fact that there are two Washoe County Crime numbers to this case, does that make the following, or the examination of this evidence any less accurate?

A: No, sir, it does not.

Q: Now, let me ask you this, you indicated that you have here, which has been admitted as Defense Exhibit C, we've got all this evidence, the small piece of carpeting, stains, lavender fleece pullover, pink black -- pink blanket, pink blanket, pink sheet, Mickey Mouse towel, crib-size comforter, sanitary pad, white cloth, blue sock, red sock, nine pairs of men's briefs -- you have a lot in evidence here.

A: Yes, sir.

Q: All right. Now, isn't it standard protocol, forensic investigative in protocol, that the submitting agency put as -- provide you as much evidence as it can?

A: I think that's crucial to my examination.

Q: All right. Now, the fact that all -- you may have truckloads of evidence which is submitted to you, does the fact that it's submitted to you require that you test every single item?

A: No, sir, it does not.

Q: All right. So in other words, your protocol at your lab [p.294] is to look at the most likely indicators for identification, or comparison purposes first.

MR. LOCKIE: Your Honor, he's leading the witness at this point.

THE COURT: I think you are, Mr. -- this is an expert, too. I don't think you should be leading her like this. So objection sustained.

By MR. SMITH (continuing):

Q: Well, let me ask you this, then --

MR. SMITH: Well, I think as an expert I could do that, Judge.

THE COURT: I think it's just the opposite, but anyway ask your question.

By MR. SMITH (continuing):

Q: That -- What is the protocol for -- what is the evidence you look for first in the truckload of evidence that comes in?

A: First thing I do when a case is submitted is, I'm going to read through the case report and all the evidence submitted to ascertain the details of the case, what is known at that time, and to determine where the biological evidence was most likely deposited on.

Q: And why do you look for the biological evidence?

A: Well, because primarily there's a lot of information that can be obtained out of the biological evidence, i.e., the DNA type evidence.

Secondly, the biological evidence needs to be preserved right away because that can degrade over a period of time. Items such as hairs and fibers, those are going to stay with the evidence for a [p.295] long, long time. So I want to go in there and go through and examine for the biological stains, and while I'm looking at an item, say the panties or the pants, if there's hairs present, I will package them up, make note of them in my examination notes, and repackage them with the item.

Now, on occasion, I do not find biological evidence and then trace evidence becomes very important. Then we can go back to the original item, look at the hairs that I collected, and do the full trace examination on it.

Q: And had you not -- following your standard protocol, what would be your procedure had you not found biological evidence in this case?

A: Then the request would go to the submitting agency for reference head hair and pubic hair standards from both the victim and suspect, and in this case we would have to have pubic hair samples from adults in the Megan Allred residence. And also if I'm looking at sheets or lint from the dryer in the suspects residence, we would need pubic and head hair samples from every adult in that residence, also.

MR. SMITH: Thank you. That's all I have.

THE COURT: And so why wasn't that done?

THE WITNESS: In this case, because of the DNA evidence being so overwhelming that --

THE COURT: Cross exam.

RECROSS EXAMINATION

By DAVID B. LOCKIE:

Q: All right. When did you perform this instruction?

[p.296] A: The examination?

Q: Right. When did you conduct the examination?

A: The examination was done on the 2nd of February, and also on the 10th of February.

Q: All right. And so you didn't do any of the rest of this because you had overwhelming DNA evidence, is that right?

A: That's correct.

Q: And did you have the overwhelming DNA evidence on the 2nd and the 10th of February?

A: By the 10th of February there was some indication that there was enough DNA present, that we would be doing that.

Q: You knew that as of the 10th of February?

A: Yes.

Q: And was that overwhelming evidence that you had as of the 10th of February?

A: No, sir. But still we see what the results with that would be before we start our trace examination.

Q: Do you know whether RFLP DNA test was undertaken in this case?

A: I believe so, but I do not have first-hand knowledge of that.

Q: You're not a DNA expert, is that right?

A: That's correct.

Q: Now, are you testifying that it's your decision as to whether you want to go forward and do hair examinations?

A: No, sir, it's not my testimony of that at all. It is more the lab procedure to wait and see, since trace examination is very [p.297] involved and yields less significant results than the DNA evidence. You wait and see that -- is there DNA evidence, and results be

obtained before we engage in trace examination, but it's not my decision.

Q: And do you still have Exhibit C in front of you?

A: Yes, sir, I do.

Q: What's the last sentence that you wrote there?

A: The last sentence --

Q: Right.

A: -- in my report, which is State's [sic] Exhibit C reads, "should hair comparisons become necessary, please contact the undersigned regarding the submission of reference head and pubic hair from the suspect."

MR. LOCKIE: No further questions.

THE COURT: I asked a question there, Mr. Smith, you want to have another go at it?

MR. SMITH: No, Judge. I thought it was a good question.

THE COURT: All right. Can this witness be excused?

MR. SMITH: Yes.

MR. LOCKIE: I'd like to be retained.

THE COURT: Okay. When were you planning on going back?

THE WITNESS: Well, I drove, so I'm pretty flexible.

THE COURT: You drove. Okay. Could you just, I guess wait outside if you don't mind, if you have something to read, could you -- is that okay?

THE WITNESS: Yes, sir.

THE COURT: The courtroom here.

[p.298] THE WITNESS: May I be allowed to go to the District Attorney's office?

THE COURT: Oh, yes. If you'd just be within 15 minutes of the courtroom during the day.

THE WITNESS: Yes, sir.

THE COURT: And thank you very much. If you'd have a seat out there. Thank you for coming.

Well, why don't we take a morning recess and stretch a little bit. During this recess we're about to take the jury is once again admonished as follows:

Do not converse amongst yourselves or with anyone else on any subject connected with the trial.

Do not read, watch, or listen to any report of the trial, or to any commentary on the trial, or to any person connected with the trial. This includes any medium of information such as newspapers, television, and radio.

Do not form or express any opinion on any subject connected with the trial until the case is finally submitted to you.

Do not visit the scene or attempt to make any independent investigations concerning these matters.

Please stretch and try and stay in your jury room if you're not using the rest room or have to smoke, but if you can be back in your jury room in 15 minutes, we'll get going again.

Court's in recess.

(Court recessed at 9:40 for 18 minutes)

THE COURT: Please be seated. I'm sorry I took a couple minutes there. The record will reflect the presence of counsel and [p.299] the defendant. Counsel, will you stipulate to the presence of the jury.

MR. SMITH: For the State, Judge.

MR. LOCKIE: We will.

THE COURT: Call your next witness.

MR. SMITH: Renee Romero.

THE COURT: Ma'am, please come forward. Face the clerk and raise your right hand.

RENEE ROMERO,

called as a witness by the plaintiff, was sworn and testified as follows:

THE COURT: Ma'am, have a seat over here. Ma'am, what's your name?

THE WITNESS: Renee Romero.

THE COURT: Could you spell both of them for me?

THE WITNESS: Renee, R-E-N-E-E; Romero, R-O-M-E-R-O.

THE COURT: Thank you. Mr. Smith.

MR. SMITH: Thank you.

DIRECT EXAMINATION

By MARSHALL S. SMITH:

Q: Ma'am, what is your occupation?

A: I'm a criminalist with the Washoe County Sheriff's Office, Forensic Crime Lab.

Q: And would you describe, please, for the jury, your -- Let me ask you this, how long have you been doing that, in that --

A: Five and a half years.

Q: -- working in that -- Five and a half years? And would [p.300] you please describe to the jury, your educational background?

A: I have a Bachelor's in Chemistry with the fulfillment of a Bachelor's in Forensic Science. And my

thesis project is currently being reviewed for Master's in Cellular Molecular Biology.

Q: And what are your duties at the Washoe County Crime Lab?

A: I am assigned to the DNA section of the crime lab.

Q: And so what does that mean? What do you do for the crime lab?

A: Basically I receive the blood, semen, saliva; extract the DNA out of those things and do comparative type work; compare the DNA patterns.

Q: What training have you had specifically in DNA analysis?

A: I spent a month at the FBI, training specifically in DNA techniques, and have also spent time in a training course at Rosch Molecular Systems in Alameda, California. And part of my graduate work was working on population studies in the DNA laboratory.

Q: And are you a member of any professional organizations or associations related to that field?

A: I'm a provisional member of the American Academy of Forensic Scientists, and I'm also a member of TWGDAM, that's an acronym -- T-W-G-D-A-M -- and it stands for the Technical Working Group on DNA Analysis Methods.

Q: And what is that group responsible for?

A: We meet back at the FBI twice a year, and we discuss quality control and quality assurance methods with the DNA technique.

Q: Have you testified concerning DNA analysis in district [p.301] courts in Nevada before?

A: Yes, I have.

MR. SMITH: If I could ask the clerk, please, to show the witness what's been marked as Exhibit 28.

By MR. SMITH (continuing):

Q: Ma'am, what is that?

A: This a copy of my C.V.

Q: Which is also known as a resume?

A: Yes

Q: And is that current?

A: Yes.

MR. SMITH: Judge, I'd move to have Ms. Romero recognized as an expert in DNA analysis and comparison.

MR. LOCKIE: No objection.

THE COURT: All right. She'll be so recognized.

MR. SMITH: Also move for the admission of Exhibit 28.

MR. LOCKIE: No objection.

THE COURT: Twenty-eight will be admitted to evidence.

By MR. SMITH (continuing):

Q: Now, is DNA analysis used in matters outside of the criminal courts?

A: Yes. It's used in paternity testing, also.

Q: And what do you mean by paternity testing?

A: Establishing parentage, usually trying to determine who the father is, of a child.

Q: And how -- would you describe, please, the -- what DNA is and then how it relates to a comparison, how you can make [p.302] comparisons of DNA.

A: DNA is something that is found in virtually all of our cells. When -- a sperm carries half the DNA and an egg carries the other half of the DNA. Those two come together and make up the DNA makeup of, eventually, that person. So that the DNA that's found in blood is the same as DNA that would be found in saliva, hair roots, semen, etc. Your DNA is consistent throughout, and it's decided from that sperm and that egg.

Q: Where is DNA located in the body?

A: In cells. In the nucleus of cells.

Q: Okay. So, in every cell there's a DNA?

A: Every cell that contains a nucleus.

Q: All right. Would it assist you in explaining this field to the jury to be able to show them examples of other DNA work and to explain the process?

A: Yes. I have some overheads I could use to explain the process.

Q: Would that -- do you believe that would be helpful to a fuller jury understanding of this?

A: Yes.

MR. SMITH: Judge, if I could ask Ms. Romero to depart the stand and use the overhead.

THE COURT: All right. And we could pull the blinds and fix the microphone for her.

MR. SMITH: I think we only need to turn out these two lights.

THE COURT: All right. Well, let's see what we need. Whatever you need us to do, we'll be glad to help. Why don't you [p.303] go and step down there.

MR. SMITH: And then also, Judge, if I could have Ms. Romero use the pointer up there, that may be helpful.

THE COURT: Okay. Here's your pointer right here.

By MR. SMITH (continuing):

Q: Ms. Romero, if you would, using the overheads, explain to the jury what DNA is, and then how it works in a comparison basis.

A: As I said, DNA is found in virtually all of our cells, all of our cells that have a nucleus. DNA is a double stranded molecule and it's made up of four things, fours bases -- A, T, G, and C. And what's very interesting about this is how those two strands and those four bases come together. A always comes with T, and G always matches with C.

And the two strands come together and form a double -- what's called a double helix, that's a picture of a double helix. And it's interesting because we could then, later, separate those strands and put them back together and they come back together in the same fashion, A with T and G with C.

The next question was where is DNA found? It's found in the nucleus of all of our cells and as I said it would be the same in hair roots, semen, saliva, blood. From one person the DNA would be the same in all of those cells.

Where is DNA found? It's found in something called chromosomes. And as I said earlier, that sperm carries 23 chromosomes, and the egg carries 23 chromosomes. And that's where all the DNA is, and you haven't got -- you end up with 46 pairs of chromosomes containing the DNA.

[p.304] Now, the big question is, what does forensics look at in DNA? We don't look at areas in -- of DNA in it's RFLP technique, that code, for anything.

What I'm -- from what I look at, I can't tell you, oh, this person is this tall, he's White or Black.

I'm looking at regions of the DNA that don't code for something specific like that. The regions of the DNA that I'm looking at are repeated regions of the DNA. And what that means is there's a certain section of those bases, for example, CATGCG. What forensics is interested in is how many times does that block repeat. And what's different in us is how many times that block repeats.

Now, remember we got some information from our mom and some information from our dad, so you're going to have two areas like that, because remember, we have two chromosome number ones, two chromosome number twos. So, for example, this area could be a chromosome number one.

I would expect to find two areas like that for each person. And what's different would be how many times it repeats. This shows a repeat of ten and a repeat of five. We have the capability of looking at several different areas like this on different chromosomes.

And the next question is how do we do this? This is a scheme of how we do this. It looks kind of complicated to start, but let me walk you through it. You start with people, from people we get some blood, from the -- and then there could be evidence, it could be hair or semen, saliva, etc., but we'll just go with blood for now. From the blood we extract the DNA.

[p.305] DNA is very long. If we took DNA out of one cell and unwound it and stretched it out, it would be about six feet long. You know that's very long. It's too

hard to work with, so we need to cut the DNA into smaller pieces. That's the next step.

The key word there is restriction enzyme. It can be thought of as molecular scissors. And those scissors cut the DNA, in this technique, everywhere it sees the pattern GGCC, it cuts in the middle.

So now what I end up with are all these strands of DNA, all these different sizes. So I need to work with them somehow. What we do is we separate these strands.

Now, I can separate these strands based on size. And we do that using this gel apparatus, here's a better picture of it. This is kind of what the gel apparatus looks like. And it really is like Jello, and we use it like you would Jello, you pour it as a liquid and then it solidifies.

Well, while it's solidifying there's a cone in one end of the gel. And what we can do then is put the DNA in those wells that the cone created and then apply a current, and DNA has an overall negative charge, opposites attract, so the negative will travel towards the positive, the smaller fragments are going to move through that gel faster than the longer fragments. The longer fragments will stay more towards the origin, towards the cone, and the shorter fragments will go towards the top.

Now, as I said, that material is like Jello, and Jello would be very hard to work with and to maintain, so we need to transfer that information that's in that gel to a solid membrane. And we do [p.306] this with a technique that's basically called blotting.

So I have a wet sponge here and this sponge has a basic solution in it. And what happens is the basic solution will make the DNA single stranded.

So, what I do is I take that gel, put it in this solution, first of all, and make the DNA single stranded. Then I take the sponge in the blot pan, put the gel on top of that and then put a membrane on top of the gel. And just by capillary action, and here's some dried blot pads, they could be like paper towels, and you know how paper towels will soak up a liquid, well, that will soak that information up onto this membrane in the same place that it was on the gel.

So, then what I'm left with to work with is this membrane. And a membrane is simply -- it looks like a sheet of paper. When I'm done, it's white, there's -- I don't see anything on it. It would simply look like this, it's just a membrane. Okay? And the DNA is single stranded now on this membrane.

Now, I told you just a little while ago, what happens with DNA when it's single stranded. It started out like this on that gel, the DNA was together. Put it in that solution and had it come apart.

And the next thing that happens is we've the capability of, basically, making some DNA, what we call a probe, to go in and look for a match. So this probe is containing DNA and it can come in and attach to the DNA that's on that membrane.

These probes that we use are radioactive. And the Cs in the probe contain radioactive phosphorous. So, what happens is, you [p.307] have probes for those repeated regions and the probe will go in there and

attach to the repeated regions for each person in two areas.

And then, I need to visualize that, so what happens next is we take that membrane, we put it between two pieces of x-ray film and let it sit in the freezer.

This is what takes so long, is that membrane may have to sit in the freezer for up to two weeks. The half-life of P-32, the radioactive nucleotide we're using, is 14 days. So generally, we will allow that membrane to sit there up to 14 days. But if the blob is really strong, it may come up in two or three days. But that's where the time consumption comes in.

Here's an example of what a situation may look like. This is what I would have perhaps loaded on the gel, okay? The first line here you see all these bands. Those bands represent a molecular weight marker. We know the size of each of those bands. We determine size in base pairs, size -- how many As, Cs, Gs, and Ts.

So, for example, this could be 500 and this could be 2300, okay? And this is where the shorter fragments are, this is where the longer fragments are.

The first lane here contains a control saline. Every gel that we run, we run with control on. And we know where that control should come up for each probe. If that control is not in the right spot for analysis, it goes out the window, doesn't work. Something's wrong. So, we have that control to show that the DNA is migrating correctly through that gel and things are showing up in the right spot.

[p.308] Typically, the next spots would be for some known samples. Here there's known number one and known number two, and then we'd have another ladder, and there's some evidence samples.

In this case it's depicting known sample number two matches Q1M -- question male. And you see the match happening between here -- these bands are lining up. Remember the DNA travels from the bottom, well, actually from the bottom up, okay?

So, each one of these represents a lane. Now, each one of these is person. Now we have some evidence. And this -- this is showing a match here.

The next lane shows a match between K1 and Q1F. And you can see those bands lining up.

The next lane doesn't match anybody.

Now, in the real world, they actually look, I told you we used x-ray film, so it would actually look more like this. Here's our control, our control here shows one band. And that's what we expect to see.

The rest of those samples are from a population study, and you can see that none of them match. Although some may show up in the same area, you can see this band and this band do show up in the same bin, this band and this band show up in the same area.

And we run these population studies so we can see, how frequent does a band show up in this area or this area. And by determining the frequency of the area that band shows up, and then in the end, we're allowed

to apply a statistic to the question sample that we look at in a case.

That's all I have for an explanation so far.

[p.309] Q: All right. Thank you. If you want to take your seat, then. Will we need to use the overhead again?

A: We might.

MR. SMITH: Okay. So, maybe I can just turn these lights on for now, Judge.

THE COURT: Sure. And just have a seat there, ma'am, and we'll -- the bailiff will do that.

THE WITNESS: May I have a glass of water?

THE COURT: Yeah. And we'll get you a glass of water.

By MR. SMITH (continuing):

Q: Ms. Romero, you indicated that -- you mentioned a type of DNA analysis called RFLP. What does RFLP mean?

A: That is the name of this technique is RFLP. RFLP stands for Restriction Fragment Length Polymorphism. Those words come from the technique.

I told you we used a restriction enzyme to cut the DNA -- the molecular scissors -- so that's where the word restriction comes from. Fragment -- we have fragments of DNA. And then Length Polymorphism --

polymorphism means different kinds and what we're looking at is different lengths in people. So there's a length difference and that's where that comes from -- Restriction Length -- Restriction Fragment Length Polymorphism.

Q: And did you -- and you were working for the Washoe County Crime Lab since January, 1994, or at least since that point?

A: Oh, Yes.

Q: And in the -- I believe you indicated you have been working for the lab for approximately five and a half years.

[p.310] A: Yes.

Q: All right. Did you have an occasion to examine some pieces of evidence that were submitted to you concerning the defendant, Troy Brown?

A: Yes, I did.

MR. SMITH: Ms. Clerk, if I could ask you to provide the following exhibits to the witness: number 29, -- no, I believe --

By MR. SMITH (continuing):

Q: Did you bring some evidence with you?

A: Yes.

Q: All right.

MR. SMITH: Then 17, Ms. Clerk.

THE COURT: What was the first number?

MR. SMITH: Twenty-nine, and I believe that --

THE WITNESS: I have 29.

MR. SMITH: Seventeen, 23 and 24. All right.

By MR. SMITH (continuing):

Q: And you indicate you have 29 in front of you?

A: Yes.

Q: All right. First of all, let's go over those. What is State's Exhibit 29?

A: Exhibit 29 is a blood stain that I made from a sample of liquid blood from Troy Brown.

Q: And showing you what's been marked for identification as number 17, what is that?

A: Number 17 contains the tube of liquid blood from which the stain in number 29 originated from.

[p.311] Q: And how do you recognize number 17?

A: My name is on the chain of custody and my initials and date are on the tube that I used.

Q: All right. And then, showing you 23 and 24. Do you recognize those?

A: Yes, I do.

Q: What are those?

A: Number --

Q: First of all number 23, I'm sorry.

A: Number 23 is a blood stain from Megan Allred's blood standard. And number 24 is a section of panties from Megan Allred.

Q: All right. Does 24 also contain a stain?

A: Yes.

Q: Okay. So what we're looking at here with 29, 23 and 24 are what? Twenty-nine is the defendant's blood stain.

A: Yes.

Q: Twenty-three is Megan's blood stain.

A: Yes.

Q: And 24 is the stain off of the panties.

A: Yes, sir.

Q: All right. Now, let me ask you this, how do you recognize those three exhibits: 29, 23, and 24?

A: My initials, along with the dates that I utilized those stains, are on the envelope.

Q: All right. Would you please describe to the jury, then, once you had those stains, what did you do with them?

A: From the very beginning?

[p.312] Q: Please.

A: Once I had these stains in my hands, I extracted the DNA, the first test I ran was a PCR test. And the second test I ran was an RFLP test.

Q: All right. With reference to the RFLP test, what testing did you do?

A: I did the testing that I just described here -- the RFLP testing, extracted the DNA from these stains and ran them out on the gel, blotted them, and examined them using five probes.

Q: Now, what does that mean when you used five probes?

A: I examined five different areas of that DNA. I have that membrane that contains the DNA which remains single stranded.

First I attached one probe to it, read those results, stripped that probe off, attached another probe to it, stripped that probe off, attached another probe to it, etc., and read those results.

Q: What was the reason for continuing to follow through with additional probes?

A: Each probe provides more discriminating value. Your first probe, your statistic may be one in a few hundred. And your second probe it jumps up to thousands, and with each probe your discrimination level gets tighter and tighter.

Q: And would you please explain what you mean by discrimination level.

A: The frequency of occurrence of that DNA pattern gets smaller and smaller.

Q: In other words, the -- a person -- two persons having that same genetic code decreases.

[p.313] A: Correct.

Q: All right. And so the more probes that you do, the greater likelihood -- I'm going to try to do this correctly -- the more probes that you do decreases the likelihood that two people would share that DNA.

MR. LOCKIE: Objection. It's leading, your Honor.

THE COURT: Well, we'll just look at this real quick. Just be at ease for a moment.

THE WITNESS: Can I make a correction? On something I said?

THE COURT: Any objection if she corrects a correction --

MR. SMITH: Sure. And while we're waiting for the other, I won't ask you any questions.

THE COURT: All right. Go ahead.

THE WITNESS: You asked what was the first thing I did with these stains. I did do a microscopic examination of those panties before I did the DNA test. Sorry.

THE COURT: Okay. Where are we looking at, gentleman, for leading questions that come -- anything --

MR. LOCKIE: I'll withdraw the objection.

THE COURT: I'm sorry?

MR. LOCKIE: I'll withdraw the objection.

THE COURT: Oh. Thank you.

By MR. SMITH (continuing):

Q: Now --

A: Can you repeat the question?

Q: I'm going to try to. And what I'm trying to determine here is, in practical terms, why is it that it's important to do [p.314] one probe after the other. In other words, what is your goal -- I understand it's to make it more discriminating, but what does that mean?

A: That's the goal -- to make it more discriminating.

Q: All right. That --

A: We want to decrease the amount of people -- the pool of people that could have contributed to that stain. With each probe we use we're throwing out a certain amount of people.

Q: Okay. All right. Now, once you determine that you have an adequate sample, be it blood or saliva or semen, and in this particular case semen, how long does the process take once you determine that there is enough sample and you make your stain. How long does the RFLP process take?

A: Well, there's not a definite answer to that. As I stated earlier, it all depends on how long that membrane has to stay in the freezer while that radioactivity is developing onto the x-ray films. If you have a weak membrane, then each probe is going to take at least two weeks in the freezer. That doesn't include the time to make the probe and wash the membrane, strip the membranes. So I've had a case that took six months. I've had another case that I've gotten it done in eight weeks. It just varies.

Q: And when you say the strength of the membrane, is that -- what correlation, if any, is there to the type of sample you have?

A: It -- directly. The correlation is to how much blood is there that I have to work with. If I have a lot of blood to work with and the rest of the evidence was in equal amount, I could load --

[p.315] I want to try to load equal amounts so that I don't have the evidence sample coming up very weak and the standards coming up very strong because then they're going to look, what we call, blown out. Those

bands will look really huge and they'll be hard to read. So you want to kind of balance everything and you're going to have to balance that based on your lowest level of DNA. If you have a low level of DNA, it's going to take a long time. If you have a higher level of DNA, then it'll take shorter times.

It also depends on the strength of your probe. If your probe's labelled what we call very hot -- is it very radioactive, is your nucleotide brand new, or is your nucleotide a week old?

Q: In this case, how would you describe the membrane from the DNA extracted from the semen?

A: The membrane contained the standards from Megan Allred, Troy Brown, and the semen and that, I thought, was very strong.

Q: All right. So that would decrease the amount of time it would take?

A: Yes.

Q: All right. Now, do you recall when -- or do your notes indicate when you received the three standards, those 29, 23 and 24?

A: I'll refer to my notes for sure, but I received Troy Brown's stain on the 8th of February, and Megan Allred's stain on the 8th of February, and I retrieved the panty stain from the freezer on the 3rd of February.

Q: All right. When did you begin the RFLP testing with -- on the panty stain?

[p.316] A: I began that on 7-8-94.

Q: Okay. So that would be July 8th, 1994?

A: Yes.

Q: Why is it that you received this -- the samples in February, but were not -- the process with RFLP process was not begun until July?

A: I initially used another technique on these samples and at the preliminary hearing it was asked if I could do RFLP on these samples. And my answer to that at that point was I didn't think so.

The first thing I did with this sample was do a microscopic examination. In that microscopic examination I determined how much semen is present. And in the area that I cut from the panties the first time I didn't think there was enough present from the area that I cut. And at the prelim it was also asked if I could repeat one of the other tests. And I said that I could.

So, after the preliminary hearing, I went and took another section of that -- those panties and did another microscopic examination and there was more than enough semen in that section. It was -- I just didn't catch it the first time. Got an area with more semen the second time. And when I saw that I then called the attorney and told him, "Well, hold on here. I do have enough for RFLP." And then he said, "Well, go ahead and do it then."

Q: Okay. And then so from that date, that's when you began the RFLP process?

A: Yes.

Q: All right. Now, and as a result of that process you [p.317] were -- found -- you conducted five probes?

A: Yes, sir.

Q: Did you -- during that process, did you make what you had referred to here, any audioradiograms for this case?

A: Yes. The audioradiograms are the x-ray films.

Q: All right. Did you bring those with you today?

A: Yes, sir.

Q: And I believe they've been previously marked as 30a, 30b, 30c, 30d, and 30e.

A: Yes, sir, I believe that's correct.

THE COURT: So is it 30a through e?

THE WITNESS: Yes, sir.

MR. SMITH: Yes, Judge.

By MR. SMITH (continuing):

Q: Would it be helpful to show the jury those x-rays?

A: Yes, I believe so.

Q: All right.

THE COURT: Why don't you just go ahead and do the same thing we did before.

THE WITNESS: Here is the first area of the DNA that I looked at.

By MR. SMITH (continuing):

Q: And if you -- please what exhibit is that?

A: Oh, sorry. 30a.

Q: Okay. Please go ahead.

A: And I'll tell you what it -- what's in each lane -- and it's not going to change for any subsequent probe, because I'm [p.318] working with that same membrane, so the lanes will be the same for every subsequent piece of x-ray film.

The first lane on the left -- up here -- is a lane, it goes up and down this way, okay? The first lane on the left is one of those marker lanes, where we know the size of each of those bands.

The next lane is our control. At the top it says K562, that's the name of the control.

The next lane is the sample from Megan Allred. And the next lane is the sample from Troy Brown. Then there'll be a ladder.

The next lane I had loaded the epithelial fraction from the stain, that would have been the blood fraction of the stain, that did not come up for your visibility in these x-ray films. If you look hard enough, it's there,

but for your visibility you will not be able to see that, I don't think in any of these.

And then the -- the next lane is the sperm fraction, and then we see a ladder.

The way we read these is we look across and we try to determine what looks similar. Here's their standards, and then here's the stain. And this stain, visually matches the stain from Troy Brown.

Q: Excuse me. Now, when you're looking -- when you're looking at the lanes, again, there's three lanes shown on that x-ray, correct?

A: Three?

Q: Just one.

A: I'm sorry, what is your question?

Q: Okay. What are you looking for, of the two stains -- or [p.319] the stains that you have of 29, 23, and 24, are those on this particular x-ray?

A: Yes.

Q: Okay. Can you describe where those are?

A: Stain number 23 is Megan Allred. And she is in lane three and it's labelled at the top.

Stain number 24 is the panties, the sperm fraction from the panties is in the lane right here labelled "sperm."

And number 29 is the sample from Troy Brown and that's in lane four labelled "Troy Brown."

Q: Okay. And so you're looking for a consistency along -- where they occur is what you're considering or where you start looking for a match?

A: Where the bands fall?

Q: Yes.

A: Yes.

Q: Okay. All right, thank you. Please continue.

A: That was the first area. And here's the second area that we looked at -- I looked at. And everything was in the same position. You see the ladder, the control -- K562, Megan Allred, Troy Brown and then the sperm fraction from the panties. And once again we can see visually, that the sperm fraction from the panties matches the blood stain from Troy Brown.

Q: And that was 30b?

A: Yes, sir. Sorry.

30c, the next exhibit. And here we see the same thing. Stand up here for this one. Here's the control and Megan's bands are [p.320] right here and right there. Troy's bands are right here and right here. And then here's the sperm fraction.

30d. And we have the same thing going on here. Here's the control. And here's Megan's band, Troy, and the sperm fraction.

And here is 30e, and you see the same thing here. In this particular audorad, Megan is read as what's called a homozygote. She either has bands there so close together that we can't discriminate them, or she has a band that's so small that it fell off into the gel, but she was read as a single-banded pattern there.

And those are the five probes, five probes that I looked at.

Q: Thank you. If you would resume the stand, please. And if we could have the lights back on, please.

So those x-rays were the five probes that you did.

A: Yes, sir.

Q: Now, in terms of the probe matches that you just previously described, what is the frequency that you would expect to find that match in the White, Black, Hispanic population?

A: We determine the frequency using a statistical calculation called the ceiling principle. The ceiling principle is from the National Research Council, which was formed under the National Academy of Scientists -- came out with a report on DNA technology because there was some controversy over the statistical application.

They came out with this conservative method of the ceiling principle. I utilized the ceiling principle in this case, in the frequency, to answer your question, it was one in 3 million.

[p.321] Q: So that means that only one in 3 million people will share the same genetic code.

A: And this is approximately, yes.

Q: Right. All right.

A: This particular genetic code, not any genetic code.

Q: This particular genetic code, you're right. I'm sorry. Is the statistics that you just gave, one in 3 million, is that what you would consider to be a conservative statistic?

A: I consider it to be very conservative.

Q: Why is that?

A: Because it is based on the ceiling principle. Ceiling in that they put a cap on the lower end of the frequency of occurrence of a band. Let's say one of those actually occurred five percent of the time. Well, they say that's too low, we're going to use ten percent. So, I didn't use anything lower, even though I may have seen it, than ten percent.

Q: Now, if someone was to refer to this as a genetic fingerprint, would that be incorrect?

A: Yes, sir.

Q: And why is that?

A: It's not a fingerprint.

Q: What is the difference between a fingerprint and DNA comparison?

A: A fingerprint is making an identification. It's been accepted in the courts, it's being an identification of the one person that left that fingerprint. In DNA comparison, I'm making a comparison. I'm not making an identification.

[p.322] Q: All right.

MR. SMITH: I'd move for the admission of State's Exhibits 30a, 30b, 30c, 30d, and 30e.

THE COURT: Mr. Lockie?

MR. LOCKIE: No objection.

THE COURT: They'll be admitted into evidence.

MR. SMITH: Exhibit number 29.

MR. LOCKIE: No objection.

THE COURT: Admitted.

Mr. Smith, I didn't -- I recall your question and I honestly didn't -- did it say males? Did you say males or did you just say all people, I don't know

MR. SMITH: The questions was --

THE COURT: Could you clear that up, please if possible?

By MR. SMITH (continuing):

Q: Yeah. What is the frequency that you would expect to find that match in the White, Black, Hispanic population, to include both?

A: All right. That would be the general population of White, Black, and Hispanic --

. . . . . .

Q: Male and female.

A: Male and female, one in 3 million.

Q: Thank you. That's all I have.

THE COURT: Mr. Lockie?

CROSS-EXAMINATION

By DAVID B. LOCKIE:

Q: You indicated that you first looked at these items on [p.323] February 3rd, '94, is that right?

A: Yes.

Q: Did you make any notes when you did that?

A: Yes.

MR. LOCKIE: May the witness, please, be shown Defense Exhibit D, after showing it to the District Attorney.

MR. SMITH: D as in dog?

MR. LOCKIE: And also D-1.

By MR. LOCKIE (continuing):

Q: Are those the notes that you made when you removed the items from the freezer?

A: This is a portion of them.

Q: Okay. That's one page of the notes?

A: Yes.

Q: All right. Why did you make these notes?

A: The top portion, I was making the notes to make a list of what I was taking out of the freezer.

Q: All right.

A: Somebody had relayed to me information about a Dr. Campbell, and then the bottom part of the notes were a plan of what I was going to do with the evidence.

Q: Now, when you removed these items from the freezer, you knew that there'd been a request for DNA testing, right? At the time that you were --

A: I don't think so, on the 3rd. I think my concern here on the 3rd was to look and see if there was any sperm present.

Q: And did you look to see if there was any sperm present on [p.324] this panties?

A: Yes.

Q: All right. And did you detect some?

A: Yes.

Q: Now, on a -- do you rate the quantity of sperm that's present?

A: Yes. We rate that one to four, one being a low amount of sperm, four being a lot of sperm.

Q: Is there anything under four? I'm sorry, anything under one?

A: Rare.

Q: Rare is less than one.

A: Or none.

Q: All right. So rare is less than one, right?

A: Yes.

Q: All right. And next to your notes on examining the panties, what did you put with respect to the sperm?

A: Rare sperm.

Q: For RFLP testing, do you grade the amounts? In other words, prior to undertaking RFLP testing, do you grade the amount of sperm that you're looking at?

A: In the one to four?

Q: Right.

A: Looking at?

Q: Right.

A: Yes.

Q: All right. Why do you do that?

[p.325] A: To determine if there's enough present for an RFLP test.

Q: And what grade do you like to see for an RFLP test?

A: I like to see a three or a four plus for RFLP.

Q: Why is that?

A: That would lead me to believe that there was sufficient sperm to do the RFLP test.

Q: All right. And what would be your conclusions as to rare?

A: Rare, I wouldn't think there was enough for an RFLP test.

MR. LOCKIE: May the witness be shown Defense Exhibit -- Oh, I'm sorry.

By MR. LOCKIE (continuing):

Q: Would you please take a look at D-1, as well? That's the thermofax that's attached.

A: This one?

Q: Right. Does that appear identical to D?

A: Yes.

Q: All right.

MR. LOCKIE: Move for admission of D and D-1, your Honor.

MR. SMITH: I guess, aside -- if she can testify to what it is, I don't know if it's cumulative or not. I don't know why he wants to have it admitted. The relevance of it. She's testified to it.

THE COURT: Objection's overruled. Go ahead, Mr. Lockie.

MR. LOCKIE: Show the witness Exhibit E.

MR. SMITH: May I see it, please.

THE COURT: This E and E-1, too?

MR. LOCKIE: E and E-1.

[p.326] MR. SMITH: Thank you.

THE WITNESS: May I keep that for a minute, please?

CLERK: Sure.

THE WITNESS: I think I'll need it. Thank you.

By MR. LOCKIE (continuing):

Q: Do you recognize E and E-1?

A: Yes.

Q: What is that?

A: This is a drawing of the areas of the panties, pajamas, and gauze pad that I looked at.

Q: All right. And your drawing of the panties, what does that purport to be?

A: It's a drawing of the panties labelled 1, 2, 3, and --

Q: And why did you label 1, 2, 3 on the panties?

A: I took three small sections from the panties.

Q: All right. And is the little caricature that you have the panties, the entire section of the panties that you'd received?

A: Yes. I'm not an artist.

Q: Right. But that's the entire section of the panties that you received, right?

A: Yes.

Q: Okay. So you looked at the entire section of the panties when you -- then you marked three areas on the panties that you'd like to look at?

A: Right. I took three small sections of the panties to do a microscopic examination.

Q: How do you decide which sections that you want to look at.

[p.327] A: Well, it's just random. That's why I took three sections. I was trying to get a representative sampling. These panties were very heavily stained with blood and showed a positive result for the presumptive presence of semen. And so I took three areas.

Q: So what you're doing here is you're trying to find out, again, if you have enough material to do RFLP DNA testing?

A: Yes, sir.

Q: Okay. And this is, again, on February 3rd?

A: Yes, sir.

MR. LOCKIE: Move for the admission of Defense Exhibits E and E-1, your Honor.

MR. SMITH: No objection, Judge.

THE COURT: E and E-1 will be admitted.

MR. LOCKIE: May the witness be shown F and F-1?

MR. SMITH: Thank you.

By MR. LOCKIE (continuing):

Q: Do you recognize Defense Exhibits F and F-1?

A: Yes.

Q: Are those your notes?

A: Yes.

Q: When did you make those notes?

A: Also on the 3rd. Those were -- are the results of the microscopic examinations.

Q: So you looked at these sections of the panties with a microscope? Is that right?

A: Yes.

Q: Is that what micros means at the top?

[p.328] A: Yes

Q: Okay. Why is there a little star at the top of the page in a circle?

A: I was drawing what I thought -- I saw a bacteria and I was drawing what that bacteria looked like.

Q: All right. And was the reason that you looked at these sections -- Was the reason that you looked at these sections with the microscope so that you could rate the testability of these items?

A: Yes. This would be the one to four rating for the microscopic examinations.

Q: All right. And then with panties 2, what did you rate it?

A: One-plus, heads. Meaning I saw heads. I didn't see any tails attached to the sperm heads.

Q: All right. And one-plus, again, is in your rating system?

A: Yes.

Q: All right. And is that ordinarily considered by you to be a sufficient sample for RFLP testing?

A: No.

Q: Okay. Then, panties 3, you also looked at that?

A: Yes.

Q: And did you grade it?

A: I rated that rare sperm.

Q: Okay. Then did you look at the vaginal swab?

A: Yes.

Q: What was the rating on it?

A: I rated that a 3-plus.

[p.329] Q: All right. Then did you look at the panties, again?

A: The panties number one, I rated that a one-plus.

MR. LOCKIE: Move for the admission of F and F-1, your Honor.

MR. SMITH: No objections.

THE COURT: Admitted.

By MR. LOCKIE (continuing):

Q: The -- going back, again, to the first exhibit which I showed you, which is Exhibit D, I noticed that you put number 14T1 panties.

A: Yes.

Q: All right. Why did you designate number 14T1 panties?

A: That's how the envelope was labelled. TI just refers to a section removed.

Q: Okay. The section of the panties that was removed?

A: Yes.

Q: All right. And then -- In your RFLP report where you conclude that the comparison sample is one in 3 million, what number did you assign to the material that you'd tested?

A: I'm sorry, I don't understand what you're saying.

Q: What number did you assign to the panties in your RFLP report which reports the one in 3 million comparison? From what source?

A: Are you referring to the numbers on the panties of 1, 2, 3, is that --

Q: Well, let me ask you this, on your RFLP DNA report, you reported that the test came from panties from Megan Allred, correct?

[p.330] A: Yes.

Q: And from what number -- numerical and letter designation did you report that that test came from?

A: I'll refer to my report.

Q: Please do.

THE COURT: Do I understand where you're asking -- you've got three cuts -- is that what you're talking about. You want to know which piece there she's testing?

MR. LOCKIE: I want to know the number and the letters of the item that she reported this one in 3 million test from.

THE WITNESS: Number 14T1.

By MR. LOCKIE (continuing):

Q: Number 14T1 is the report that you made of one in 3 million, is that right?

A: Yes.

Q: All right. Now, go back again to Exhibit D, and at the top of that page is there a 14T1 panties?

A: Yes.

Q: And what is your rating as to that item for RFLP testing?

A: Dated February 3rd, it's rare sperm.

MR. LOCKIE: May the witness be shown Exhibit G? And G-1?

By MR. LOCKIE (continuing):

Q: What is that exhibit?

A: This is a copy of my report on the RFLP analysis.

Q: And is G-1 a thermofax of that?

A: Yes.

Q: Is that what you just used, or a copy of what you just [p.331] used, to refresh your memory as to the letter designation and number designation that you gave the item that you tested from Megan Allred for RFLP?

A: Yes, sir.

Q: You mentioned an epithelial content, right?

A: Yes.

Q: All right. And you said that the epithelial content is not visible on the audorad?

A: No.

Q: Is it -- you mentioned something --

A: I can see it in some of them, but my answer's going to be no, because to a person who's not experienced in looking at these, they probably couldn't see it. So I'm going to say no, it's not visible.

Q: What are epithelial cells?

A: They're cells that aren't sperm cells. They could be skin cells, blood cells, etc.

Q: Can those skin cells and blood cells be important in the context of an RFLP test?

A: Yes, they can be.

Q: Okay. And can they also serve as an important control?

A: It could serve as another control, yes.

Q: All right. For example, if you had an epithelial fragment you could see that the fragment goes back and matches the victim, right?

A: Correct. If the evidence you were looking at, the stain was from the victim, then you would possibly expect to see the [p.332] epithelial cell matching the victim, unless the suspect had also sloughed off epithelial cells. If you had a mixed blood pattern, you'd see both.

Q: All right. So that would be a way that we could tell that what you were looking came from the victim, right?

A: Sure. You could say that.

Q: All right. Is it unusual to not be able to see an epithelial fraction?

A: I don't think it's unusual. A lot of times epithelial fractions will be pretty degraded and the DNA will have broken down and we won't see it. Sometimes we see it and sometimes we don't.

Q: Okay. And is the epithelial fraction normally reported?

A: Statistically?

Q: Right.

A: No. If the match of interest is from the sperm fraction, then that's what's reported.

Q: How can we tell from looking at the audorads, that the sperm that you tested was sperm collected from the panties?

A: Because I'm telling you it was.

Q: Okay. Is there any way that you can look at the audorads and you can tell that?

A: No. You'd have to have somebody to tell you what was in each lane.

Q: All right. Are epithelial cells normally found in blood samples?

A: Yes.

Q: And did you observe or report any epithelial fraction from [p.333] the blood samples?

A: From the panties?

Q: Right.

A: I did not report the epithelial fraction from the blood, no.

Q: Okay. Is it possible to do that?

A: No. I wouldn't do that.

Q: Is it possible to do, though?

A: No. Not by our policy, no.

Q: In the -- you've been with the Washoe Crime Lab for five and a half years?

A: Yes, sir.

Q: Have you done exclusively DNA that entire time?

A: No.

Q: All right. When did you begin doing DNA testing?

A: 1990? '91? Have to look at my C.V. After I got back from the class at the FBI -- was that in January of '91? It was when I started doing case work. I think it was January of '91.

THE COURT: Can we start collecting those exhibits?

MR. LOCKIE: I'm finished with them.

THE COURT: All right. We'll have the clerk collect them. Sometimes with your materials we want to be sure we get them back and not go out with you. That's happened, so you want to make sure we get our exhibits back from you.

THE WITNESS: Do you want these exhibits, also?

THE COURT: Yeah, if they're Court exhibits, we want them.

MR. LOCKIE: That's all I have, your Honor.

[p.334] THE COURT: Redirect?

MR. SMITH: Judge, you indicated earlier that if I needed a few minutes with this expert I could take that, so I would like to have maybe five or ten minutes before I commence my redirect.

THE COURT: Mr. Lockie?

MR. LOCKIE: As long as I can ask what they talked about.

THE COURT: Well, I guess I didn't take that to mean in the middle of an examination. How about if I let both of you talk to her, how's that?

MR. LOCKIE: Well, I think that she's testified and we object to that. It's in the middle of an examination and a crucial piece of evidence.

THE COURT: Yeah.

MR. SMITH: Well, that's fine, Judge. That was my impression of what you indicated earlier.

THE COURT: I didn't take that to mean in the middle of an exam.

MR. SMITH: Fair enough, very well.

THE COURT: Why don't you go ahead and redirect.

MR. SMITH: All right.

REDIRECT EXAMINATION

By MARSHALL S. SMITH:

Q: Now, you've testified concerning DNA analysis in which courts before?

A: Elko District Court and Washoe County District Court.

Q: Now, as far as -- Let me ask you this, when the crime lab is provided with evidence, samples of blood or semen or any other [p.335] type of bodily fluid, what is -- have you been able to determine a statistic when you don't find matches? In other words, some -- an agency will submit a blood or semen and you will look at it and it doesn't match with the control.

A: In a DNA sense?

Q: Yeah.

A: I'd say about 30 percent of our cases result in exclusions.

Q: In other words, as a result of your lab work, you exclude people --

A: Yes.

Q: -- from being the donor of that particular DNA?

A: Yes.

Q: And have you ever -- do you only testify for the State in this --

MR. LOCKIE: .Objection. Scope, your Honor.

THE COURT: Mr. --

MR. SMITH: I think that he went into her qualifications and I can -- should be allowed to go in to that.

THE COURT: Well, I'll overrule the objection. Go ahead.

By MR. SMITH (continuing):

Q: Have you testified for the defense in criminal court before?

A: Yes, I have.

Q: Now, as far as a -- for my benefit, we're looking at a one in 3 million statistic, is there another way to show that statistic? In other words, what -- let's say 100 percent -- what [p.336] is the likelihood that the DNA found in the panties is the same as the DNA found in the defendant's blood?

A: Paternity testing uses percentages.

Q: Okay.

A: Not the way forensics likes to look at it. We prefer the one in 3 million.

Q: I understand that, but for just another way to look at it, what would that percentage be?

A: It would be 99.99967 percent. That's what --

MR. SMITH: Can I approach the -- may I go to the blackboard, Judge?

THE COURT: Well, we'll pull it out for you and you want her to write on it?

MR. SMITH: No, I'd like to write on it.

THE COURT: Well, I don't think you're a witness. I'm not going to let you write on it now.

MR. SMITH: All right.

THE COURT: If you want her to write on it, she can write on it.

By MR. SMITH (continuing):

Q: Okay. If -- Ms. Romero, if you'd write it down, please.

A: Okay.

THE COURT: Why don't you step down to the blackboard. You might want to give Stefanie your stuff there so you don't -- the other exhibits there, too. And you have a calculator, is that right?

THE WITNESS: Yes.

[p.337] THE COURT: All right.

By MR. SMITH (continuing):

Q: And if you'd take any one of those pens and put that percentage -- point what, out of a hundred percent.

A: Okay. I'm going to take a second and verify that, okay?

Q: Please do.

THE COURT: Is there a -- could you make the decimal a little bigger for us older --

By MR. SMITH (continuing):

Q: So, okay. So, if you would do, also, put 100 percent on top of that, if you would, please, with the corresponding number of zeros after the decimal point.

And if you would please, then, subtract the lower number from the higher number.

A: I don't think this is right. Just a minute.

Q: All right. So, if you put a little line under the 99 there and a minus -- subtraction indication. All right. All right. Thank you. If you'd just take -- resume the stand.

THE COURT: Would you like to have that marked?

MR. SMITH: Yeah. I'm going to have that marked.

By MR. SMITH (continuing):

Q: And Ms. Romero, would you -- you indicated that you completed that subtraction by use of a calculator?

A: Yes.

Q: And you believe that that is accurate?

A: Yes.

MR. SMITH: I'd like to have that marked and admitted as [p.338] exhibit number 31.

THE COURT: Objection?

Be admitted.

By MR. SMITH (continuing):

Q: So, the -- would it be fair to say, based on that that the chances that the DNA found in the panties -- the semen in the panties -- and the blood sample, the likelihood that it is not Troy Brown would be .000033?

A: I'd prefer to refer to it as the one in 3 million.

Q: All right. But from a mathematical standpoint, would that be inaccurate?

A: Repeat the question, please.

Q: Would it be fair, then, to say that with that mathematical calculation there, that the likelihood that the DNA extracted from the semen in the panties and the DNA extracted from the blood that the likelihood that it's not Troy Brown, that it's not a match is .000033?

MR. LOCKIE: Your Honor, I'm going to object on relevance. The witness is testifying that it's not scientifically valid in her opinion. So it's not relevant.

THE COURT: Well, I don't know that --

MR. LOCKIE: That's just a subtraction problem.

THE COURT: Let's go back. I don't think that's what she said. I don't think that's what she said. Let's go back a step and find out. I don't think that's what she said.

By MR. SMITH (continuing):

Q: Now, I understand that -- and what I'm trying to do is [p.339] make this into a percentage where I can understand it. And so I recognize that as far as your testing, you would prefer to have it as a one in 3 million, but just as another way of looking at it, would it be inaccurate to state it that way?

A: It's not inaccurate, no.

Q: All right. Then in response to my question, would the likelihood that the semen from the DNA found in the panties and the blood from Troy Brown, that it's not the same, would it be -- the chances that they are not a match would be .000033?

A: Yes. That's the way the math comes out.

Q: All right.

THE COURT: Let's make sure. It's the same thing -- it's the same math just expressed differently. Is that correct?

THE WITNESS: Yes. Exactly, your Honor.

THE COURT: Thank you.

By MR. SMITH (continuing):

Q: Now, as far as the --

MR. SMITH: And I would also move for the admission of Defendant's Exhibit G.

MR. LOCKIE: Object, your Honor. 51.155 subsection 3.

THE COURT: Now, this is your Exhibit G?

MR. LOCKIE: It's what she used to refresh her memory with, your Honor.

MR. SMITH: And you don't want that to be admitted into evidence?

THE COURT: What was that statute number again?

MR. LOCKIE: 51.155 subsection 3

[p.340] THE COURT: Okay. I'll look at it and I'll reserve my ruling.

MR. SMITH: Okay.

By MR. SMITH (continuing):

Q: So, now with reference to the -- in your notes which you just --

MR. LOCKIE: Your Honor, I'm going to withdraw my -- I'll withdraw my objection.

THE COURT: G will be admitted. And that's G and G-1, right?

MR. LOCKIE: Right.

THE COURT: G and G-1 will be admitted.

By MR. SMITH (continuing):

Q: Now, you testified --

MR. SMITH: Ms. Clerk, if you could hand the witness, again, Defendant's D, E, F, and G, please.

By MR. SMITH (continuing):

Q: Do you have those in front of you?

A: Yes.

Q: Looking at D --

A: Yes.

Q: When you indicate that -- I'm sorry, let's look at number F, please.

A: Okay.

Q: Now, you made those notes when?

A: On February 3rd.

Q: All right. And at that time you indicated what was the -- your numbering system for the quantity of sperm you found?

A: In the panties?

[p.341] Q: Yes.

A: Was about a one-plus.

Q: Then you testified later that you had found a strong -- or a large amount of sperm. Is that correct?

A: Yes.

Q: How do you explain the difference when first in the -- first time you indicated rare, or small amount, but then later you determined that there was sufficient amount for RFLP testing, how is that?

A: I took a different section of the panties.

Q: Why don't you report findings concerning epithelial cells?

A: It's never been requested.

Q: All right. Is it -- so that's not part of your general protocol?

A: Let's back up.

Q: All right.

A: Epithelial cells reported statistically as far as a female fraction from a stain, we don't statistically report. However, epithelial cells from a blood stain left at the scene of a crime is a piece of evidence that would get statistically reported.

Q: Because that would be the evidence you were looking for in that particular case.

A: That would be the evidence in question. The epithelial cell in the situation that you're describing is not the evidence in question. It's known where the panties came from.

Q: Okay.

MR. SMITH: May I have just a moment, Judge?

[p.342] THE COURT: Uh-hum.

By MR. SMITH (continuing):

Q: So the -- what we have in State's -- what's been admitted as number 24 --

MR. SMITH: Ms. Clerk, could you show that to her again, please. And also, please, number 29, and 23, please.

By MR. SMITH (continuing):

Q: Those are the three stains from which you conducted the RFLP analysis?

A: Yes, sir.

Q: And those, as a result of studying and examining and then comparing those three, is what you based your results on.

A: Yes, sir.

MR. SMITH: Thank you. That's all I have.

THE COURT: Recross.

RECROSS EXAMINATION

By DAVID B. LOCKIE:

Q: You said you didn't need to do -- don't need to do any epithelial reporting because you already know where the panties came from, right?

A: Yes.

Q: How do you know where they came from?

A: I know they're labelled as coming from Megan Allred.

Q: All right. And who put that label on?

A: Maria Fassett. Well, no, it just says T-1 panties. Personal conversation, then.

Q: You had a personal conversation?

[p.343] A: With Maria.

Q: With Maria?

A: Uh-hum.

Q: How would Maria know where the panties came from?

A: Well, she probably received a bag of evidence that was labelled that way.

Q: But the epithelial test would be valuable in confirming what you say is known. Is that right?

A: Sure. If I told you -- if we saw a band in the epithelial fraction from the stain, then assuming those epithelial cells are coming from the blood-stained panties from Megan Allred, you would see bands from the blood, and would probably be from Megan Allred, it would show the panties -- show the blood on the panties came from her.

MR. LOCKIE: That's all I have, your Honor.

Oh, I'm sorry, your Honor, I've got one more question.

THE COURT: All right.

By MR. LOCKIE (continuing):

Q: Does that statistical probability change with brothers?

A: Yes.

Q: How does it change?

A: With a brother, there would be some genetic relationship. They have a 25 percent chance of sharing both alleles -- both bands, and 50 percent chance of sharing one band.

MR. LOCKIE: No further questions.

THE COURT: Well, I -- can you help us with that. What does that mean? Is there any way to help us with that more than what [p.344] you've just said?

THE WITNESS: Yes.

THE COURT: Would you please.

THE WITNESS: In the National Research Council report, the one I spoke about earlier, the committee wrote the report under the auspices of the National Academy of Sciences, they addressed that problem, in their discussion about useful data-banking DNA, and they have a formula in there, and they state that they could share -- 25 percent could share two bands and 50

percent chance to share one band. And they have a formula in there that they use -- utilize the frequency of occurrence of the alleles.

And in this case that turns out to be one in 6,500. Meaning those two adults would have to mate and produce offspring 6,500 times to come up with that pattern again.

THE COURT: Mr. Smith, do you want to -- I asked a question so would you like to follow up on that?

REDIRECT EXAMINATION

By MARSHALL S. SMITH:

Q: Yeah. When -- what was the percentage again?

A: It was one in 6,500.

Q: So, in practical terms that means that the -- would it be fair to say that the parents would have to have 6,000 -- bear, actually bear 6,000 offspring?

A: Um-hum.

Q: For them to have 2 children, who are not identical twins, share the exact genetic code.

A: That's how that formula comes out, yes.

[p.345] MR. SMITH: That's all I have.

THE COURT: Mr. Lockie?

RECROSS EXAMINATION

By DAVID B. LOCKIE:

Q: Would it necessarily have to be the 6,000th one that was identical?

A: No.

Q: All right. It could be the second one, couldn't it? Just as easily as it could be the 6,000th, then, right?

A: Sure.

MR. LOCKIE: All right. Thank you. I have no further questions.

MR. SMITH: I have one follow-up on that, Judge.

THE COURT: All right.

MR. SMITH: Again, and I know that you don't necessarily prefer to do this, because you have your own way of reporting, but I'd like --

Ask her to depart the stand and show this again, please.

THE COURT: All right. If you'd walk down there. I'm going to let you both go back and forth until we get this done, because it's difficult material and so Mr. Lockie, I'll be letting you have some more time, too.

MR. LOCKIE: Thank you.

REDIRECT EXAMINATION

By MARSHALL S. SMITH:

Q: Have your calculator?

A: Yes.

[p.346] Q: Okay.

THE COURT: Why don't you draw a line underneath that -- a double line so we know you're talking about a different -- we'll use the same exhibit and she can put a double line there, then we'll use -- and a different color, too.

By MR. SMITH (continuing):

Q: And then, maybe, if you could put on the top RFLP. How about you do that in red. Okay. And then at the bottom put -- how would you describe that? Ms. Romero, how would you describe that, just for listing the exhibit?

A: Oh, we're talking about the possibility of a brother, we could just call it brother.

Q: That'd be fine.

So you indicated that -- what is the percentage -- we're looking at one to 100 percent, one in 6,000.

A: One in 6,500?

Q: Yes. All right. And if you would put a 100 -- 100 above that with the corresponding number of zeros, with a -- I think you need another zero there.

A: I don't think so.

Q: Oh, I'm sorry, that's a percent sign. And a -- subtraction and a line. And would you subtract the lower number from the higher number, please.

All right. So, would it be fair, then, to say that the likelihood of the parents having one child, and then the very next child having the same genetic code would be .02 percent?

A: Yes.

[p.347] MR. SMITH: Thank you. That's all I have.

THE COURT: Mr. Lockie?

RECROSS EXAMINATION

By DAVID B. LOCKIE:

Q: Does that change at all with two brothers?

A: No.

MR. LOCKIE: That's all I have.

THE COURT: The bottom portion, however, is not based on the testing you did, right? That's just an overall test if you had -- if you could analyze the entire DNA strain, is that correct?

THE WITNESS: No. It's based on the testing in that I used the frequency -- the average frequency of occurrence of alleles that I looked at.

THE COURT: That you looked at.

THE WITNESS: Yes.

THE COURT: Okay. Anything on that?

MR. SMITH: No, Judge.

THE COURT: Anything else, Mr. Lockie?

MR. LOCKIE: Nothing on that, your Honor.

THE COURT: Ms. Romero, if you'd come back. And I think we're going to have to keep her for a while, don't you?

MR. SMITH: I don't believe I have any further questions, Judge.

THE COURT: Okay. But you want to release her?

MR. SMITH: I believe so, based on my previous conversations with Counsel.

THE COURT: Well, I'll leave that up to -- Do you want to keep [p.348] her, Mr. Lockie?

MR. LOCKIE: No, your Honor. She can be released.

THE COURT: Okay. We're going to take our recess now, so I'll leave it to these two attorneys to have another shot at talking to you, but if it's okay with them you can go back.

THE WITNESS: Okay. There's a flight that leaves at noon, I was going to try to catch. I can stay if you want me to stay.

THE COURT: If you'd just stand outside for a minute and I'll release them and then you can talk to them.

THE WITNESS: Okay.

THE COURT: I think that if there's any doubt at all, we should keep her.

MR. SMITH: Okay.

THE COURT: That's my thought.

THE WITNESS: No, that's fine.

THE COURT: All right.

THE WITNESS: I'll find another way.

THE COURT: Why don't you have a seat outside and we'll do our lunch break, here.

Okay. I guess -- do you have any other witnesses, Mr. Smith?

MR. SMITH: No. That'll do it, Judge.

THE COURT: All right. And what I'll do, you can look -- if you would go through the clerk through all exhibits and I'll allow you to make an offer if we've missed anything prior to continuing.

MR. SMITH: Thank you, Judge.

THE COURT: And we're going to work on jury instructions and come back at 2:00 for your case. Is that correct?

[p.349] MR. LOCKIE: That'd be fine.

THE COURT: So, I'm going to release you until 2:00 o'clock for a long lunch break. We are going to work on the jury instructions, which take a while to work on. So we'll be working and if you could be back in your jury room and 2:00 o'clock, I'll try and get you right back in.

During this recess that we're about to take the jury is once again admonished do not converse amongst yourselves or with anyone else on any subject connected with this trial.

Do not read, watch, or listen to any report of the trial, or to any commentary on the trial, or to any person connected with the trial. This includes any medium of information such as newspapers, television, and radio.

Do not form or express any opinion on any subject connected with the trial until the case is finally submitted to you.

Do not visit the alleged scene or make any independent investigations.

A violation of these admonishments may result in a mistrial and the unnecessary expenditure of significant public funds.

Please don't talk about the case. Be back in your jury room at 2:00 o'clock. Counsel, if you'd meet with me in chambers and bring your copies of the jury instructions we'll talk about them.

Court's in recess.

(Court recessed at 11:35 A.M.)

[p.350] THURSDAY, SEPTEMBER 29, 1994, 2:09 P.M.

THE COURT: Please be seated. The record will reflect the presence of counsel and the defendant. Counsel, will you stipulate to the presence of the jury?

MR. SMITH: For the State, Judge.

MR. LOCKIE: We stipulate, your Honor.

THE COURT: Mr. Smith, did you have another witness?

MR. SMITH: Yes. Dr. Campbell.

THE COURT: Sir, please come forward. Face the clerk, raise your right hand.

ROLLA BRUCE DUNBAR CAMPBELL,

called as a witness by the plaintiff, was sworn and testified as follows:

THE COURT: Have a seat right here. Sir, what's your full name?

THE WITNESS: It's Rolla Bruce Dunbar Campbell.

THE COURT: Sorry, Ronald?

THE WITNESS: It's Rolla, R-O-L-L-A.

THE COURT: And how do you spell Campbell?

THE WITNESS: C-A-M-P-B-E-L-L.

THE COURT: Thank you. Mr. Smith.

MR. SMITH: Thank you.

DIRECT EXAMINATION

By MARSHALL S. SMITH:

Q: What is your occupation, sir?

A: I'm an emergency physician.

Q: And where are you presently employed?

[p.351] A: I work at the Elko General Hospital.

Q: And are you licensed to practice medicine?

A: Yes, I am.

Q: Where are you licensed to practice?

A: In the states of Nevada, California, and Idaho.

Q: Would you -- do you have a particular specialty within the field of medicine?

A: Yes. I specialize in emergency medicine.

Q: Would you please relate to the jury, your educational background.

A: I attended Stanford University, got a BA in Psychology and then I subsequented Premedical courses at the University of Colorado at Boulder; at Metro City College in Denver; at the University of New Hampshire. Then I went to Medical School in Albany Medical College, and subsequently did a one-year medical internship at the University of Hawaii, and subsequent moved to Reno and practiced emergency medicine for 14 years.

Q: And how long have you been working in -- at Elko General Hospital?

A: For about 18 months.

Q: Are you -- hold any certifications in the field of emergency medicine?

A: I do. I'm board-certified in emergency medicine.

MR. SMITH: And if I could ask the clerk to show the witness number 18, please.

By MR. SMITH (continuing):

Q: What is that?

[p.352] A: It's a copy of my C.V.

Q: And is that -- and that shows, essentially, your education, accomplishments and what not?

A: It does.

Q: Is that current?

A: Yeah. Well, it's current within one year.

MR. SMITH: Okay. I'd request that Dr. Campbell be recognized an expert in emergency medicine.

MR. LOCKIE: No objection.

THE COURT: He'll be so recognized.

MR. SMITH: Also for the admission of State's Exhibit 18.

MR. LOCKIE: No objection.

THE COURT: Eighteen will be admitted.

MR. SMITH: And while I'm at it, I'd also like to, at this time, move for the admission of Exhibit 2, which is the diagram of the trailer.

MR. LOCKIE: No objection.

THE COURT: Two will be admitted.

By MR. SMITH (continuing):

Q: All right. Directing your attention to the early morning hours of January 29th, 1994, did you have an occasion to examine a young girl who had suffered a sexual assault?

A: I did.

Q: Do you recall what the child's name was?

A: It was -- it was Megan Allred.

Q: And would you please explain to the jury, were you on-duty at that time?

[p.353] A: I was on-duty. I work in the night shift.

Q: Okay. And so you were working when they brought her in.

A: That's correct.

Q: Would you explain to the jury what your examination of Megan consisted of -- what you did.

A: My exam consisted of immediate assessment of Megan and her overall hemodynamic status of her blood pressure and vital signs were okay. She was obviously bleeding quite a bit. She was brought in by ambulance. I wanted to make sure there was not an immediate threat to her in the first few minutes.

And after that, upon determining that she was able to talk to me and her blood pressure was adequate and her pulse was okay, I proceeded with a more full exam.

Q: Were you able to make a determination as to whether or not she'd lost any blood?

A: It my estimate that she'd lost approximately one unit of blood.

Q: What is one unit relative to how much blood she had in her body?

A: It would probably be in the order of 15 percent of Megan's blood volume.

Q: Had bled out?

A: That's correct. That was my estimate.

Q: And what did you do then?

A: After determining that I could proceed with a more full exam, I examined her, basically, head to toe. And I also performed, or executed a sexual assault kit, collecting evidence as [p.354] per protocol on the kit.

Q: Now, were you able to form an initial diagnosis as to what had -- or not a diagnosis, but what had caused her injuries? What she was suffering from.

A: Well, the major injuries were the vaginal penetration and lacerations. And then she also had some perirenal, or lacerations around her rectal area, as well. And she, additionally, had some soft tissue injuries around her neck and on her face.

Q: All right. Now, with reference to the collection of evidence, what evidence did you assist in collecting?

A: I collected some head hairs. I collected the saliva filter paper samples. I collected vaginal swabs and smears.

Q: What, if anything, did you put on those smears?

A: I put some of the contents of her vagina on the smears.

Q: And what was the reason for doing that?

A: To assess for the presence of sperm, either motile, or live, or non-motile, which would be not live.

Q: Did you see any presence of sperm?

A: I did see sperm, yes.

Q: Now, then, what did you do with that evidence of that kit?

A: I packaged it up as per protocol and I handed it to the officer who was in the emergency department.

Q: Okay. Thank you, Doctor, that's all I have.

THE COURT: Mr. Lockie?

MR. LOCKIE: Thank you.

CROSS-EXAMINATION

By DAVID B. LOCKIE:

[p.355] Q: Had you received a report from Megan that she had bitten the person?

A: I'd have to review my chart to answer that question. No, I don't recall right now.

Q: Do you have your chart with you?

A: No.

Q: Did you bring it to the court at all?

A: No.

Q: All right. Where is your chart located?

A: Oh, I assume you have a copy of it here.

Q: Well, is your medical chart available to you here in Elko?

A: It would be at the hospital. Yeah, it should be.

Q: All right. You don't recall whether you took any scrapings from her teeth?

A: I don't specifically recall whether I did.

Q: All right. Would reviewing your medical chart improve your memory as to that?

A: Um-hum.

Q: Or refresh your memory?

A: Yes, it would.

MR. LOCKIE: Thank you. I don't have any further questions at this time. I ask that he be retained.

THE COURT: Mr. Smith?

MR. SMITH: I have no further questions.

THE COURT: Now, are you on-call now, working over there?

THE WITNESS: I have someone actually working for me right now.

[p.356] MR. SMITH: Until how long, Doctor?

THE WITNESS: Until 7:00 p.m. tonight.

THE COURT: Well, you shouldn't have said that.

MR. LOCKIE: Judge, if I can just have a moment with Mr. Smith I may be able to resolve it.

MR. SMITH: Sure.

THE COURT: All right. Why don't you see if you can help us so that -- the doctor's a busy man.

(Discussion between counsel held off the record)

MR. LOCKIE: Judge, may I have the clerk show some documents to the witness?

THE COURT: All right. This is just to refresh memory?

MR. LOCKIE: Yes.

THE COURT: All right. Doctor, if you'd just look at that by yourself for a second and indicate to Mr. Lockie if you can identify that.

By MR. LOCKIE (continuing):

Q: Can you tell what you collected and what you didn't from that report?

A: No.

Q: All right. Is there another report that you have that you could tell what was collected and what was not from?

A: On the outside of the evidence collection kit I marked down which evidence is contained in there. It's a brown envelope and we check off whatever boxes we have inserted evidence of.

Q: All right. And you did that with a brown envelope?

A: Yes. I put yes or no adjacent to each category.

[p.357] Q: Is that different than the history of assault, where you take --

A: Yes. It's a brown envelope and it just -- it contains items A, B, C, D, E, F as marked.

THE COURT: I think he's talking about number 16, is what I think he's talking about.

MR. LOCKIE: May the witness be shown number 16?

THE WITNESS: And that looks good. Uh-huh. Thank you.

By MR. LOCKIE (continuing):

Q: Is that the envelope that you were just talking about?

A: Yes, it is.

Q: All right. Are you able to review that and determine what items you collected?

A: Yes.

Q: All right. Did you collect anything from Megan's mouth?

A: Yes. I did the saliva sample.

Q: Anything else?

A: Nothing else from her mouth, that I know of.

Q: All right. You did not collect any debris from her teeth?

A: I noted there was debris in her teeth. I don't specifically recall whether I collected it or not, but it isn't marked here.

Q: All right. Is there anything that could help you recall that?

A: If there was an envelope that I had marked, debris from teeth, and -- that would convince me.

Q: All right. And would there be a record of that in your [p.358] chart, would you believe?

A: Not in my chart. No, it would be -- there might be some envelope that specified other evidence, and it's possible I could have collected some. I do remember

there was debris in her teeth, but I don't specifically remember collecting that.

Q: All right. Did you examine the debris in the teeth?

A: I looked at it. Yes, I looked at it -- her teeth.

Q: All right.

A: And the debris.

Q: And were you able to make any determinations to what that debris was?

A: No. It was just sort of a dirty, filmy type of debris.

MR. LOCKIE: All right. Those are all the questions I have. I would like the doctor retained, subject to recall.

THE COURT: Okay. We'll talk about that. Anything else, Mr. Smith?

REDIRECT EXAMINATION

By MARSHALL S. SMITH:

Q: Well, on this -- the debris you're talking about, the best of your recollection all the evidence that you collected, you marked on the envelope?

A: Um-hum. That's correct.

Q: And the envelope has indications of what -- if you did collect something, you would mark it off on the envelope?

A: That's correct.

Q: And there's no -- or, you don't have a specific recollection of collecting this debris?

[p.359] A: No, I don't have a specific recollection of it.

Q: And the debris was what? Again, it was --

A: It just looked like some dirt and a little bit of filmy -- maybe some dried saliva, some mucus, that type of thing. It was really non-specific in appearance.

Q: Could that have been the result of -- do you know she was taking oxygen at that point? When she arrived?

A: I don't specifically recall that, but it would not have been the result of that.

Q: Okay. All right. Or how about just have -- her mouth being open for a period of time and then just saliva drying or something like that. Does that look possible?

A: That could have accounted for some of it.

MR. SMITH: Okay. I have nothing further.

THE COURT: Mr. Lockie?

RECROSS EXAMINATION

By DAVID B. LOCKIE:

Q: Was anyone else present when you were doing the exam?

A: There was a nurse present.

Q: Do you remember Mary Tognarelli from Carlin?

A: Marilou?

Q: And she was present when you did your exam, as well, when you're collecting the evidence?

A: I don't specifically recall whether Marilou was or not.

Q: Was Chris Murphy present? Carlin Police officer?

A: There would probably not have been a male in the room.

Q: All right. Do you remember discussing with Chris Murphy, [p.360] whether you collected any debris from Megan's teeth?

A: No, I don't recall that.

MR. LOCKIE: I have no further questions at this time.

THE COURT: So, whatever, if I can understand correctly, whatever written recollection there may be

of the questions Mr. Lockie's asking would not be in your medical file. They'd be with something that law enforcement took, is that kind of what you've been saying?

THE WITNESS: That's correct.

THE COURT: So, you don't have anything about this in your files, is that correct?

THE WITNESS: That's correct.

THE COURT: Do you still want the doctor held? I can have him --

MR. LOCKIE: Potentially subject to recall. I don't foresee recalling him.

THE COURT: Okay. And the next two days, can we reach you through the hospital during the daytime?

THE WITNESS: Sure.

THE COURT: Okay. If you'd just be available through the hospital in case of a legal emergency --

THE WITNESS: Okay.

THE COURT: -- we will call you, Thank you very much, doctor. Thank you very much for coming.

Call your next witness.

MR. LOCKIE: Chris Murphy.

THE COURT: I think the State has --

[p.361] MR. LOCKIE: Oh, I'm sorry.

THE COURT: All right.

MR. SMITH: With that, Judge, the State would rest.

THE COURT: Okay. And if you could, when you get a chance, look over your exhibits to see if they're all in or not.

MR. SMITH: I have done that, Judge.

THE COURT: All right.

The record will reflect that the State has rested it's case in chief.

Mr. Lockie, you may call your first witness.

MR. LOCKIE: Chris Murphy.

THE COURT: Sir, please come forward. I would remind you that you're still under oath, and just have a seat right here.

Go ahead, Mr. Lockie.

CHRISTOPHER GLEN MURPHY,

called as a witness by the defendant, having been previously sworn, testified as follows:

DIRECT EXAMINATION

By DAVID B. LOCKIE:

Q: Mr. Murphy, do you recall discussing with Dr. Campbell, the matter of collecting debris from Megan's teeth?

A: Yes, I do remember something to the effect.

Q: Okay. Where did that conversation take place?

A: Took it outside in a hallway.

Q: All right. And what did Dr. Campbell say regarding the teeth debris?

A: It was my recollection that he stated at this point in [p.362] time he didn't know whether it was skin or just food particles.

Q: All right. And was there any discussion as to how further analysis could take place?

A: He didn't really elaborate on that. He just basically, somebody would have to view it under a scope or something.

Q: All right. Was it your understanding that teeth debris was collected in connection with the rape kit?

A: Well, he told me. I would assume that he did.

Q: You saw Troy Brown back in at least February, right?

A: Of this year?

Q: February of '94.

A: Yeah. I believe that I might have seen him when we did an interview in Loa, Utah.

Q: You saw him in Loa, Utah?

A: Right.

Q: All right. And does his physical appearance seem any different today than it did then?

A: Yeah. He does have a haircut.

Q: Okay. All right. Can you estimate what his hair length was back then?

A: I believe it looked a lot like his brother Travis's -- not as curly, but it was wavy.

Q: All right. Were you the arresting officer in this case here?

A: No, sir.

MR. LOCKIE: All right. Those are all the questions I have, your Honor.

[p.363] THE COURT: Cross-exam?

MR. SMITH: No questions, Judge.

THE COURT: Okay. May this witness be excused?

MR. LOCKIE: Yes, he may.

THE COURT: Mr. Murphy you may now be excused. Thank you very much for coming today. That means you can leave, stay, or whatever.

THE WITNESS: Thank you.

THE COURT: Thank you.

Call your next witness.

MR. LOCKIE: Bill Schultz.

THE COURT: Sir, please come forward. Please raise your right hand and face the clerk.

WILLIAM JOHN SCHULTZ,

called as a witness by the defendant, was sworn and testified as follows:

THE COURT: Sir, please have a seat right in this box here. What's your name, sir?

THE WITNESS: William John Schultz.

THE COURT: How do you spell Schultz?

THE WITNESS: S-C-H-U-L-T-Z.

THE COURT: Go ahead, Mr. Lockie.

DIRECT EXAMINATION

By DAVID B. LOCKIE:

Q: Mr. Schultz, did you undertake any activity in the connection with a sexual assault on a nine-year-old girl out in Carlin?

[p.364] A: Yes, I did.

Q: All right. And do you recall when that was?

A: The exact date, I don't remember.

Q: All right. Was it last January?

A; Yes, sir.

Q: And did you have occasion to be called in to do anything?

A: I was called to the crime scene to do some crime scene investigations.

Q: And do you recall where that crime scene was?

A: It was a trailer in Carlin.

Q: Okay. And what were you called to undertake?

A: Well, I was called to assist the Carlin PD by coming over and checking the crime scene; see if I could locate anything.

Q: And what did you look at?

A: The bathroom area, bedroom area.

Q: Were you also called upon to lift useable fingerprints?

A: Yes.

Q: And what -- did you find any useable prints?

A: Found one.

Q: Where did you find that print?

A: It was on a make-up mirror in the bedroom.

Q: Why were you looking at the make-up mirror?

A: Because the Carlin Police Department told me that the make-up mirror was used as a night light. And it was supposedly lit and then it was shut off.

Q: Okay. And you did find a useable print from that mirror?

A: Well, I lifted a print off of it, yes, sir.

[p.365] Q: Did you send it to the FBI for analysis?

A: Yes, I did.

MR. LOCKIE: May the witness please be shown Defense Exhibit J?

By MR. LOCKIE (continuing):

Q: Does that document look familiar to you?

A: Just a second. Yes, it does.

Q: And how can you recognize it?

A: It's the one that I received in my office, stamped when it was received, from the FBI.

Q: And that was received pursuant to your request?

A: Yes, it was.

Q: And was that kept in your office, afterwards?

A: Yes, it was.

MR. LOCKIE: All right. And at this time, your Honor, I'd move for the admission of Exhibit J.

MR. SMITH: What -- if I ask a question, Judge.

THE COURT: Okay.

MR. SMITH: Well, what does that report say? Does it say it matches Troy Brown?

THE COURT: Well -- So are we going to bring the document or are --

MR. SMITH: Yeah, I am, but I -- right now, we don't know what the relevance is.

THE COURT: Well, if we start reading from it, it seems like it's going to be in.

MR. SMITH: I have no objection to it coming in, Judge. I [p.366] just want to make sure that we know what it is.

THE COURT: Okay. It'll be admitted into evidence and you're going to go into it, I guess.

MR. LOCKIE: All right.

By MR. LOCKIE (continuing):

Q: Could you please read the document?

A: It's to the Sheriff of Elko County. Communication dated April 29, 1994. Fence number 0194-0070. "Reference: Unknown suspect or suspects, sexual assault. Specimens received May 2, 1994. Specimens being one lift, fingerprints of Troy Don Brown. This report confirms and supplements information furnished telephonically on May 12, 1994. One latent fingerprint of value is present on the lift. The latent fingerprint is not a fingerprint of Brown. Photographs of the latent print are available for any future comparison you may request. The specimens and your mail envelope are enclosed."

MR. LOCKIE: Thank you. Those are all the questions I have of the witness.

THE COURT: Cross?

CROSS-EXAMINATION

By MARSHALL S. SMITH:

Q: So that says that the print that you lifted off of that one area wasn't Troy Brown's?

A: That's correct.

Q: All right. Did you dust any other areas?

A: Yes, I did.

Q: You did?

[p.367] A: Yes.

Q: Okay. And no other useful prints were found?

A: No.

Q: Is that unusual based on the experience -- First of all, you're a detective with the Elko County Sheriff's Office?

A: That's correct.

Q: And your duties involve investigation of crime scenes?

A: That's correct.

Q: Is it unusual not to find fingerprints?

A: Yes, it is.

Q: It is unusual?

A: Not to find them?

Q: Yes.

A: Yes.

Q: All right. And then -- so in this particular case, what else did you have to do with the investigation of this case?

A: That was basically it. By the time I got called, everything was pretty well cleaned up. And so I just did the best I could for them, after they'd cleaned everything up.

Q: Very good, detective. Thank you.

MR. SMITH: That's all I have.

THE COURT: Redirect?

REDIRECT EXAMINATION

By DAVID B. LOCKIE:

Q: Had anybody wiped down the bed frame?

A: I -- to be honest with you, I didn't even ask them. They told me they cleaned it up. And I went ahead and dusted everything [p.368] again anyway.

Q: All right. You didn't ask them what "cleaned it up" meant?

A: No. They just said they cleaned up the crime scene.

MR. LOCKIE: No further questions.

MR. SMITH: No. I have no questions.

THE COURT: May this witness be excused?

MR. LOCKIE: Yes.

THE COURT: Well, thank you very much for coming, Officer. You may be excused. You can stay or leave, whatever.

Call your next witness.

MR. LOCKIE: Marilou Tognarelli.

THE COURT: Please come forward. Raise your right hand, face the clerk.

MARILOU TOGNARELLI,

called as a witness by the defendant, was sworn and testified as follows:

THE COURT: Have a seat right here. Could you tell us your full name and then spell it for us?

THE WITNESS: Marilou Tognarelli. M-A-R-I-L-O-U T-O-G-N-A-R E-L-L-I.

THE COURT: Go ahead, Mr. Lockie.

DIRECT EXAMINATION

By DAVID B. LOCKIE:

Q: How were you employed last -- at the end of last January?

A: I worked for the Carlin Police Department.

Q: Okay. Did you have any involvement in the case of the [p.369] sexual assault of Megan Allred?

A: Yes, I did.

Q: What was your role in that case?

A: I also work for the ambulance service. It's a volunteer ambulance service, and I was on-call that night, and I responded on the ambulance.

Q: And do you recall the approximate time that you responded to the scene?

A: No, I don't.

Q: What was going on when you did respond?

A: When I walked in the home, Megan was laying on the living room floor, her head was in her mother's lap. There was another EMT on scene who had formerly been a member of our crew, who lived in the area, and he'd heard the page on his scanner and responded. He was kneeling by Megan, he had one hand between her legs.

I came around Megan to the other side and Mike leaned across and told me that she had been sexually assaulted. I sent him out to get the gurney and I replaced his hand with mine to hold pressure, because she was bleeding.

Q: All right. Did you talk to Megan at all?

A: Yes, I did.

Q: And did she make any statements regarding the identity of her attacker?

A: She said she didn't know who it was.

Q: All right. And did she make any -- did she describe her attacker at all?

A: Chris Murphy came into the ambulance and asked if she knew [p.370] who it was and she said no.

He said, "Can you describe him?" And she said, "He has blond hair."

Q: Okay. And any other statements regarding the hair?

A: After he left the ambulance, she told me that his hair was curly.

Q: All right. Did she say anything with -- regarding length?

A: Not then, later on in the hospital, she told me -- she told Connie, when Connie Walker came in to do an initial forensic interview, she said she didn't know who it was.

I asked -- I told her to tell Connie what she had told me. And she said that the person had blond hair, and that his hair was curly. But she had also said that it had been dark.

And so I said "If you can't see, how do you know his hair is curly?" And she said that she had reached up and touched the back of his neck, and his hair felt curly and that it came to about the middle of his neck.

Q: And did you -- were you around Dr. Campbell at all?

A: Yes, I was.

Q: All right. Why is that?

A: We brought Megan into room one in the emergency room, which is the room on the south side that you can lock the doors on when they've been -- They use that room when they do gynecological examinations.

And then I left and the mother went into the room, but they had asked her to leave when they were doing the exam. And she went up to me and asked me, would I stay with Megan while she was being [p.371] examined because they wouldn't allow her in the room. So I said I would.

Q: All right. And did you discuss with Dr. Campbell, the evidence that he had collected?

A: I watched him collect it, but I -- I don't know what you mean by discuss it.

Q: Did you see him collect anything from Megan's teeth?

A: Yes. I watched him take off what he called debris, with a Q-tip.

Q: All right. Did you see what he did with that?

A: I believe he put it inside the sexual assault kit.

Q: All right. Did you have any discussion with respect to that debris?

A: No.

Q: All right. Did you independently observe debris on Megan's teeth?

A: Once he noted that it was there and he was taking it off, I saw that there was something on her teeth. I don't know what it was.

Q: Okay. How did he go about removing that material from her teeth?

A: With a Q-tip -- a long Q-tip.

Q: All right. Where on her teeth, do you remember?

A: I don't remember.

MR. LOCKIE: Those are all the questions I have, Judge.

THE COURT: Cross?

[p.372] CROSS-EXAMINATION

By MARSHALL S. SMITH:

Q: With reference to Megan saying -- whether your recollection of Megan saying whether or not she bite her assailant, did she say that she was certain about that?

A: She said she tried to bite him, but she didn't think that she had succeeded. And I asked her why. And she said because he didn't say anything and he didn't stop. And in her view, if she would have succeeded, he would have said, Ouch, and would have stopped doing what he was doing.

Q: Were you present when Mike Skinner was assessing Megan, initially?

A: No.

MR. SMITH: Okay. That's all I have.

THE COURT: Redirect?

MR. LOCKIE: Nothing based on that.

THE COURT: May this witness be excused?

MR. LOCKIE: Yes.

THE COURT: Mr. Smith?

MR. SMITH: Yes, Judge.

THE COURT: Thank you for coming. You're free to leave or stay, whatever you wish. Thank you.

THE WITNESS: Thank you.

THE COURT: Call your next witness.

MR. LOCKIE: Connie Walker.

THE COURT: Please come forward. Please face the clerk and raise your right hand.

[p.373] CONNIE WALKER,

called as a witness by the defendant, was sworn and testified as follows:

THE COURT: Have a seat right here. What's your name, ma'am?

THE WITNESS: Connie Walker.

THE COURT: And it's spelled just like it sounds?

THE WITNESS: Yes, sir.

THE COURT: Thank you. Mr. Lockie?

DIRECT EXAMINATION

By DAVID B. LOCKIE:

Q: Ms. Walker, how are you presently employed?

A: I'm a detective with the Elko Police Department.

Q: And how were you employed last February?

A: I was a police officer with the Elko Police Department.

Q: All right. And how long have you been with the Elko Police Department?

A: Two and a half years.

Q: At that time, were you a member of the Saint's Team?

A: Yes, sir.

Q: And are you familiar with the case of the sexual assault of Megan Allred?

A: Yes, sir.

Q: Did you participate in that case?

A: Yes, I did.

Q: As a member of the Saint's Team?

A: Yes, sir.

Q: All right. Do you know why you were called into the case?

[p.374] A: Yes. Being a member of the Saint's Team, there is a protocol that is followed on cases like this. And they called me in because I am on the Saint's Team, I am a female, and they requested that I do the interview at the hospital.

Q: All right. Did you have to do anything in particular to qualify to be on the Saint's Team?

A: I went to a lot of training classes, both through the Sheriff's Office and the Police Department. I don't know -- understand what you mean "in particular" for training.

Q: All right. You did have some training though?

A: -- and qualifications. Yes.

Q: All right. And did part of your training have to do with the questioning of child victim witnesses?

A: Yes, sir.

Q: Okay. And did you actually sit down with Megan and ask her what happened?

A: Yes, I did.

Q: Okay. Do you recall when that interview occurred?

A: The interview at the hospital was the early morning hours of January 29th, 1994.

Q: The early morning hours? Did you also conduct an interview on February 1st, 1994, at 1400 hours?

A: Yes, I did.

Q: Okay. Where did that interview take place?

A: In the foster home where she was staying at the time.

Q: Okay. Who else was present during that interview?

A: I believe Lieutenant Ladd was there also.

[p.375] Q: All right. And do you recall asking Megan questions and listening to her responses?

A: Yes, I do.

Q: And have you -- did you record what she'd said at the time?

A: Yes.

Q: You tape recorded it?

A: Yes, sir.

Q: And did you also have a transcript made of that?

A: I did not. I believe someone else did.

Q: Have you either listened to the recording, or reviewed the transcript, since the time that the interview occurred?

A: No, I have not.

Q: All right. So that's been clear since last February that you can recall any of these events.

A: Just by report -- the report that I had typed on the situation.

Q: All right. Let me ask you, do you remember asking Megan whether she could remember everything that happened?

A: I'm sorry, would you repeat the question?

Q: Do you remember whether Megan said whether she could remember everything that happened?

A: I do not remember her saying that, no.

Q: All right.

MR. LOCKIE: Your Honor, may the witness be provided with a copy of the transcript?

THE COURT: Well, do you have any objections to that [p.376] Mr. Smith?

MR. SMITH: Of the preliminary examination?

MR. LOCKIE: No.

MR. SMITH: Oh. No, I don't have any objection, Judge.

THE COURT: Okay. Now she didn't prepare this, that's the only reason I'm asking about that.

MR. SMITH: No. I'm aware of the transcript, Judge. I have no objection to it.

THE COURT: All right. What do you want her to do?

By MR. LOCKIE (continuing):

Q: Could you take a look at what's numbered 151, the page?

A: Okay.

Q: All right. At the top of that, is there a -- something that Megan said?

A: Yes.

Q: What did she say?

A: "Cuz I remember everything that happened."

Q: Okay. And then what did you ask her?

A: "You remember everything?"

Q: And Megan's response.

A: It was a positive response.

Q: Okay. Did you ask Megan whether she had talked to anyone else on the phone that night?

A: I don't recall if I did so or not.

Q: Okay. Could you look at what's numbered page 150, which is page 2 of your transcript? And look at the bottom of that page.

A: Okay.

[p.377] Q: Do you recall now?

A: Yes.

Q: All right. What did you ask Megan?

A: I asked -- do you want me to repeat it verbatim?

Q: Sure.

A: "Did you talk to anyone else on the phone before you talked to her?"

Q: And what did Megan respond?

A: "No -- yeah, the bartender."

Q: Okay. Then, do you recall asking Megan whether there was a light on in her bedroom?

A: I don't remember asking her, but I remember her response.

Q: What was her response?

A: She had turned a small lamp on, or a -- she said it was a lamp in her room, before she went to sleep that night. She used it as a night light.

Q: Okay. And do you remember whether she said if the attacker shut it off?

A: Yes, I do remember.

Q: What did she say?

A: She said that when she woke up the light was off.

Q: All right. Why don't you look at page 4, numbered 148 of your transcript.

A: 148?

Q: Right. It's about in the middle of that page.

A: Okay.

Q: Where you say "Okay," do you see that?

[p.378] A: Yes, I do.

Q: What did you ask Megan?

A: "Okay. Was there a light on in your bedroom?"

Q: And what did Megan respond?

A: "Yeah, there was at first. And I guess that guy shut it off."

Q: All right. And then what did you ask her?

A: "What kind of light was it?"

Q: And then her response?

A: "It was like a naked mirror light."

Q: Did you ask Megan to describe the events for you?

A: Yes, I did.

Q: All right. And could you please take a look at page 5? Did he -- did she describe the man's hair?

A: Yes, I remember her describing his hair.

Q: What did she say?

A: He had blond hair, curly at the bottom, and there wasn't very much hair right on the top of his head.

Q: And do you recall asking Megan whether she saw the man grab the sock?

A: No, I don't recall asking her that.

Q: All right. Take a look at page 7. About a third of the way down.

A: I'm sorry, a third of the way down? Okay.

Q: What did you ask her?

A: "Did you see him grab the sock?"

Q: Megan's response?

[p.379] A: "Yes."

Q: Okay. And then what did you say?

A: "You saw him grab it. Is the sock sack in your bedroom?"

Q: And Megan's response?

A: "Yes."

Q: And then, do you recall Roy Ladd asking Megan what she was wearing? I'm sorry. Roy Ladd asking Megan what he, the attacker, was wearing?

A: Yes, I do.

Q: Okay. Could you look at page 12?

A: All right.

Q: What did Mr. Ladd ask Megan? It's about the middle of the page --

A: Okay. Lieutenant Ladd asked, "Do you remember what he was wearing?" And you want --

Q: And her --

A: -- me to just go ahead and read, then?

Q: And what was her response?

A: "He wore a black jacket, I think."

Q: And then what did Mr. Ladd ask?

A: "Anything else about the jacket you remember?"

Q: And then what was Megan's response?

A: "It had a zipper, for sure."

Q: Okay. And then, do you recall asking Megan about his shirt?

A: Yes.

Q: All right. And what did she say about the shirt?

[p.380] A: The only thing I recall at the moment is it -- he had a shirt on. And I think she said it was a western type shirt.

Q: Okay. Could you look at page 12?

A: Okay.

Q: And look at the bottom of that page?

A: Okay.

Q: And what did you ask Megan?

A: "More this color. Do you remember seeing a shirt on him?"

Q: And Megan's answer?

A: "Nope."

Q: Okay. And then, did you ask Megan whether the man was wearing any jewelry? Look at page 13.

A: I'm sorry.

Q: Do you remember asking Megan whether the man wore any jewelry?

A: I remember asking her, but I don't remember what her response was.

Q: Would you take a look at page 13, please. And the bottom of the page.

A: I see it.

Q: What was Megan's response?

A: "I think he had a watch on."

Q: And then what did you ask?

A: "A watch?"

Q: And what did Megan say?

A: "It scraped my face."

Q: Do you remember asking Megan whether the man was wearing a [p.381] hat?

A: I remember she said he was wearing a hat.

Q: She said that he was?

A: I believe so, yes.

Q: Okay. Did she describe the type of hat?

A: She said it was a cowboy hat.

Q: Megan said that?

A: I -- She said that in one of the interviews, whether it's this one, specifically or not, I do not know.

Q: Are you sure about that?

A: Yes, sir.

Q: Okay. When and where was the interview?

A: There was an interview at the hospital, and there were several interviews at the foster home.

Q: Did you make a report of the interview?

A: Yes.

Q: And have you saved your reports?

A: Yes, sir.

Q: And are they readily accessible to you?

A: They're at the office.

Q: All right. When was the last time that you read your reports?

A: I've read them for the last several days.

Q: Okay. All right. In this interview, do you recall asking Megan whether the man wore a hat?

A: I don't recall in this particular interview, no.

Q: All right. Would you look at page 14? At the top of the [p.382] page? What did you ask Megan?

A: "Okay. Do you remember if he was wearing a hat, or cap, or anything like that?"

Q: And what was Megan's response?

A: Negative response.

Q: Okay. And then what did you ask Megan?

A: "But you saw the hair up in here?"

Q: And Megan responded?

A: "Yeah.

Q: And then what was your next question?

A: "Okay. Describe that."

Q: And then your -- then her response?

A: "He had shorter hair, not too bad. It had curls at the bottom. Then he" -- excuse me -- "Then he hardly had any up here, up on top."

Q: And then what did you ask?

A: "He hardly had any?"

Q: And her response?

A: "Yeah."

Q: All right. Then did you ask again, the color of the hair?

A: Yes, I did.

Q: All right. And what was her answer?

A: "I think blond."

Q: And then your answer?

A: "Blond?"

Q: And her response?

A: Positive response.

[p.383] Q: Okay. Did you ask whether he had a mustache?

A: Yes, I did.

Q: And Megan's response?

A: "I think so."

Q: Okay. Did you ask Megan whether he reminded her of anyone?

A: Yes, I recall asking that question.

Q: All right. Could you please take a look at page 15? All right. Was Megan asked "Who does he remind you of"?

A: On this one here, it was Lieutenant Ladd who actually asked that question.

Q: All right. Do you recall Lieutenant Ladd asking that question?

A: Yes.

Q: All right. And what was her response?

A: "Yes."

Q: And what did Lieutenant Ladd ask next?

A: "Who does he remind you of?

Q: And her response?

A: "Troy."

Q: And then Lieutenant Ladd's next question.

A: "Who?"

Q: And her next response?

A: "Trent. Yes, Trent."

Q: And your question?

A: "Who's Trent?"

Q: And Megan's response?

[p.384] A: "Trent Brown."

Q: And you -- what did you ask her then, next?

A: "And this is who?"

Q: And her answer?

A: "Raquel's husband."

Q: And your -- and then your next question or response?

A: "Raquel's husband."

Q: And then her response?

A: "Yes"

Q: All right. Then, do you recall asking further questions about the man's hair?

A: I don't specifically recall in this interview.

Q: Okay. Could you please look at page 16? About a third of the way down. Do you see where you asked, "Okay"?

A: Yes, I do.

Q: What did you ask?

A: "Okay. I'm going to go back for a minute."

Q: And then her response?

A: "It felt like Troy's hair."

Q: And then Roy Ladd's question?

A: "It felt like Troy's hair?"

Q: Megan's response?

A: "Yeah. I've never felt Troy's hair, but it looked like it."

Q: And then Roy Ladd's question?

A: "It looked like Troy's hair. What else about it reminded you of Troy?"

[p.385] Q: And Megan's response?

A: "Not Troy's, but Trent's."

Q: Okay. And then, what was Roy Ladd's next question to her?

A: Would you like me to read it?

Q: Please.

A: "Trent's. Okay. Could you -- do you know what it smells like when someone has been drinking and stuff?"

Q: And what was Megan's response?

A: "Yeah. But he didn't really smell like that."

Q: Okay. And then Roy Ladd's next question?

A: "Okay."

Q: And then, what did you ask her?

A: "What did he smell like?"

Q: And her response?

A: "Cologne."

Q: And then, what was your next question?

A: "Cologne. He --" Oh, I'm sorry. My next question?

Q: Right. Starts with cologne.

A: Okay. "Cologne. He had a lot of fou-fou powder on, huh? Okay. If you smelled that cologne again, do you think you could recognize it?"

Q: And her response?

A: "I don't think so."

Q: And then your answer?

A: "Okay."

Q: And then her next statement?

A: "He had an awful smell, though."

[p.386] Q: And then your response?

A: "Just awful, didn't smell pretty at all, huh? Nothing that would attract the girls, huh?"

Q: And then Megan's response?

A: Negative response. "At least not me."

Q: All right. Ms. Walker, do you recall going to where Megan was living, in response to a photo line-up?

A: Yes, I do.

Q: Okay. And do you recall Lieutenant Ladd making up a photo line-up?

A: Yes, I do.

Q: Do you recall the conditions of what -- you know, why you responded at that time?

A: Yes, I do.

Q: Why was it that you responded?

A: I received a call from dispatch that Megan's foster mother had called and wanted me to contact them at their home because Megan was upset.

Q: Okay. And then -- and when you responded, what happened?

A: Megan and her foster mother were watching television, they were watching Cheers on TV. And during one of the commercials, a flash came on and there was a spot about the nine-year-old girl in Carlin, and a suspect that they had a warrant for.

Q: Okay. And so, why was it that you came with photos?

A: To see if Megan could identify if -- maybe with the time lapse -- we're talking several days, now. Maybe she's in a mental state where she could hopefully recognize who had assaulted her.

[p.387] Q: All right. And then what did Megan say when you got there?

A: She was really upset. She described what she had seen on TV, and then she made a response to it.

Q: All right.

A: To the segment on television.

Q: And did she say anything about anyone sending her flowers?

A: Yes, she did.

Q: What did she say about that?

A: She said, "He sent me flowers."

Q: All right. "Her meaning who? The man who had attacked her?

A: Yes.

Q: All right. Did you have an occasion to -- did she retrieve the card from the flowers for you?

A: Yes, she did.

Q: And did you look at the card.

A: Yes, I did.

Q: What did the card say?

A: It said Trent -- it was signed Trent and Raquel.

Q: All right. And then, did you show her a photo line-up?

A: Yes we did.

Q: All right. And Troy Brown's picture was in that line-up?

A: Yes, sir.

Q: Was Trent's?

A: No, I don't -- I don't think so, no.

Q: All right. And what did she do in response to the photo [p.388] line-up?

A: She picked out Troy's picture.

Q: And what did she say?

A: She said, "That's him."

Q: She said, "That's him"?

A: Yeah. I believe that's what she said. Something in that nature.

Q: Do you remember preparing a report?

A: Yes, I do.

Q: All right.

MR. LOCKIE: Your Honor, may I have the --

THE COURT: All right.

MR. LOCKIE: -- clerk show --

By MR. LOCKIE (continuing):

Q: All right. Is it your testimony that she was I.D.ing Troy Brown as the man who had assaulted her at that point?

A: Well, what I'm saying is that she said -- What I just testified to is that she said she knew him. That that's him.

Q: Well, what exactly, did Megan say?

A: What she said is that she knew him. He was a friend of her father's.

Q: And what else?

A: When asked for a name, Megan said she couldn't remember his name.

Q: Okay. She said that she could not remember his name?

A: That's correct.

Q: And then, when you first got there, what -- do you [p.389] remember Megan saying "I knew it was him"?

A: Yes, I remember her saying that.

Q: All right. And did she say "I really think it's Troy"?

A: I believe that's what she said, yes.

Q: All right. That's in your report, isn't it?

A: Yes.

Q: All right.

A: This is it right here.

Q: And then later, then, after she was shown the picture, she said, pointing to picture number two, that she knew him?

A: Yeah.

Q: He was a friend of her father's?

A: Yes, sir.

Q: And when asked for a name, she said she couldn't remember his name, is that right?

A: That's correct.

Q: All right. Thank you.

MR. LOCKIE: I have no further questions, Judge.

THE COURT: Mr. Smith?

MR. SMITH: Thank you.

CROSS-EXAMINATION

By MARSHALL S. SMITH:

Q: During this conversation with Megan, where did she say that this assault took place?

A: At her home in Carlin.

Q: And where in her home?

A: In her bedroom.

[p.390] Q: Where in her bedroom?

A: On the floor.

Q: All right. And did she say anything about what he did after he was finished?

A: Yes.

Q: What?

A: After -- are you saying specifically before he left, or --

Q: Yeah.

A: He -- he got up and she remembers hearing the door lock and unlock, lock -- she couldn't remember which, and she heard the door shut.

Q: Okay.

MR. SMITH: Ask the -- Judge, if you still have that interview?

THE COURT: The interview, I gave back.

By MR. SMITH (continuing):

Q: And if you'd just look at page 7 of that. About half-way down where she described where it happened.

A: Okay.

Q: And what did she say happened after he -- when he was finished?

A: "He stopped. And then he grabbed a sock from my sock thing and choked me with it."

Q: All right. Continuing on from that point.

A: "Did you see him grab a sock?" "Yes."

Q: Then your next question?

A: "You" saw him grab it. Is the sock sack in your bedroom?"

[p.391] Q: Next.

A: "Yes."

Q: Then your next question.

A: "Okay. Okay. You're on the floor, and he's touched your butt and the front part of you, what does he do, then?"

Q: And Megan's response?

A: "Then he kissed me. And then, um, then he stopped and finally got up and I guess he got scared and left."

Q: Thank you.

MR. SMITH: That's all the questions I have, Judge.

THE COURT: Now, I think it's got to be clear now, did she identify the man who raped her or did she not in this interview -- in this photographic line-up?

THE WITNESS: In the photo line-up, she identified someone she knew.

THE COURT: Who's is this?

MR. SMITH: Judge, if I can ask one more question.

THE COURT: Let's go around again. Mr. Lockie, your turn.

REDIRECT EXAMINATION

BY DAVID B. LOCKIE:

Q: What do you mean by that?

A: She was shown the photo line-up, and -- but when she looked at the photo line-up and what she said was, and it's in this -- and it's in the thing there -- is that she knew him, pointing to Troy Brown's photograph.

Q: All right. But she wasn't identifying him as her attacker, at that point, was she?

[p.392] A: She -- all she said was as I -- she knew him. She didn't that that was the attacker, no.

Q: No, right?

A: No.

Q: Okay. So, you don't consider this to be an I.D. of Troy Brown, do you?

THE COURT: I think you don't mean that. You mean an I.D. of her attacker?

By MR. LOCKIE (continuing):

Q: I'm sorry, an I.D. of her attacker?

A: No.

Q: Okay.

RECROSS EXAMINATION

By MARSHALL S. SMITH:

Q: Now, so you got this call from -- you received this call from the foster mother, right?

A: Yes, sir.

Q: And did she tell you -- did the foster ma tell you what the problem was?

A: Yes, she did.

Q: And what did she tell you?

A: She said that they were watching Cheers on television, she and her -- she and Megan were downstairs watching Cheers on the TV set and a news flash came on about the nine-year-old girl in Carlin. There was a suspect, and a warrant had been issued to him. And she said she was upset because before she

could get to the clicker to change the channel, it was already there and Megan had [p.393] seen it.

Q: Okay. And what was Megan's response that was communicated to you?

A: Megan was very upset about it. She was very upset and they wanted me to come over and talk to her.

Q: All right. And then, why did you take the time to -- you and Lieutenant Ladd -- take the time to put together a photo line-up as opposed to just saying, well, that's the end of the hunt. She's identified him?

A: Megan, after the attack, mentally she was -- she was horrible. She was a mess. And she hadn't truly identified -- she hadn't come up with a name. And we were hoping that she would be able to identify her attacker.

Q: And so you put together a photo line-up to try to find out -- to test the depth of her understanding or recollection?

A: Yes.

Q: Okay.

MR. SMITH: That's all I have.

THE COURT: Mr. Lockie?

REDIRECT EXAMINATION

By DAVID B. LOCKIE:

Q: Was there anyone else in the photo line-up that Megan knew?

A: She didn't -- she didn't come up with anyone else.

Q: Now, when you pulled the line-up, did you just get a list of people that had been booked or something, or did you pick other people that Megan might know?

[p.394] A: Lieutenant Ladd made up the line-up, not me.

Q: All right.

A: The photo line-up.

Q: As far as you know, were there any pictures in there of people that Megan knew?

A: I don't know.

Q: Okay.

MR. LOCKIE: No further questions.

MR. SMITH: Nothing based on that, Judge.

THE COURT: What question did you ask -- or was there a question asked, when you showed her the line-up?

THE WITNESS: I believe Lieutenant Ladd asked her --

THE COURT: Well, do you know? Do you remember --

THE WITNESS: I don't recall specifically. I don't recall specifically.

THE COURT: All right. Anything on that? Now, I know there was nothing said, but anything on that, Mr. Lockie?

MR. LOCKIE: No.

THE COURT: Mr. Smith?

MR. SMITH: No. Nothing, Judge.

THE COURT: Thank you for coming. You may be excused.

Call your next witness.

MR. LOCKIE: Lieutenant Ladd.

THE COURT: Lieutenant, please come forward. Have a seat, again. I'd remind you that you're still under oath.

Go ahead, Mr. Lockie.

[p.395] ROY LADD,

called as a witness by the defendant, having been previously sworn, testified as follows:

DIRECT EXAMINATION

By DAVID B. LOCKIE:

Q: Lieutenant Ladd, I want to go back to the photo line-up that you prepared --

A: Um-hum.

Q: -- for Megan. You had Troy Brown's photo, right?

A: Yes.

Q: Where did you get the rest of the photos?

A: We maintain a file of mug shots.

Q: All right. And to your knowledge, was there anyone in there that Megan knew?

A: Not to my knowledge, no.

MR. LOCKIE: Thank you. I have no further question.

THE COURT: Mr. Smith?

MR. SMITH: Nothing based on that, Judge.

THE COURT: Thank you for coming. You may be excused.

MR. LOCKIE: I would like him retained, your Honor, for different purposes.

THE COURT: Why don't you just stay outside for awhile and we'll see if we need you. Are you working?

THE WITNESS: I can stay here.

THE COURT: Okay. Have a seat outside.

Call your next witness.

MR. LOCKIE: Pam Henle.

[p.396] THE COURT: Ma'am, please come forward. Have a seat in the witness box. And I'd remind you, you're still under oath.

Go ahead Mr. Lockie.

PAMELA SUE HENLE,

called as a witness by the defendant, having been previously sworn, testified as follows:

DIRECT EXAMINATION

By DAVID B. LOCKIE:

Q: Pam, when -- prior to January 28th, when was the last time that you'd spoken with your ex-husband?

A: My ex-husband?

Q: That was Megan's natural father.

A: I couldn't tell you. It had been quite awhile.

Q: Was it around December 30th?

A: Yes, it was.

Q: Okay. About a month before?

A: Yeah.

Q: All right. And then, do you remember when Officer Terry responded to the scene, when you were there with Megan?

A: Yes.

Q: Do you recall saying anything to Officer Terry?

A: I don't remember what was said.

Q: All right.

A: I was worried about Megan.

Q: All right. Did you tell Officer Terry that your -- that Megan's natural father had made a threat against Megan?

A: They've told me that I've said that. I remember --

[p.397] Q: You don't remember saying it, though?

A: No, I don't remember saying that.

Q: All right. Did the threat occur?

A: Pardon me?

Q: Did that threat happen?

A: No.

Q: It didn't?

A: No.

Q: Why did you tell Officer Terry that, though?

A: That he had threatened her?

Q: Right.

A: He had threatened me.

Q: All right.

A: I don't ever recall telling them that he'd threatened her.

Q: Okay. And later you'd been told that you made some kind of a threat?

A: Yes. They -- I don't recall telling them that, but they've said I did.

Q: All right. You do recall speaking with Megan's natural father on the 30th?

A: Yes.

Q: Okay. Was there any kind of a dispute with him?

A: That night? No.

Q: Was there any kind of a dispute with him in the past?

A: Just basic blaming each other for the divorce.

Q: All right. Had he -- he never made any threats that you can recall?

[p.398] A: Not towards Megan, no.

Q: All right.

MR. LOCKIE: Those are all the questions I have, your Honor.

THE COURT: Cross-exam?

MR. SMITH: No questions, Judge.

THE COURT: May this witness be excused?

MR. LOCKIE: She may.

MR. SMITH: Yes, Judge.

THE COURT: Thank you for coming. You may be excused.

Call your next witness.

MR. LOCKIE: Leah Dokes [sic].

THE COURT: Ma'am, please come forward and have a seat. You're still under oath.

Go ahead, Mr. Lockie.

MADONNA LEAH DOKE,

called as a witness by the defendant, having been previously sworn, testified as follows:

DIRECT EXAMINATION

By DAVID B. LOCKIE:

Q: Ma'am, do you -- I'm going to draw your attention back to the time when you saw the man walking along the street. Did you get a look at the emblem on the back of his coat?

A: I didn't get a real good look at it. All I know is it had fluorescent green.

Q: All right. And did the emblem remind you of anything?

A: It reminded me of like a skull, bandit emblem.

Q: All right. Thank you.

[p.399] MR. LOCKIE: That's all that I have.

THE COURT: Mr. Smith?

CROSS-EXAMINATION

By MARSHALL S. SMITH:

Q: Ms. Doke, whom have you talked to about your testimony here today? Who's discussed your testimony with you?

A: Everybody that I know of that's asked me about it has -- say, how's it going? It's like I don't know nothing.

Q: All right.

A: I can't, you know -- because I don't.

Q: All right. Have you ever testified previously about the color of that jacket?

A: I'm not sure if we discussed it at the preliminary.

Q: All right.

MR. SMITH: I have no further questions.

THE COURT: Anything further, Mr. Lockie?

REDIRECT EXAMINATION

By DAVID B. LOCKIE:

Q: Well, you wrote in your report that it was green, too, right?

A: Yeah.

Q: And that it reminded you of a skull?

A: Yeah.

Q: All right. And did you discuss your testimony with Mr. Smith before you testified in court?

A: Yeah.

Q: Did you discuss it with me, at all?

[p.400] A: No.

MR. LOCKIE: Thank you. I have no further questions.

THE COURT: Recross?

MR. SMITH: No, Judge.

THE COURT: May this witness be excused?

MR. SMITH: For the State, Judge.

MR. LOCKIE: Yes.

THE COURT: Thank you for coming. You can go home, now.

Call your next witness, Mr. Lockie.

MR. LOCKIE: Mr. Jay Doke.

THE COURT: Sir, please come forward. Face the clerk, raise your right hand.

JAY ALLEN DOKE,

called as a witness by the defendant, was sworn and testified as follows:

THE COURT: Sir, have a seat right here. What's your full name, sir?

THE WITNESS: Jay Allen Doke.

THE COURT: Why don't you spell it all for us. How do you spell Jay?

THE WITNESS: J-A-Y.

THE COURT: And Allen?

THE WITNESS: A-L-L-E-N.

THE COURT: And your last name?

THE WITNESS: D-O-K-E.

THE COURT: Thank you. Mr. Lockie.

[p.401] DIRECT EXAMINATION

By DAVID B. LOCKIE:

Q: Mr. Doke, are you married?

A: Yeah.

Q: Who are you married to?

A: Leah Doke.

Q: Okay. And do you recall where you were last -- in the late night or early morning of January 29th?

A: Yeah.

Q: All right. What were you doing at that point?

A: We just -- we were at a show in Elko and we went to -- back home to Carlin. Late.

Q: Okay. And do you recall being with your wife when you saw a man walking down the street?

A: Yeah.

Q: Okay. Do you recall what the man was wearing?

A: All we could tell -- just looked like a black cowboy hat and a black jacket of some type.

Q: All right. Did you notice an emblem on the back?

A: A bright green color stood out to me, on the back of the jacket.

Q: All right. Bright green?

A: Yeah, bright green.

Q: Okay.

MR. LOCKIE: Thank you. I have no further questions.

THE COURT: Mr. Smith?

MR. SMITH: I have no questions, Judge.

[p.402] THE COURT: May this witness be excused?

MR. LOCKIE: Yes.

THE COURT: Thank you for coming. You can go home.

Call your next witness.

MR. LOCKIE: Officer Terry.

THE COURT: Sir, please come forward. Have a seat up here. I would remind you, you're still under oath.

Mr. Lockie?

MICHAEL JOSEPH TERRY,

called as a witness by the defendant, having been previously sworn, testified as follows:

DIRECT EXAMINATION

By DAVID B. LOCKIE:

Q: Officer Terry, where were you when you responded to Puett?

A: I was at Alias Smith and Jones.

Q: Where's that --

A: On Main Street.

Q: Where is that located in Carlin?

A: It's on Main Street -- 6th and Main.

Q: All right. And would you be able to identify where that is from the schematic of Carlin? Exhibit 3 or 3a?

A: I can't see it from here.

MR. LOCKIE: All right. May the witness be shown the drawing?

THE COURT: Okay. Why don't you get it set up there again?

Do you want him to come out and draw on it, or something?

MR. LOCKIE: No.

By MR. LOCKIE (continuing):

[p.403] Q: Will you be able to see it?

A: Yeah.

MR. LOCKIE: Maybe if he could use that pointer.

THE COURT: If you push this button down and point, you get a little deal there, see?

By MR. LOCKIE (continuing):

Q: All right. What was your location when you got the call?

A: Sixth and Main. It's -- it would be further west.

Q: All right.

A: On that map.

Q: To the left?

A: Yeah.

Q: And then what route did you take in to the Henle residence?

A: I went -- to the best of my recollection, I went down to 10th Street, up on 10th Street, I crossed at Bush --

Q: Can you draw that?

A: Sure.

Q: With your marker?

A: I went up 10th, and then across on Bush, down Chestnut, and then the middle entrance to Irvingtown, which is Irving Street.

Q: All right. Why did you bypass the first exit to the right?

A: At that time, I wasn't real familiar with the streets of Carlin, and I basically took the -- I could have taken the first one'd been quicker, but I didn't.

Q: Okay. And are you generally familiar with the location of [p.404] the street lights in Carlin?

In looking at that diagram, you see little round circles that look like stars.

A: Okay. I see those.

Q: Do you know what those are?

A: Street lights?

Q: Okay.

A: Okay.

Q: Now, I want to go back, again, to the time that you went to Troy Brown's residence in the early morning?

A: Um-hum.

Q: Was he in bed at that time?

A: Yes, he was.

Q: Did you actually see him in bed at that time?

A: Yes.

Q: Did you ever tell Maria Fassett, or anyone over at the Washoe Crime Lab, that he wasn't in bed?

A: No.

Q: All right. Did you ever have a discussion with the Washoe Crime Lab as to whether he was or was not in bed?

A: No.

Q: Never?

A: Not that I can recall.

Q: Okay. And did you ever go back and move Troy Brown's bed?

A: No, sir, I didn't.

Q: When you recovered the evidence from the victim's -- well, when you're at the victim's trailer, what was she wearing?

[p.405] A: I really can't recall.

Q: All right. Did she have on a fleece pullover?

A: I don't remember.

Q: Okay.

MR. LOCKIE: I have no further question.

THE COURT: Mr. Smith?

CROSS-EXAMINATION

By MARSHALL S. SMITH:

Q: Officer Terry, what follow-up investigation did you do concerning other suspects in this case?

A: Other suspects?

Q: Right.

A: None that I know of.

Q: Do you know -- remember calling a person by the name Steven Scott Goulman?

A: No, sir.

Q: All right. Okay.

MR. SMITH: I have nothing further, Judge.

THE COURT: Mr. Lockie?

MR. LOCKIE: All right.

REDIRECT EXAMINATION

By DAVID B. LOCKIE:

Q: Do you recall, when I asked you, the other day, what Pam had said at the scene when she was excited?

A: Yes.

Q: All right. Was that -- do you definitely recall hearing her say that?

|p.406| A: Yes, I do.

MR. LOCKIE: I have no further questions.

THE COURT: I just feel like we don't know. I think you should tell us what it is that we're talking about.

MR. LOCKIE: All right.

THE COURT: It's not clear to me what we're talking about.

By MR. LOCKIE (continuing):

Q: What did she say?

A: She said that her ex-husband threatened to -- in her words exact, "Fuck Megan if --" to get back at her.

Q: She said that he had made that threat?

A: Yes.

THE COURT: Okay.

RECROSS EXAMINATION

By MARSHALL S. SMITH:

Q: Then, do you know, as a result of that, what action was taken to follow-up that lead?

A: I contacted -- I found out where he, the ex-husband should be and contacted Carbon County Sheriff's Department.

Q: Right.

A: And had her --

MR. LOCKIE: Your Honor, I'd object on any hearsay.

THE COURT: I think it already come in before. Hasn't this --

MR. LOCKIE: No. You sustained my objection.

THE COURT: Hearsay objection, Mr. Smith?

By MR. SMITH (continuing):

Q: Okay. Who was it that made that call.

[p.407] A: I did.

Q: Call where?

A: To Carbon County Sheriff's Department.

MR. SMITH: What is the problem here? He made the call.

By MR. SMITH (continuing):

Q: What was the purpose of your call?

A: To follow up on that lead.

Q: And what lead did you follow up on?

A: It was the lead on -- from her statement.

Q: And what did you find as a result of your telephone --

THE COURT: That's the hearsay there. That's the hearsay objection is what they told him.

MR. LOCKIE: Your Honor, strongly object.

MR. SMITH: Let me ask you this --

MR. LOCKIE: You sustained the objection once --

THE COURT: The objection's sustained. It's hearsay.

By MR. SMITH (continuing):

Q: As a result of your call to Carbon County, did you pursue that person as a possible lead?

A: No, we didn't.

Q: Possible -- as a possible suspect?

A: No, we didn't.

Q: All right. Fine. Thank you,

THE COURT: Mr. Lockie, anything on that?

MR. LOCKIE: No.

THE COURT: Okay. May this witness be excused?

MR. LOCKIE: Yes.

[p.408] MR. SMITH: Yes, Judge.

THE COURT: You may be excused. Let me have that light back. Thank you.

Call your next witness.

MR. LOCKIE: Jason New.

THE COURT: Sir, please come forward. Face the clerk and raise your right hand.

JASON NEW,

called as a witness by the defendant, was sworn and testified as follows:

THE COURT: Sir, have a seat right here. What's your name?

THE WITNESS: Jason New.

THE COURT: How do I spell your last name?

THE WITNESS: N-E-W.

THE COURT: Go ahead, Mr. Lockie.

DIRECT EXAMINATION

By DAVID B. LOCKIE:

Q: Mr. New, do you know the gentleman seated to my right?

A: Yes, I do.

Q: And how do you know him?

A: I grew up with him, back in Utah.

Q: What's his name?

A: Troy Brown.

Q: All right. Were you living in Carlin at the end of January?

A: Yes, I was.

Q: Where were you staying?

[p.409] A: At Travis Brown's place.

Q: Okay. Was that on Puett?

A: Yeah.

Q: And do you remember being there when Officer Terry came to the residence?

A: Yes, I do.

Q: What did Officer Terry do?

A: He come in the house and just asked a few questions.

Q: All right. Did you see him go back to Troy's bedroom?

A: Yes.

Q: What did he do when he went back there?

A: He went back, closed the door, talked to Troy.

Q: All right. Did you ever observe him do anything around Troy's bed?

A: I didn't. I was in the other room.

Q: All right. Was Troy in bed at that time?

A: Yes, he was.

Q: Did you look around the residence at all?

A: Yeah.

Q: Why did you look around the residence?

A: Just curious what was going on.

Q: What were you looking for?

A: Just anything that was out of place.

Q: All right. Were you looking for blood, for example?

A: Yeah.

Q: Did you -- where'd you look?

A: On the shower door, door knobs, places like that.

[p.410] Q: Did you find any?

A: No.

Q: When did you look?

A: Right after Officer Terry left.

Q: Did you see Dave Prescott that morning?

A: Dave Prescott, yeah.

Q: All right. How was he looking?

A: Like Dave Prescott.

Q: Okay. Had you been there the night before?

A: The night before, yeah.

Q: All right. What time did you come to the trailer?

A: About 9:30, I think.

Q: 9:30 at night?

A: Yeah.

Q: And was Travis Brown home, then?

A: Yeah, I believe he was.

Q: Are you sure?

A: I -- it's been seven months ago, it's hard to recall.

Q: Did you go out at all that night?

A: Yeah.

Q: Where did you go?

A: I stopped at CG's after work, cashed my check.

Q: All right. Did you go out partying at all that night?

A: No.

Q: Okay. All right. Were you aware that Troy went to Utah that -- on January 29th?

A: The following day?

[p.411] Q: Right.

A: Yeah.

Q: Okay. And did you happen to see what he was wearing when he went over to Utah?

A: I didn't. I was at work.

Q: Okay. Were you aware that he had plans to go over to Utah?

A: Yeah.

Q: All right.

MR. LOCKIE: Those are all the questions I have, Judge.

THE COURT: Mr. Smith?

CROSS-EXAMINATION

By MARSHALL S. SMITH:

Q: You're pretty good friends with Troy?

A: Yeah.

Q: How long have you known him?

A: All my life.

Q: And you were paying rent there at his house?

A: Yeah.

Q: Yes?

A: Yes.

Q: And you indicated that Travis was home when you got home, right?

A: As far as I recall he was.

Q: That was about 9:30? Yes?

A: Yes.

Q: And -- but still -- and you were aware that Officer Terry [p.412] had come over? And -- yes?

A: Yes.

Q: And do you know -- and you know the reason why Officer Terry was over there looking.

A: Not until after he told us.

Q: Okay. But it was after that that you kind of had a sneaking suspicion that maybe Troy did this. Fair to say?

A: Yeah.

Q: And, because the fact you wanted to look for blood.

A: Yes.

Q: And that's based on knowing Troy?

A: Just, yeah -- no. Just to prove him -- just to prove him innocent.

Q: But --

A: Because there's bound to blood in there somewhere.

Q: But you still looked, didn't you?

A: Yes, I did.

MR. SMITH: I have nothing further.

THE COURT: Mr. Lockie?

REDIRECT EXAMINATION

By DAVID B. LOCKIE:

Q: Well, you were there when Officer Terry came, right?

A: Yeah.

Q: Is that how you found out what had happened?

A: Yeah.

Q: And you know that Officer Terry went in to question Troy, right?

[p.413] A: Yeah.

THE COURT: Speak up, please.

THE WITNESS: Yes.

MR. LOCKIE: I have no further questions.

THE COURT: Mr. Smith?

MR. SMITH: Nothing based on that, Judge.

THE COURT: You may be excused. Thank you for coming.

Call your next witness.

MR. LOCKIE: Call Julie Gurr.

THE COURT: Ma'am, please come forward. Face the clerk, raise your right hand. Over here.

JULIE ANN GURR,

called as a witness by the defendant, was sworn and testified as follows:

THE COURT: Ma'am, have a seat right in this box there. What's your name?

THE WITNESS: Julie Ann Gurr.

THE COURT: How do I spell your last name?

THE WITNESS: G-U-R-R.

THE COURT: Thank you. Mr. Lockie?

DIRECT EXAMINATION

By DAVID B. LOCKIE:

Q: Where do you live, Ms. Gurr?

A: Loa.

Q: Loa, Utah?

A: Uh-huh.

Q: How long have you lived there?

[p.414] A: For about 15 years.

Q: All right. And your occupation?

A: I'm a waitress at the Sun Glow.

Q: Do you know the gentleman seated to my right?

A: Yes.

Q: Who is he?

A: Troy Don Brown.

Q: And how long have you known him?

A: For about five years.

Q: All right. Do you have an opinion as to his moral character?

A: Yes.

Q: And what is your opinion?

A: He's very honest. He's -- I'm going to cry.

Q: Is he of good moral character?

A: Yes.

Q: All right. And how long have you known him?

A: About five years.

MR. LOCKIE: Thank you. I have no further questions, your Honor.

THE COURT: Mr. Smith?

CROSS-EXAMINATION

By MARSHALL S. SMITH:

Q: How old are you, Ms. Gurr?

A: Seventeen.

MR. SMITH: Thank you. I have no further questions.

THE COURT: Mr. Lockie?

[p.415] REDIRECT EXAMINATION

By DAVID B. LOCKIE:

Q: Have you ever been Troy's girlfriend?

A: No.

MR. LOCKIE: Thank you. No further questions.

THE COURT: Mr. --

RECROSS EXAMINATION

By MARSHALL S. SMITH:

Q: Well, let me ask you this, as far as your -- the five years you've known him you've been a neighbor of his, or -- how have you known him?

A: We -- I hang out with Trace, and he's Tracy's brother. And we've just all been really good friends.

MR. SMITH: Thank you. That's all I have.

THE COURT: May this witness be excused?

MR. LOCKIE: Yes.

THE COURT: Okay. Thank you for coming. You may be excused. You can sit in the courtroom if you want, or you can leave, either one.

Call your next witness.

MR. LOCKIE: Farah Pace.

THE COURT: At some point we'll take a break. Do you have a good idea when it would be good for you?

MR. LOCKIE: Probably after this witness.

THE COURT: Okay. Is that kind of along the lines we talked about?

MR. LOCKIE: I've got several more.

[p.416] THE COURT: Okay.

Ma'am, please come forward. Face the clerk and raise your right hand.

FARAH PACE,

called as a witness by the defendant, was sworn and testified as follows:

THE COURT: Ma'am, have a seat right here. What's your name?

THE WITNESS: Farah Pace.

THE COURT: How do I spell your last name?

THE WITNESS: P-A-C-E.

THE COURT: And how about your first name?

THE WITNESS: F-A-R-A-H.

THE COURT: Mr. Lockie.

DIRECT EXAMINATION

By DAVID B. LOCKIE:

Q: Where do you live?

A: Loa, Utah.

Q: How long have you lived there?

A: Eighteen years.

Q: Do you know the gentleman seated to my right?

A: Yes, I do.

Q: Who is he?

A: Troy Brown.

Q: How long have you known Troy?

A: About 18 years.

Q: Okay. Do you have an opinion as to his moral character?

A: Yeah, it's great.

[p.417] Q: I'm sorry. What did you say?

A: Yes.

Q: What is your opinion as to his moral character?

A: He's a great person.

Q: With respect to his character of morality, do you have an opinion?

A: No.

Q: Do you know what I mean by moral?

A: No, I don't.

Q: All right. In your opinion is he an honest person?

A: Yes, he is.

Q: Have you ever been his girlfriend?

A: No, I haven't.

MR. LOCKIE: Thank you. I have no further questions, Judge.

THE COURT: Mr. Smith.

CROSS-EXAMINATION

By MARSHALL S. SMITH:

Q: And how old are you?

A: I'm 18.

MR. SMITH: Thank you. I have nothing further.

THE COURT: May this witness be excused?

MR. LOCKIE: Yes.

MR. SMITH: For the State, Judge.

THE COURT: You may be excused.

Call your next witness.

MR. LOCKIE: Cindy Ellett.

THE COURT: Please come forward, ma'am. If you'd face the [p.418] clerk and raise your right hand.

CINDY ELLETT,

called as a witness by the defendant, was sworn and testified as follows:

THE COURT: Ma'am, have a seat right here. If you'd just kind of pull that door shut. What's your name, ma'am?

THE WITNESS: Cindy Ellett.

THE COURT: How do I spell your last name?

THE WITNESS: E-L-L-E-T-T.

THE COURT: Mr. Lockie.

DIRECT EXAMINATION

By DAVID B. LOCKIE:

Q: Where do you live, ma'am?

A: In Bitnell.

Q: Where's Bitnell?

A: In Wayne County, southern Utah.

Q: Okay. Do you know the gentleman seated to my right?

A: Yes, I do.

Q: Who is he?

A: He's Troy Brown, my nephew.

Q: All right. And you've known him all his life, then?

A: Very well.

Q: And how do you know him?

A: He is my nephew. I've known him since the day he was born. He grew up with my children, he's been in my home three or four times a week since the day he was born.

Q: All right. And do you have an opinion as to his moral [p.419] character?

A: Very clear.

Q: All right. And what is your opinion?

A: A very strong, honest human being.

Q: All right. And do you have an opinion as to his truthfulness?

A: Very truthful.

MR. LOCKIE: All right. Thank you. I have no further questions, your Honor.

THE COURT: Mr. Smith?

CROSS-EXAMINATION

By MARSHALL S. SMITH:

Q: Ms. Ellett, am I saying that correctly?

A: Ellett.

Q: So this -- the effect that Troy's been charged with this has caused you some degree of concern? Fair to say?

A: Yes, it has.

Q: It'd be fair to say you'd be concerned about anybody being charged with these kind of crimes?

A: Yes.

Q: Okay. But particularly Troy, is that what you're saying?

A: Yes.

MR. SMITH: That's all I have. Thank you.

THE COURT: Mr. Lockie, may this witness be excused?

MR. LOCKIE: She may.

THE COURT: Thank you for coming. You may be excused.

MR. LOCKIE: Request a recess at this point.

[p.420] THE COURT: Okay. We'll take our afternoon recess. Just a second.

During this recess that we're about to take the jury is admonished as follows:

Do not converse amongst yourselves or with anyone else on any subject connected with this trial.

Do not read, watch, or listen to any report of the trial, or to any commentary on the trial, or to any person connected with the trial. This includes any medium of information such as newspapers, television, and radio.

Do not form or express any opinion on any subject connected with the trial until the case is finally submitted to you.

Do not visit the scene or attempt to make any independent investigations concerning this matter.

If you'd be back in your jury room in 15 minutes, I'll try and get you right back in.

And, Counsel, as soon as you take a little break, would you come see me in chambers?

Court's in recess.

(Court recessed at 3:20 P.M. for 15 minutes)

THE COURT: Please be seated. The record will reflect the presence of counsel and the defendant. Counsel, will you stipulate to the presence of the jury?

MR. SMITH: For the State, Judge.

MR. LOCKIE: We stipulate, your Honor.

THE COURT: Call your next witness.

MR. LOCKIE: I call Ms. Rosie Arnold.

[p.421] THE COURT: Ma'am, please come forward. First, I'm going to have you face the clerk and raise your right hand.

ROSIE ARNOLD,

called as a witness by the defendant, was sworn and testified as follows:

THE COURT: Have a seat right here. What's your name, ma'am?

THE WITNESS: My name is Rosie Arnold.

THE COURT: All right. Mr. Lockie?

DIRECT EXAMINATION

By DAVID B. LOCKIE:

Q: Ms. Arnold, do you know the gentleman seated to my right?

A: Yes, I do.

Q: Who is he?

A: Troy Brown.

Q: Where do you live?

A: I live in American Fork, Utah.

Q: All right. How long have you known Troy Brown?

A: Nine years.

Q: And how do you know him?

A: Troy worked for us on the farm when we lived in Loa. And he was one of my 4-H leaders, one of my youth social activity leaders in the 4-H.

Q: And in knowing Troy, do you have an opinion as to his moral character?

A: Yes, I have a very strong opinion as to his moral character.

Q: And what is that?

[p.422] A: That he is a very highly moral person.

Q: Do you have an opinion as his -- as to his truthfulness?

A: Yes, I do.

Q: And what is your opinion?

A: I believe he is very truthful.

MR. LOCKIE: Thank you. I have no further questions, your Honor.

THE COURT: Mr. Smith?

MR. SMITH: I have no questions.

THE COURT: You may be excused. Thank you for coming.

Call your next witness.

MR. LOCKIE: Brenda Brown.

THE COURT: Ma'am, please come forward. Face the clerk and raise your right hand.

BRENDA BROWN,

called as a witness by the defendant, was sworn and testified as follows:

THE COURT: Have a seat right here. What's your name, ma'am?

THE WITNESS: Brenda Brown.

THE COURT: Mr. Lockie?

DIRECT EXAMINATION

By DAVID B. LOCKIE:

Q: Where do you live, Ms. Brown?

A: Pardon?

Q: Where do you live?

A: Orem, Utah.

Q: Do you know the gentleman seated to my right?

[p.423] A: Yes, I do.

Q: Who is he?

A: He's my nephew.

Q: All right. Do you have an opinion as to his moral character?

A: It is very good. He's very truthful, honest.

MR. LOCKIE: I have no further questions, your Honor.

THE COURT: Mr. Smith?

CROSS-EXAMINATION

By MARSHALL S. SMITH:

Q: Do you know Rosie Arnold?

A: No, I don't.

Q: You don't know her? All right. How about Cindy Ellett?

A: Yes, I do.

Q: And Farah Pace?

A: No, I don't.

Q: And Julie Gurr?

A: Yes.

Q: You do?

A: Yes.

Q: And, so you're his aunt?

A: Yes.

Q: You'd hate to see him get in any trouble, wouldn't you?

A: Pardon?

Q: You would hate to see him get in any trouble, wouldn't you?

A: Yeah, I would hate to see him get in trouble.

[p.424] MR. SMITH: Thank you. That's all I have.

THE COURT: May this witness -- Just a second.

MR. LOCKIE: I have a question based on that.

THE COURT: Have a seat.

Go ahead, Mr. Lockie.

REDIRECT EXAMINATION

By DAVID B. LOCKIE:

Q: Why would you hate to see him get in any trouble?

A: Because he's my nephew and I love him dearly. And as truthful and honest and that that he is, I just wouldn't want to see him get in any trouble.

MR. LOCKIE: Thank you. I have no further questions, Judge.

THE COURT: Mr. Smith?

MR. SMITH: No. Nothing based on that, Judge.

THE COURT: You may be excused. Thank you for coming.

Did you want to take our evening recess now?

MR. LOCKIE: Yes, your Honor.

THE COURT: All right. We'll work on jury instructions. My thought is to still get started at 8:00 o'clock in the morning. Counsel, do you think we can finish it tomorrow?

MR. LOCKIE: I do.

MR. SMITH: I do, Judge.

THE COURT: All right. So to make sure of that we'll come back again at 8:00 o'clock tomorrow morning.

During this recess that we're about to take the jury is once again admonished as follows:

Do not converse amongst yourselves. Do not converse with [p.425] anyone else on any subject connected with the trial.

Do not read, watch, or listen to any report of the trial, or to any commentary on the trial, or to any person connected with the trial. This includes any medium of information such as newspapers, and television, and radio.

Do not form or express any opinion on any subject connected with the trial until the case is finally submitted to you.

Do not visit the alleged scene or attempt to make any independent investigations concerning this matter.

A violation of these admonishments may result in a mistrial and the unnecessary expenditure of public funds.

So, please don't talk about it. I'm going to take care of a matter after you leave, so -- Please be in your jury room at 8:00 o'clock tomorrow morning, we'll try and get started. So, if you'd leave by this door, we'll wait until you leave.

(Pause for jury to exit the courtroom)

THE COURT: Please be seated. The record will reflect that we're convened outside the presence of the jury. When this trial started, I was concerned about the defendant remaining through the trial, based upon the DNA evidence. After listening to two days of evidence, I'm now satisfied that the defendant can be

safely released on his bail bond, so I'm going to order that he be released back on his bail, so you will not be taken back into custody.

Counsel, if you could meet me in chambers to work on the jury instructions. Court's in recess.

(Court recessed at 4:10 P.M. for 1 hour, 10 minutes)

THE COURT: Please be seated. The record will reflect that we're convened outside the presence of the jury. And both counsel are present.

Mr. Lockie, do you waive the presence of your client for settling jury instructions?

MR. LOCKIE: Yes.

THE COURT: All right. The record will reflect that the Court has delivered to each counsel, copies of 20 proposed jury instructions.

Does the State have any exceptions to those jury instructions?

MR. SMITH: No, Judge. But I think we're missing Instruction 3.

CLERK: Well, they'll be renumbered when they're finalized.

THE COURT: So --

MR. SMITH: So, they're not final now?

THE COURT: See the notes which -- those three pound signs indicate a note. So, just behind number 2 you'll see what is -- that piece of paper. That will come out and the instruction numbers are actually page numbers. And that's why. So, I guess really I've given you 19 instructions. Because all of them will be renumbered here. Let me see if there's another double page.

MR. SMITH: What I'd like to do is find out what the final numbering of these are, too.

THE COURT: Okay. I think we can do that right now.

Everything is numbered correctly except just behind number 2, you have an additional page which throws every subsequent number off one. So, when she does the final, she'll be taking all [p.427] sentences out that had the three pound signs -- they automatically come out. So, after number -- We'll be able to give you a final copy. Can we do it today or --

CLERK: It'd be tomorrow.

THE COURT: Tomorrow morning you'll get it. We'll have it -- tomorrow morning we'll have a final.

MR. SMITH: So, in other words, Instruction 4 will be Instruction 3?

THE COURT: And every other one will move up.

MR. SMITH: That's fine.

THE COURT: Okay. And every note with the three pound signs is coming out, too.

Okay. With that clarification, then, does the State have any exceptions to the proposed instructions?

MR. SMITH: No.

THE COURT: Does the defendant have any exceptions to the proposed instructions?

MR. LOCKIE: No.

THE COURT: Okay. The Court has also supplied -- Let me point out, Mr. Lockie, that we do not have in the proposed instruction, a cautionary instruction on the defendant's testimony. And that's at your request, is that correct?

MR. LOCKIE: That's right.

THE COURT: All right. Now, we have also delivered to counsel, forms of verdict. Two forms of verdict for each count, for a total of eight forms of verdict.

Does the State have any exceptions to the forms of verdict?

[p.428] MR. SMITH: No.

THE COURT: Defense counsel?

MR. LOCKIE: No.

THE COURT: Does either the State or defense counsel have any additional instructions or proposed forms of verdict?

MR. SMITH: None for the State, Judge.

MR. LOCKIE: None.

THE COURT: Have we settled the jury instructions on the record, Counsel?

MR. SMITH: Yes.

MR. LOCKIE: Yes.

THE COURT: Okay. Counsel, if you'd look at Instruction number 1. I read this to the jury earlier today -- or yesterday, or whenever it was. I'll turn your attention to -- where is that? Did you take it out?

CLERK: Yes.

THE COURT: All right. I took out that paragraph that I read to them about it's not their concern about sentencing. And that was by stipulation, is that correct?

MR. SMITH: That's correct, Judge.

THE COURT: Mr. Lockie?

MR. LOCKIE: Yes.

THE COURT: And we're just simply going to deal with that if, and when, the jury comes back with a guilty verdict.

MR. SMITH: That's correct, Judge.

MR. LOCKIE: That's correct.

THE COURT: Okay. Counsel, will you stipulate to my supplying [p.429] each juror with a copy of the instructions?

MR. SMITH: For the State, Judge.

MR. LOCKIE: We'll stipulate.

THE COURT: Okay. We'll have a final copy on your desk tomorrow. If you have an opportunity to proof them again, I have never read in about 50, 60 times I've done this, I've never gotten all the way through without finding at least a typo, sometimes never really particularly serious, but it would never hurt to read them again.

Is there anything else you want to discuss outside the presence of the jury?

MR. SMITH: Just as far as timing is concerned, I can't imagine -- and Dave and I have been talking about this a little bit -- I can't imagine the direct and cross of the defendant taking any longer than an hour, if that. And the -- any possible rebuttal being a matter of minutes. So, when would we -- if that is the case --

THE COURT: Well, let's do this. How about if I take a break when -- When you're done with evidence, I'll give you 15 minutes or 20 minutes, is that enough?

MR. SMITH: Well, yeah. I was just wondering if --

THE COURT: Because we're going to be done, from what you're saying, by 9:00 or 9:30 tomorrow.

MR. SMITH: Right.

THE COURT: 9:30. So, I think the best I could -- I would think -- Let me give you half an hour. I'll have the jury take a half an hour break.

[p.430] MR. SMITH: Okay.

THE COURT: And then when we come back, I'll read instruction --

MR. SMITH: That'd be fine.

THE COURT: Give's you another 20 minutes. And all -- I've never been able to think when someone was reading instructions. But anyway, let's do that then. I'll give you half an hour and we'll be done tomorrow, okay?

MR. SMITH: That's fine.

THE COURT: Court's in recess.

(Court adjourned for the day at 5:25 P.M.)

In the District Court of the Fourth Judicial District of the State of Nevada, in and for the County of Elko

[caption omitted in printing]

FRIDAY, SEPTEMBER 30, 1994
JURY TRIAL - DAY 4

[p.432] FRIDAY, SEPTEMBER 30, 1994, 8:15 A.M.

THE COURT: Please be seated. The record will reflect the presence of counsel and the defendant. Counsel, will you stipulate to the presence of the jury?

MR. SMITH: For the State, Judge.

MR. LOCKIE: We will.

THE COURT: Mr. Lockie, you may call your next witness.

MR. LOCKIE: Ellen Johnson.

THE COURT: Ma'am, please come forward. If you'd face the clerk and raise your right hand.

ELLEN JOHNSON,

called as a witness by the defendant, was sworn and testified as follows:

THE COURT: Ma'am, have a seat right here. What's your name, ma'am?

THE WITNESS: Ellen Johnson.

THE COURT: How do you spell Ellen?

THE WITNESS: E-L-L-E-N.

THE COURT: And Johnson, is it -- how do you spell it?

THE WITNESS: J-O-H-N-S-O-N.

THE COURT: Thank you. Mr. Lockie?

DIRECT EXAMINATION

By DAVID B. LOCKIE:

Q: Where do you live, Ms. Johnson?

A: 1635 Puett Drive.

Q: How long have you lived there?

A: Going on three years. I

[p.433] Q: All right. Do you recall last January when this case was going on of the little girl being raped?

A: Yes.

Q: Did you see anything unusual on or about the time of January 28th and 29th? Or in that time frame?

A: About two or three days after it happened.

Q: Okay.

A: There was a young gentleman that lived in the trailer park.

Q: All right.

A: And he had kind of longer, dirty blond hair.

Q: All right. That was -- was that the gentleman to my right?

A: No.

Q: Okay. And did you notice anything unusual about him?

A: Yeah. He had real short hair and he was real clean shaven, and that was unusual.

Q: All right. And that -- it changed suddenly, is that what you're saying?

A: Yes.

Q: All right. Did you report that to the police?

A: Yes.

MR. LOCKIE: Thank you. I have no further questions, your Honor.

THE COURT: Mr. Smith?

CROSS-EXAMINATION

By MARSHALL S. SMITH:

[p.434] Q: I'm sorry. What was unusual?

A: Well, he had always had real long hair and -- about down to here and kind of rough looking. And then all of a sudden he was totally opposite.

Q: Okay. And did he live in that area before, or --

A: Yes. He was there when I moved into the trailer park. He had lived there.

Q: Okay. And you think this is unusual because he had short hair, then he had long hair, he had long hair and then he had short hair.

A: Right. He had long hair and then all of a sudden he had short hair, real clean shaven.

Q: Okay. And that was unusual?

A: Yeah. It was something that had changed.

MR. SMITH: Okay. Thank you. I have nothing further.

THE COURT: Mr. Lockie?

MR. LOCKIE: Nothing further on this.

THE COURT: You may be excused. Thank you for coming.

THE WITNESS: Thank you.

THE COURT: Call your next witness.

MR. LOCKIE: Scarlet Patrick.

THE COURT: Ma'am, please come forward. Face the clerk and raise your right hand.

BEVERLY SCARLET PATRICK,

called as a witness by the defendant, was sworn and testified as follows:

THE COURT: Ma'am, have a seat right here. Ma'am, what's your [p.435] name?

THE WITNESS: Beverly Scarlet Patrick.

THE COURT: The first name?

THE WITNESS: Beverly

THE COURT: And how do I -- just last name, just Patrick?

THE WITNESS: Patrick.

THE COURT: Go ahead, Mr. Lockie.

MR. LOCKIE: Thank you.

DIRECT EXAMINATION

By DAVID B. LOCKIE:

Q: Where do you live, Ms. Patrick?

A: 231 ½ Bullion Road.

Q: Here in Elko?

A: Elko.

Q: All right. Last January, where were you working?

A: Peacock Lounge.

Q: And were you working there on January 28th, 29th?

A: Yes, sir.

Q: All right. And what shift did you work?

A: Swing shift, 4:00 to midnight.

Q: You got off at midnight?

A: Yes, sir.

Q: Do you remember seeing Troy Brown in the bar?

A: Yes, sir.

Q: Is he the gentleman seated to my right?

A: I don't remember now, to tell you the truth.

Q: All right. How was he dressed?

[p.436] A: He was in a black cowboy hat with a silver band.

THE COURT: I guess -- I'm worried that we're not even talking about the same person, now. What's happening here? Do you understand my point?

By MR. LOCKIE (continuing):

Q: All right. Did you see a man in the bar?

A: Yes.

Q: And how was that man dressed?

MR. SMITH: Well, which man are we talking about?

THE COURT: I think you're going to have to back up and start again, Mr. Lockie. I'm worried that we're not even talking about the same thing, here. It's just not clear to me who we're talking about.

By MR. LOCKIE (continuing):

Q: Did you see a man in the bar, who you believed to be Troy Brown, that night?

A: Yes, sir. The man that I -- see, it's been months since I seen him, and I only saw him one night, but all night he introduced himself as Troy Brown.

Q: All right. And did you make a statement to the police?

A: Yes, I did.

Q: Did you tell the police that you'd seen Troy Brown in the bar?

A: Yes, sir. He was there my whole shift.

Q: All right. Do you know him personally?

A: No.

Q: All right. Can you please describe what the man was [p.437] wearing?

A: Black cowboy hat with a silver rim. He had cowboy boots on, had a black jacket with CG's on it.

MR. LOCKIE: All right. May the witness be shown Exhibit 14?

By MR. LOCKIE (continuing):

Q: Does that look like the hat that you saw that night?

You have to answer out loud because it's being recorded.

A: Yes, it does.

MR. LOCKIE: All right. And may the witness be shown Exhibit 13?

By MR. LOCKIE (continuing):

Q: Is that a CG's jacket?

A: Yes, sir, it is.

Q: Does that look like the jacket that you saw the man wearing that night?

A: Yes, he was.

Q: All right. What did you do after you got off-shift?

A: I had -- one of the customers had asked me to -- was wanting me to go out with him, so I sat down and talked to him afterwards. So I was just sitting at the end of the bar.

Q: Okay. Did you have anything to drink yourself?

A: I had a Sharp's. I don't drink, so it's a non-alcoholic beer.

Q: Okay. And do you recall what time you left the bar?

A: I wasn't sure the next -- when I wrote that, if it was at 1:30 or 2:00 o'clock. I know it was about -- it had to be around 1:30, at least.

[p.438] Q: When you left the bar?

A: Um-hum.

Q: And was the man who you just described in the bar at that time?

A: Just before I left, I thought I saw him right over to the right, at the tables.

Q: All right. And did you prepare a police statement in this case?

A: I did.

Q: And did you say in the police statement that the man was there when you left the bar?

A: I said I thought he was.

Q: All right. Thank you.

MR. LOCKIE: I have no further questions.

THE COURT: Cross-exam.

MR. SMITH: I have nothing based on that, Judge.

THE COURT: All right. Thank you for coming. You may be excused.

Call your next witness, Mr. Lockie.

MR. LOCKIE: Mr. Mike Skinner.

THE COURT: Sir, please come forward. Face the clerk, raise your right hand.

MIKE SKINNER,

called as a witness by the defendant, was sworn and testified as follows:

THE COURT: Have a seat right here in the box. Sir, what's your name?

[p.439] THE WITNESS: Mike Skinner.

THE COURT: How do you spell your last name?

THE WITNESS: S-K-I-N-N-E-R.

THE COURT: Mr. Lockie?

DIRECT EXAMINATION

By DAVID B. LOCKIE:

Q: Mr. Skinner, how are you presently employed?

A: With Newmont Gold.

Q: And back in the end of last January, how were you employed?

A: Newmont.

Q: Did you have any special type of training in the medical field?

A: Yeah. I've been a EMT for six years.

Q: And did you respond to the case where the little girl was raped in Carlin?

A: Yes, I did.

Q: And that was at the end of January?

A: Yeah.

Q: All right. At that time, did you see a woman named Pam Henle?

A: Yes, I did.

Q: And did you hear her say anything at the scene?

A: No. She was worried about her daughter and she mostly wanted me to help until the ambulance got there.

Q: Did she make any statements regarding her ex-husband?

A: Yeah. She said that they were --

[p.440] Q: I want to know exactly what you remember her saying.

A: She said they were feuding and that --

Q: Feuding?

A: Yeah. And that he would -- he said he'd -- she said he would do anything to get back at her including doing things to her daughter.

Q: I want you to say the exact words. I know we're in court, but I want you to say the exact words.

A: She told me that he said that he would "fuck" his -- "her daughter" if -- to get back at her.

Q: That he said that?

A: Um-hum.

MR. LOCKIE: Thank you. I have no further questions.

THE COURT: Mr. Smith.

CROSS-EXAMINATION

By MARSHALL S. SMITH:

Q: Is that the ex-husband in Carbon County?

A: I'm not sure. She just said that her ex-husband.

Q: All right. Thank you.

MR. SMITH: That's all I have.

By MR. SMITH (continuing):

Q: Well, let me ask you this, you were there, also -- you were the first one to assess Megan, right?

A: Yes, sir.

Q: And did Megan give a description of the hair color?

MR. LOCKIE: Scope, your Honor.

THE COURT: It's outside the scope, Mr.--

|p.441| MR. SMITH: I think he was talking about there for medical reasons, Judge.

THE COURT: Yeah. But you're going beyond that.

MR. SMITH: All right. Sorry.

THE COURT: Anything else?

MR. LOCKIE: That's all.

THE COURT: All right. Thank you for coming.

You want him held, Mr. Smith?

MR. SMITH: No, Judge.

THE COURT: You may be excused. Thank you for coming. You can stay in the courtroom if you want. You're excused.

Mr. Lockie?

MR. LOCKIE: Call Troy Brown.

THE COURT: Mr. Brown, please come forward. Face the clerk and raise your right hand.

TROY DON BROWN,

the defendant, was sworn and testified as follows:

THE COURT: Sir, please come over here and have a seat in the box.

Go ahead, Mr. Lockie.

DIRECT EXAMINATION

By DAVID B. LOCKIE:

Q: Please state your name.

A: My name is Troy Don Brown.

Q: And you're the defendant in this case?

A: Yes, sir, I am.

Q: Troy, did you commit these crimes?

[p.442] A: No, sir, I did not.

Q: Can you tell the jury?

A: Yes, I can. I'm not guilty. I did not rape this little girl, and I've never hurt a child in my entire life.

Q: Thank you. Where do you live, Troy?

A: I live in Loa, Utah.

Q: Is that where you grew up?

A: Yes, it is.

Q: What kind of work do you do?

A: Construction, farming, I can drive all -- just about whatever.

Q: Did there come a time when you moved to Carlin?

A: Yes, sir, there did.

Q: Do you remember when you moved to Carlin?

A: Yes, sir, I do.

Q: When did you move to Carlin?

A: August of '93.

Q: And when you moved to Carlin in August of '93, where did you live?

A: I lived at 1717 Puett.

Q: And who did you live there with at the time?

A: I lived there with my brother.

Q: And other people stayed there occasionally?

A: Yeah.

Q: And what kind of work were you doing for Ledcor?

A: I was driving haul truck.

Q: Now, do you remember January 28th, that day?

[p.443] A: Yes, sir, I do.

Q: Okay. What did you do that day?

A: That day I had the day off so I slept in, got up, washed a bunch of clothes, got a shower, packed my clothes -- I was getting ready to go to Utah -- just laid around the house.

Q: You planned to go over to Utah?

A: Yes, I did.

Q: And you had that day off?

A: Yes, sir, I did.

Q: And then, ultimately, you went out that evening?

A: Yes, sir, I did.

Q: Did you know Pam Henle?

A: Yes, sir, I did.

Q: And did you know Wayne Henle?

A: Yes, sir, I did.

Q: How did you know Pam and Wayne?

A: We were just -- Travis, he knew them and then I got to know him when I was working with Wayne. We was just -- occasionally get together and have a social drink. Just drinking buddies.

Q: Okay. And had you been over to their residence before?

A: Yes, I had.

Q: Okay. And you went out that evening, was that a payday?

A: Yes, sir, it was.

Q: All right. And how did you get your check?

A: Well, I was just waiting around the house for my older brother to get home. So while I was waiting I showered and shaved [p.444] and just waited around the house for my brothers to get home from work and

when Travis came home he said my older brother had my check and he was up to the bar.

Q: All right. And did you go up and get your check?

A: Yes, I did.

Q: How much was it for?

A: $1300.

Q: Did you cash it?

A: Yes, sir, I did.

Q: And you had that cash with you?

A: Yes, sir, I did.

Q: Now, you said that you'd been over to the Henle's on previous occasions, right?

A: Yes, sir, I have.

Q: Had you seen Megan there?

A: Yes, sir, I have.

Q: Okay. And you knew who she was, right?

A: Yes, sir, I did.

Q: All right. Did you know where her bedroom was?

A: Yes, sir, I did.

Q: How did you know that?

A: That's where Wayne would send them when he sent them to bed when I was over there drinking and playing guitars.

Q: All right. And was that visible from the living room?

A: Yeah. It was just straight down from the living room.

Q: All right. And what did you do before you got ready to go out that night?

[p.445] A: Just got in the shower and shaved and got cleaned up and ready to go.

Q: Did you wear any aftershave?

A: No, sir, I didn't.

Q: Do you normally?

A: No, sir, I don't.

Q: Now, the first place that you went was where?

A: I went to CG's bar.

Q: Okay. Did you have a drink there?

A: Yes, I did. I had three or four.

Q: Did you see anybody you knew there?

A: Travis was there, Jason was there, Trent was there.

Q: All right. And did you -- how long did you stay at CG's, do you know?

A: Probably, first time I went down, we stayed there long enough to have three beers. And I went back down with Trent.

Q: Did you go anywhere else after that?

A: Yeah. I got back in when Trent went back to the bar, after we went back to the trailer.

Q: And what trailer did you go back to?

A: I went back to mine to tell Travis that if he seen Dave Prescott to have him come up and talk to me at the bar.

Q: Okay. Why is that?

A: Because I asked Trent if I could use his car and Trent said he needed his car. And Dave said if I didn't have a ride, he'd take me to Salt Lake and then I had a friend that was coming to meet me in Salt Lake.

[p.446] Q: And did you see Megan at all that evening?

A: Yes, I did.

Q: Where did you see Megan?

A: I seen her over at Trent's house when I got in with Trent to go back to the bar.

Q: All right. Did that make you want to rape her?

A: No, sir, it didn't.

Q: What did you do later?

A: I went back up with Trent, had a beer at CG's and then walked over to The Peacock. That's where I spent most the night.

Q: And fair to say that you had quite a bit to drink.

A: Yes, sir.

Q: And did you actually get drunk that night?

A: Yes, sir, I did.

Q: Now, when you're at The Peacock, did you get a call from someone?

A: Yes, sir, I did.

Q: All right. And how was it that you took this call?

A: I just got done playing pool, walked over to the end of the bar to order a drink, I ordered my drink and the phone rang, so I just picked it up and said, "Peacock."

It was a little girl on the phone and she asked if her mom was there. I said, "Who's your mom" And she says, "My mom's Pam Henle." And I said, "No, she's

not in here, but I think she's over to the other bar." And the little girl said she'd been trying but she couldn't get through.

I told her, "Well, this is Troy, I'll go over and tell your [p.447] mom you're trying to get hold of her." So I hung up the phone, told the bartender not to throw my drinks away because I'd be right back, and then I ran over to get ahold of Pam.

Q: And did you see Pam?

A: Yes, I did.

Q: And what was Pam doing when you went across?

A: She was on the cordless phone, talking to her daughter.

Q: So what happened after that?

A: I just told Pam I was over to The Peacock and I went back to The Peacock.

Q: How do you know that Pam was talking to her daughter?

A: Because I asked her.

Q: All right. Was that the only reason that you'd gone over to CG's?

A: Yes, sir, it is.

Q: Then you -- what did you do when you came back to The Peacock?

A: Got my drinks and continued to play pool. A little later Pam came over.

Q: Were you trying to pick up on Pam at all that night?

A: No, sir, I wasn't.

Q: Why not?

A: Because she's married.

Q: Troy, did there come a time when you left that bar?

A: Yes, sir, I did.

Q: All right. And do you remember what time you left?

A: No, sir, I don't.

[p.448] Q: Okay. Were you wearing a watch that night?

A: No, sir, I wasn't.

Q: All right. What did you do after you left?

A: I went over, passed the Cavalier, into CG's, looked around, ordered a beer, took a couple drinks out of it, and took it with me and headed home.

Q: Okay. Why did you look around CG's?

A: Just looking to see if my brothers were still there.

Q: Okay. All right. And do you recall walking home?

A: Yes, sir, I do.

Q: All right. And where did you walk when you walked home?

A: I walked down Chestnut Street to the dirt road and down to Puett and across to my trailer.

MR. LOCKIE: All right. Your Honor, may the witness be shown the diagram, Exhibit 3? And may he depart the stand so that he can draw --

THE COURT: How about this light, can we do that or --

MR. LOCKIE: The light would be fine.

THE COURT: All right. Just push this little button here and you'll get a light there.

By MR. LOCKIE (continuing):

Q: With that pointer, can you show the route that you walked home that night?

A: Yeah. Come right out of The Peacock and across. And right there's The Cavalier, and then CG's. And I come across CG's and I came down this road here, all the way down to the dirt road, goes down right there. Goes down and over to my trailer.

[p.449] Q: And was that the route that you normally walked home?

A: Yes, it is.

Q: How were you walking that night?

A: Not real well. I remember I keep felling off the road. I was trying to follow the line. I just remember I kept falling off the road.

Q: Following what line?

A: The white line. So I knew where I was at.

Q: The white line on the main road there?

A: Yeah. Just trying to follow the road back.

Q: And is there a street light at the corner where you turn?

A: Yeah. On the first road there is a street light.

Q: All right. And do you remember seeing any police cars or anything?

A: No, sir, I do not.

Q: All right. What did you do when you got home?

A: When I got home, I walked in through the living room, went in the kitchen, took my hat off, took my coat off, took my shirt and my pants off, took everything out of my pockets, took my belt off, put it

all on the table, throwed my shirt and my pants in the washer, started the washer.

Q: All right. Why did you throw your shirt and pants in the washer when you got home?

A: Because on the way home, I'd gotten sick, and I puked a couple times on the way home. Got some of it on me and I had to have my clothes clean to go home.

Q: All right. You were planning to go to Loa the next day?

[p.450] A: Yes, sir. I was going home for a week.

Q: How many good sets of clothes did you have at that time?

A: Four or five shirts, four or five pair of pants.

Q: Okay. And how long were you getting ready to stay over in Loa?

A: A week.

Q: Did you wash any underwear?

A: No, I did not.

Q: Why not?

A: I had that all packed.

Q: All right. What did you do next?

A: I went in and went to bed.

Q: Okay. And were you awakened the next morning?

A: Yes, I was.

Q: Do you remember what time you were awakened?

A: It was 5:30, 6:00 o'clock. About the time my brother's getting up, ready to go to work.

Q: Okay. Oh, when you got home, do you remember seeing Troy? When you got home that night?

A: When I got home Travis was on the couch.

Q: I'm sorry, not -- Travis is what I mean.

A: He was on the couch.

Q: Then in the morning, the police woke you up?

A: Yes, sir, they did.

Q: Okay. Did you talk to them?

A: Yes, sir, I did.

Q: Did you see Dave Prescott that morning?

[p.451] A: About the time the cops were getting ready to leave, yes, he did come in.

Q: Okay. How did he look?

A: He looked like death warmed over to me.

Q: Okay. And did you talk to him?

A: Yes, I did.

Q: Did he ask you anything?

A: Yes, he did.

Q: What did he ask you?

A: He asked me if I remembered what happened.

Q: All right. And what did you tell him?

A: I told him I wish I could remember what time I got home.

Q: So what did you do later on that day?

A: Well, I -- After the cops left, I went back to bed. Dave Prescott come in about 8:00, somewhere around in 8:00 o'clock area, said he was called in to go to work and he was going to work.

So I hurried and got up, went over to my sister-in-law's house, called the Greyhound Bus station, found out what time they left, called Wayne County and got my ride headed up to Salt Lake and I got ready and caught the bus in Wells.

Q: Who did you go with?

A: I had -- sister-in-law took me to the bus. I took my six-year-old nephew with me.

Q: Where did you catch the bus?

A: In Wells.

Q: And you went back home to Loa?

A: Yes, sir, I did.

[p.452] Q: Did there come a time when you made a call to the Carlin Police Department from Loa?

A: Yes, sir, there was.

Q: Why did you make the call to the Carlin Police Department?

A: It was Sunday night, my little brother called my mom and said that the police had come to the house and took all by bedding, my clothes, everything that I had.

Q: Okay. And so, who did you call at the Carlin Police Department?

A: I called Mike Terry.

Q: Why did you call?

A: Because I'd heard that Carlin had a warrant for my arrest and I wanted to know why. So I called and asked if they was looking for me and if they had a warrant for my arrest.

Q: Okay. And what did you -- what did Mike Terry tell you?

A: He said no, they weren't looking for me and they didn't have a warrant for my arrest.

Q: Did you try and hide from them?

A: No, sir, I did not.

Q: Okay. And to your knowledge, did they have your phone number and know how to get ahold of you?

A: Yes, sir, they did.

Q: All right. And did you get a call back from Mike Terry at any time?

A: Yes, sir, I did.

Q: What was the content of that call?

A: Mike Terry called and he was just wondering when I was [p.453] coming back. And I told him it'd be Friday or Saturday, whenever my mom could get off work to bring me back.

Q: And then did your mom suggest that you do anything at that time?

A: On Friday?

Q: No. The -- a little bit later. Did you go to the doctor?

A: Yeah. I went to the doctor on Wednesday.

Q: Why did you do that?

A: Because after the first time I talked to Mike Terry, it had been said that the little girl had bit the guy, and scratched and she put up a pretty good fight.

My dad says, "Well, it wouldn't hurt to go down and be checked out so they don't think you just come down here to hide."

Q: Okay.

A: So I did go down to the doctor and had a full-body exam.

Q: And did you have that full-body exam?

A: Yes, I did.

MR. LOCKIE: May the witness be shown Defense Exhibit K? Show it to the District Attorney first, please.

By MR. LOCKIE (continuing):

Q: Showing you what's been marked as Defense Exhibit K, can you turn the pages on that and look? Who's Cory Britton?

A: He is the RN down there.

Q: All right. And is he the man who looked you over?

A: Yes, sir, he is.

MR. SMITH: He's a nurse?

By MR. LOCKIE (continuing):

[p.454] Q: Is he a nurse?

A: Well, he's a -- not an RN, he's a PH, or something like that.

Q: All right. Does he work at the medical place?

A: Yes, he does. He works at our clinic.

Q: And had you seen him medically before?

A: Yes, I have.

Q: For medical purposes?

A: Yes, I have.

MR. LOCKIE: Your Honor, we'd move for the admission of Exhibit F.

MR. SMITH: Is that a medical doctor we're talking about?

MR. LOCKIE: It's a medical record.

THE COURT: What exhibit? Is it F or K, or what is it?

MR. LOCKIE: K.

MR. SMITH: K.

THE COURT: It's K. Well, let me see it.

THE WITNESS: I also have a copy of that -- photocopy of the one I gave the police that they lost -- in my wallet.

THE COURT: What's the PAC, Mr. Lockie, do you know? Physician's Assistant, or something, probably.

THE WITNESS: Yeah.

THE COURT: Well, I'll reserve my ruling. I'll look at this. Colleen, I need the Evidence Code. Is she over there?

CLERK: She's not here.

THE COURT: Just Chapter 48, again. You might have to -- let's have -- Jim, you go get it because Colleen may have it. [p.455] Chapter 48. Go ahead.

By MR. LOCKIE (continuing):

Q: All right. Later on, did you see the police again?

A: Yes, sir, I did.

Q: Where did you see the police?

A: At the Wayne County Courthouse on Thursday.

Q: And how did it come about that you saw them there?

A: Well, I went down to Hanksville, which is about an hour's drive, for a barbecue with all my friends, couple of my friends come from in town out to the sand dunes where we was at and said the Carlin Police --

MR. SMITH: I'm going to object to any hearsay, Judge.

By MR. LOCKIE (continuing):

Q: Just tell me what you did.

A: I was down in Hanksville, police came down, I flagged them down, I got in with the police, went back up to the courthouse.

Q: You flagged the police down?

A: Yes, I did.

Q: And you talked to the police at that point?

A: Yes, sir, I did.

Q: And did there come a time when you came back to Carlin?

A: Yes, sir, there was.

Q: When did you come back to Carlin?

A: I came back to Carlin the following day, on Friday.

Q: How did you get back to Carlin?

A: My mom brought me.

Q: Troy, did you commit this crime?

[p.456] A: No, sir, I did not.

Q: Are you sure?

A: Yes, sir, I am.

Q: Is there any chance at all that you're guilty of this crime?

A: No chance in hell.

MR. LOCKIE: I have no further questions, your Honor.

THE COURT: Cross-exam.

MR. SMITH: Thank you.

CROSS-EXAMINATION

By MARSHALL S. SMITH:

Q: Megan was accurate when she said then, that you'd been over to her house several times.

A: Yes, sir.

Q: And she's got a dog.

A: Yes, sir, she does.

Q: What kind of dog?

A: It's a big, black dog.

Q: And Dallas never said anything to you, did she?

A: No. I seen her the day -- on the 28th most of the day. She was with Skylar running out of the house.

Q: Okay. How old's Dallas?

A: I hear she's five. I don't -- didn't really know.

Q: Well, based on seeing her, does that comport with her being five years old?

A: Yes.

Q: Now, Officer Terry was accurate when he said then that he [p.457] spoke with you during the morning hours of January 29th, is that correct?

A: Yes, sir, it is.

Q: And at that time, when he asked you whether or not you knew what was going on, what did you say?

A: I said, "No, I don't."

Q: Said you don't know.

A: I said, "No, I don't." He asked me if I knew what was going on.

Q: And did you ask -- Well, you didn't ask him, "Well, why are you here talking to me," did you?

A: No, sir, I did not.

Q: Well, so that was not unusual to you then?

A: Well, I -- he's a police officer, he come over, I didn't know what he wanted. He come -- I was friends with Mike Terry, he used to come over all the time. I didn't --

Q: Isn't it a fact that you were friends with Mike Terry in Utah?

A: Yes, sir, it is.

Q: All right. So that was -- when you figured that you may have been in some trouble, you called him.

A: Well, he was the one that come over to the house. He was the investigation officer, that's why I called him.

Q: So you didn't just call the Carlin Police Department, did you?

A: That's the only number I had. I called the police department, then he'd -- told them I was looking for him -- the [p.458] reason I'd catch him there.

Q: All right. Now, you indicated also that, Mr. Lockie then was incorrect when he stated earlier that you only had one or two pair Levis.

A: No, sir, that's all I have.

MR. LOCKIE: Your Honor, I'm not sure what that question's about. My statements aren't in evidence here in any way.

THE COURT: Can you rephrase it, Mr. Smith?

MR. SMITH: Sure.

By MR. SMITH (continuing):

Q: Would it be incorrect to say that you only have one or two pair of jeans?

A: That's correct. I only have one or two pair of jeans.

Q: Now, I believe I just heard you testify you have four or five pairs.

A: I have three or four pair of pants. That's all I've ever had. I don't go buy a lot of clothes.

Q: All right. And so, do you have four or five pairs, or one or two pair of pants?

A: I got four or five pair.

Q: Okay. Now, and so your -- that night you'd washed how many pairs of pants?

A: During the day I'd washed all my clothes except for the clothes that I had on.

Q: Okay. And the reason that you washed the clothes, then, when you got home that evening, was because you had vomited all over your clothing?

[p.459] A: Yes, sir, that's correct.

Q: Now, you told Officer Terry that you did not know anything about this assault.

A: Yes, sir, I did.

Q: Yet, you told Dave Prescott that next morning -- or that same morning, early in the morning, when he

asked you -- and he said specifically -- now he was talking about the assault, and he asked you, "Did you do this? Did you do this?" And he testified that you said, "I wish I could remember what went on."

A: No, sir, I did not.

Q: Well, you heard Dave Prescott testify to that, didn't you?

A: Yes, sir, I did.

Q: In fact, Mr. Brown, you were able to hear all the witnesses' testimony here throughout this trial, isn't that correct?

A: Yes, sir, I did.

Q: And Dave Prescott, you allowed him to stay in your home, is that correct?

A: Yes, sir, we did.

Q: And -- All right. So you left The Peacock, then, that night and you don't recall when?

A: No, I don't remember what time I left.

Q: And you don't recall what time you came home?

A: No, sir, I don't.

Q: But are you -- Now, are you saying, then, that you do -- Now, you were drinking an awful lot that night.

A: Yes, sir, I was.

[p.460] Q: And what were you drinking?

A: I was drinking Kamikazes with beer chasers.

Q: And what is a Kamikaze?

A: It's vodka, tequila, lemon juice -- a lemon-lime mix, and a lime in it.

Q: And you had about ten of those, right?

A: Yes, sir, I did.

Q: And so how many beer chasers did you have with them?

A: Ten.

Q: All right. So we're talking about 20 drinks.

A: Yes, sir.

Q: And you got so -- you drank so much that you vomited.

A: Yes, sir, I did.

Q: Now, are you saying that you remember everything that happened between the time that you left The Peacock and the time you got home?

A: Yes, sir. I'm saying I know how I got home and I know how I got there.

Q: So you don't -- so, I want to make sure that I understand this. So there's no point in there that you don't have a memory of.

A: No, sir, there's not.

Q: Okay. So, it'd be fair to say that Dave Prescott was mistaken in his recollections?

A: I'd say so, yes, sir, from what I remember.

Q: Okay. All right. Now, do you remember speaking with -- First of all, do you know who Lieutenant Roy Ladd is?

[p.461] A: Yes, sir, I do.

Q: He testified here earlier?

A: Yes, sir, he did.

Q: Do you remember speaking to him in Utah?

A: Yes, sir, I do.

Q: And that was just a couple of days after this incident, right?

A: Yes, sir, it was.

Q: Now, do you recall telling him that you couldn't remember everything that went on?

A: No, sir, I don't. I told him I don't remember what time.

Q: Okay. I want to make sure I got this straight, Now, he asked you, "Troy, is it possible you could have done this and you don't remember?" And what was your response?

A: I told him no. I told him I remember how I got home and I know -- I know I walked home, and I know how I got home.

Q: Well, that's not my question. Do you recall him asking you, well, Troy, you know, you'd been drinking a lot that night, is it possible you don't remember? And what did you say?

A: I said no.

Q: Are you sure about that?

A: Yes, I am.

Q: Okay. And do you recall him asking you, "Well, Troy, could something like this have happened and you not remember?" And you said, "I doubt it." Well, you're saying you doubt that something like this could happen without you remembering it?

A: Well, I said -- when say "I doubt it" is just the same as [p.462] saying no.

Q: So that would be inaccurate. Lieutenant Ladd would be accurate, or that was -- your response would be accurate when you say, "I doubt it?"

A: Yeah. I didn't say "I doubt it" like I didn't know. I said, "I doubt it." It'd be like me asking if you can

pick up something that weighs a thousand pounds, you're going to say, "I doubt it."

Q: Well, okay. As opposed to saying "Absolutely not, there's no way I could have done this."

A: Well, that's not the way I talk.

Q: All right. Fair enough. Now, do you recall at -- when Lieutenant Ladd again asked you, he says, "Now, Troy, are you sure you remembered everything?" And your response was, "Well, I can't remember a lot." Now --

MR. LOCKIE: Judge, he's got to ask the question first of all, before he's saying what the -- what he said. Ask him if he remembers the question and did he say.

THE COURT: Overruled. Go ahead, Mr. Smith.

By MR. SMITH (continuing):

Q: Now, do you remember saying, "I can't remember a lot," to Lieutenant Ladd?

A: No, I don't.

Q: But now eight, nine months later, you say, "I remember everything." Is that what you said?

A: I told Roy Ladd I do not remember times, because I never had a watch and I never looked at times. I told him I remember [p.463] everything that happened in between where I was at and then my way home.

Q: Okay. So, "a lot," -- when you said, "I can't remember a lot" you were referring simply to the time, is that what you're saying?

A: Yes, sir.

Q: Okay. Now, you -- Lieutenant Ladd also asked you about whether or not it's possible you could have gone over to that trailer that night.

A: Yes, sir, he did.

Q: And was it possible that you went over there?

A: No, sir, it is not.

Q: All right. And you're sure about that today?

A: Yes, sir, I am.

Q: Now, were you as sure about that when you spoke to Lieutenant Ladd?

A: Yes, sir, I am.

Q: Well, isn't it a fact that when Lieutenant asked you, "Isn't it possible you went over to check on their welfare?" meaning Megan and Dallas, you said --

A: "I doubt it."

Q: -- "I don't think so."

A: That's what I said. "I don't think so."

Q: Now, is "I don't think so" and "I doubt it" the same way, is that the way you talk?

A: Yeah. Yes, it is.

Q: All right. So when he asked you a second time, "Is it |p.464| possible that you could have gone over there?" What did you say?

A: I said, "I doubt it."

Q: No, you said "I don't think so."

A: Same thing.

Q: Now, when he asked you a fourth time, "Is it possible you could have gone over there?" What did you say?

A: "I don't think so."

Q: All right. So, four times he asked you, and you say "I don't think so." So, are you saying it's possible you went over there?

A: Nope, I not. I'm saying I don't think so.

Q: So you don't remember.

A: Yes, I do remember.

Q: Well--

A: That's like some -- if I was some guy, I'd come up -- if you'd come up to me and told me you was going to --

Q: Mr. Brown --

A: -- kick my butt --

Q: -- I understand it. I --

A: -- I'd say "I doubt it."

MR. LOCKIE: Judge --

THE COURT: Just a minute, just a minute. Go back, ask a question, please.

MR. SMITH: All right.

By MR. SMITH (continuing):

Q: So, you would agree with me, then -- or you don't disagree with the fact that you told Lieutenant Ladd four times, "I don't [p.465] think I went over to that residence."

A: No, I didn't.

MR. LOCKIE: Objection, your Honor. That's not the evidence.

THE COURT: Overruled. Answer the question again. Ask the question again and have it answered.

By MR. SMITH (continuing):

Q: So, Mr. Brown, are you denying that you told Lieutenant Ladd, when he asked you repeatedly, four times, "Is it possible you could have gone over to that trailer that night?" And you said, "I don't think so."

A: That's what I said, probably.

Q: Probably? All right. Now, you just testified that you've been over to Megan's house, or trailer, there for playing guitar and drinking, right?

A: Yes, sir.

Q: And that the way that you know where Megan's room is is because that is when they direct her to her bedroom, they tell her to go that way.

A: Yes, sir, it is.

Q: So, you've never been in her room, have you?

A: No, sir, I have not.

Q: And you're absolutely sure about that.

A: Yes, sir.

Q: No question in your mind.

A: Yes, sir.

Q: Now, was there any question in your mind when Lieutenant Ladd asked you that in the early -- a few days after this incident?

[p.466] A: No, sir, there wasn't.

Q: Okay. Well, when Lieutenant Ladd asked you whether you'd ever been in her room, you said --

A: "Not that I can remember."

Q: -- "Not that I know of." Okay. So now you -- before that you said, "Nope, there's no way I'd ever been in there." And now you say, "Not that I know of."

A: Yes, sir.

Q: Have you or haven't you?

A: No, sir, I have not.

Q: Or not that you know of.

A: Not that I know of.

Q: Okay. And then, he asked you again, said, "Well, isn't it possible you went in that room?" And you said -- what'd you say?

A: "That I know of."

Q: You said, "I don't think so." Well, is it possible you went in that room?

A: No.

Q: It's not? Not possible.

A: Not that I remember ever going in there. No, I can't remember ever going in there.

Q: So, possible you went in there and you don't remember.

A: No. I don't have blank spots in my memory.

Q: Okay.

A: It's like me asking you, do you remember every place you've ever been?

Q: Sir, I'm asking the questions now, all right?

[p.467] A: Yes, sir.

Q: Now, what is a power-drinker?

A: Power-drinking is where you're chasing whiskey with beer.

Q: Okay. Would you consider yourself a power-drinker?

A: Sometimes I am, yes.

Q: Were you power-drinking that night?

A: Yes, sir, I was.

Q: Now, do you take some pride in the fact that you can drink that much?

A: No, sir, I don't.

Q: Well, how about people that drink and stagger around, do you have an opinion of them?

A: Yes.

Q: What's that?

A: It irritates me.

Q: It irritates you.

A: Yes, sir.

Q: Makes you mad?

A: No. It just irritates me, it just kind of piss me off. I've always been told that if you're going to drink hold your liquor.

Q: Okay. And so that -- even so, if you drink 20 drinks, you should still hold your liquor?

A: Yes, sir.

Q: All right. Now, how many times did you vomit that night?

A: Three.

Q: And where were those three places?

[p.468] A: Once in The Peacock, once on Chestnut, and once by Kranovich's by the cop car.

Q: Is it possible that you threw up at the intersection of Chestnut there and Puett?

A: No, sir.

Q: It's not possible?

A: Well, no. I puked on Chestnut Street.

Q: All right. So that's not possible, you don't think so.

A: I wasn't in the intersection. I remember where I puked, I wasn't in an intersection, no.

Q: You remember that clearly?

A: Yes, sir.

Q: Okay. Now, isn't it a fact that you danced with Pam Henle that night?

A: I danced with Pam Henle a few times. I don't remember which times I danced with Pam Henle.

Q: Well, do you remember dancing with her that night?

A: I danced with her a few times is all I remember. I know I have danced with Pam.

Q: So, are you saying you don't recall dancing with her that night?

A: I never even thought about it.

Q: Well, that's not my answer. Did you dance with her that night or not?

A: I think so, I did.

Q: So, you did dance with her that night.

A: I think I did.

[p.469] Q: Okay. And played pool with her?

A: Yes, sir, I did play a game of pool.

Q: And you were touching her that night?

A: I put my hand on her shoulder, yes, sir.

Q: And you had a conversation with her in the women's bathroom.

A: Outside the women's bathroom.

Q: And that you followed her into.

A: I was talking to her and she went in and I did follow her a couple steps into the women's bathroom.

Q: All right. Then, you asked her if she needed a drive -- a ride home, is that correct?

A: Yes, sir, I did.

Q: Did you have a car?

A: No, sir, I did not.

Q: Now you say it was your mom that suggested to you that you ought to get checked out?

A: No, sir, it was my dad.

Q: All right. And you agreed with that idea.

A: Yes, sir, I did.

Q: Was there some concern in your mind, that maybe you couldn't remember if you'd done this or not?

A: No, sir, there wasn't.

Q: Little bit at that time?

A: No, sir, there wasn't.

Q: All right.

THE COURT: I'm going to admit this document, so if you want [p.470] to ask questions on that you may, also. I'll give this to you now.

This is Exhibit K, will be admitted.

MR. SMITH: That's fine, Judge.

By MR. SMITH (continuing):

Q: All right. So you figured that -- Now, let me go back here, you said you called Mike Terry. When did you call Officer Terry?

A: I called Officer Terry on a Monday.

Q: Okay. And you said that you asked him -- you heard that there was a warrant.

A: Yes, sir, I did.

Q: All right. And wouldn't it be fair to say, you didn't know what that warrant was for.

A: I knew I was a suspect at that time, yes, sir.

Q: And you knew that talking to Mike Terry?

A: No. I knew that because my brother called and they came in my house with a search warrant and took

everything I owned, which probably means you're a suspect.

Q: All right. And then as a -- then it was after that that you decided to get this exam.

A: No. It was on a Wednesday, because my dad said, "Well, yes, you want to go down and have you checked because they're --" If I'm gone a week and I'm a suspect I didn't want them saying, Well, I went home to hide until everything was clear.

Q: Sure. Sure, I understand that. And so you went in, checked out, then you believed that was a pretty good idea, too, then?

[p.471] A: Yes, sir, I do.

Q: Okay. Isn't it a fact that you knew that Megan and Dallas were home alone that night?

A: I did not know who was at the residence. No, I didn't.

Q: Okay. And well, isn't it a fact that Megan told you that she was home and wanted -- was looking for her mom?

A: Yes, sir, she did tell me she was home.

Q: Do you believe that -- Now, you testified here that you believe that you can drink a lot and maintain your sobriety. Am I saying that fairly?

A: I cannot maintain my sobriety, I can maintain my actions. I don't stagger, I don't fall down.

Q: Well, didn't you just testify that you were puking and following a white line over here?

A: Yes, sir, I was.

Q: So that is not necessarily true.

A: That's why I left the bar, because I was starting to become ill and you have no business being there if you're going to be that way.

Q: Sure. Now, do you -- is there some change also that you -- do you act the same when you have been drinking that much as you act right now?

A: Yes, sir, I do.

Q: You do?

A: Yes, sir.

Q: After twenty drinks?

A: Yes, sir, I do. No, well, I start -- you start walking a [p.472] little different. Everybody does.

Q: Okay. And now you just testified, Mr. Brown, that -- Now, Mr. Lockie asked you, he says, "Did you do this? Did you do this crime?" And you said, "There's no chance in hell."

A: That's right.

Q: Now you're just absolutely sure of that.

A: Yes, sir, I am.

Q: Because this is a horrible crime, isn't it?

A: Yes, sir, it is.

Q: All right. And that there's never been any question in your mind as to whether or not you did this or not.

A: No, sir, there has not.

Q: Well, when you spoke to Roy Ladd, he asked you, he says, "Well, Troy, have you been kind of worried about that maybe you did this." What was your response?

A: It's not the question he asked me, sir. I know which question you're referring to on that.

Q: Well --

A: It's a two-part question. He asked me, have I been thinking. I said, "Yes, I've been thinking."

Q: Okay. All right. Fair enough. I'm sorry. And what was your response?

A: I said, "Yes, I've been thinking about it."

Q: And --

A: And I know there's no way I could have done this.

Q: Well, didn't you say that you've thought about it and "thought about it bad enough to drive me crazy"?

[p.473] A: No, I did not. Didn't mention --

Q: You didn't say that?

A: -- the word crazy.

Q: I'm sorry?

A: Didn't mention the word crazy.

Q: All right. Well, okay. You didn't say the word crazy?

A: No, sir, I didn't.

Q: Well, would it be fair to say, though, that you thought about it and thought about it and thought about it?

A: Yes, sir, I thought about it.

Q: And now you --

A: And I did say I thought about it.

Q: And now you come to the conclusion that there's "no way in hell" you could have done it.

A: I know there's no way in hell. I knew that from the beginning.

Q: Well, why then, is it necessary for you to think about it and think about it and think about it?

A: Because I'd like to know how they got me in this in the first place.

Q: Well, you --

A: I thought exactly -- I've been trying to remember what time. That's the only thing I've ever been wondering about is the times.

Q: Okay. I understand that. So it's -- although you say that you didn't say it, you thought about it and thought about it, could I have possibly done this, could I have possibly done this? [p.474] Did those thoughts ever go through your mind?

A: No, sir they didn't. I thought about what happening, where I was that night.

Q: Okay. Now, isn't it a fact that Lieutenant Ladd asked you -- well, informed you about the possibility of obtaining a sample of your blood?

A: Yes, sir, he did.

Q: All right. And at that time did you agree to that?

A: No, sir, I did not.

Q: In fact, when Lieutenant Ladd asked you, he says, "Well, would you be afraid of the results of those tests?" And do you recall what your answer was?

A: I told him, "No, sir."

Q: You told him you were not afraid of the answer?

A: Yes, sir.

Q: Now, are you sure of that, Mr. Brown?

A: Yes, I am.

Q: Because you were sure that if you had this test it'd show you weren't the guy, right?

A: Not really. I didn't know a whole lot about DNA. Do you know everything there is to know about DNA?

Q: Well, I'm the one asking the questions here, Mr. Brown. All right. Well, isn't it a fact that he told you that it was a hundred percent this could either put you there or put you out of this picture?

A: No, he didn't. He basically -- he tried to confuse me all the way through. He told me he had my fingerprints, he said [p.475] he'd -- somebody'd seen me coming out of the house. Basically, he said -- tried to confuse my for an hour, just like you're doing.

Q: I'm not trying to confuse you, Mr. Brown. I'm trying to find out --

THE COURT: Let's just ask questions, Mr. Smith.

By MR. SMITH (continuing):

Q: Okay. You were wearing boots that night?

A: Yes, sir, I was.

Q: You were wearing black jeans?

A: Yes, sir, I was.

MR. SMITH: And Ms. Clerk, if you could show Mr. Brown 13 and 14, please.

By MR. SMITH (continuing):

Q: Is that your -- 13, is that your hat?

A: Yes, sir, that is my hat and my coat.

Q: All right. And those -- that was the hat and coat you were wearing that night?

A: Yes, sir, it is.

Q: Now, let me ask you this, you were -- is your hair the same as it was, your hair length, the same that it was a couple of days after this incident?

A: No, my hair was --

Q: After January 29th?

A: -- about like yours, down, you could see it just below my ears. It's a little shorter now.

Q: What could you see just below your ears?

A: My hair. Hair on the sides, right here.

[p.476] Q: Was it kind of curled up a little bit?

A: No. It was -- my hair's always been straight. It's a little -- it was frayed on the ends.

Q: Well, I understand, I'm not --

A: I hadn't had a haircut in two months.

Q: I understand. And I'm not saying curly, but I'm saying like right here as it grew out, did it kind of curl around, kind of stick off out like that a little bit?

A: Yeah. It come out. It was frayed out.

Q: Okay. And you had a little mustache then?

A: I had a few days afterward, yes, sir, I did have a little mustache.

Q: Okay. Do you shave every day?

A: I shave whenever I'm going to go out and go somewhere.

Q: Okay. And, so your hair was about the same length?

A: My hair was a little longer then than it is now.

Q: Okay. And the same color?

A: Yes, sir.

MR. SMITH: If I could ask the clerk to show the witness -- I would first show counsel -- number 32, please.

By MR. SMITH (continuing):

Q: Do you recognize who that's a photograph of?

A: Yes, sir, that's a photograph of me.

Q: And you -- would it be fair to say that that was taken about three or four days after this incident?

A: It was taken exactly seven days after my first -- after I left here.

[p.477] Q: Okay. All right.

MR. SMITH: May I have just a moment, Judge?

THE COURT: Yes.

By MR. SMITH (continuing):

Q: All right. Would it be fair to say that was taken about four or five days after this incident?

A: I'd say six or seven days.

Q: All right. That's fine, that's fine. Now, Trent Brown is your brother, right?

A: Yes, sir, he is.

Q: And Travis Brown's your brother?

A: Yes, sir, he is.

Q: You all pretty close?

A: Yes, sir, we are.

Q: As a matter of fact, your whole family is very close, isn't it?

A: Yes, sir, we are.

Q: And now, were you aware of the fact that Trent had sent some flowers or something to Megan?

A: No, sir, I was not.

Q: You didn't -- you weren't aware of it.

A: No.

Q: Okay. Thank you, Mr. Brown, that's all I have.

THE COURT: Redirect?

REDIRECT EXAMINATION

By DAVID B. LOCKIE:

Q: Now, when you were talking to Lieutenant Ladd and giving [p.478] your responses, you weren't using the inflection Mr. Smith's putting in your mouth, were you?

A: No, I was not.

Q: All right. And you heard Mr. Smith use certain vocal inflections to you?

A: Yes, sir.

Q: Were those your vocal inflections, the way you said things, or were they Mr. Smith's?

A: Mr. Smith's.

Q: All right. And when you say "I doubt it," what do you meant?

A: I say "I doubt it" as like I don't think it will ever happen. "I doubt it" is a no.

Q: All right. And when you say "I don't think so," what do you mean by that?

A: It's another way of saying no.

Q: Does it mean anything else at all?

A: No. It's like I'm saying, if you ask somebody a question, if you go up, tell somebody you're going to whip them he's going to say, "I don't think so." Same way of saying no. His way of saying, "Oh, I don't –"

Q: In other words, it's a way of responding to a serious allegation, right?

A: Yes, sir it is.

Q: I'm going to whip you, Troy.

A: I don't think so.

Q: Troy, can you pick up this table?

[p.479] A: I don't think so.

Q: Do you doubt it?

A: I doubt it, highly.

Q: Now, it would be fair to say that Lieutenant Ladd had lied to you during this interview?

A: Yes, sir, it would.

Q: And did he lie to you about certain scientific evidence?

A: Yes, sir, he did.

Q: What did he tell you?

A: He told me that he had my fingerprints from inside the little girl's room, he said that a car had shined it's lights on my face at -- coming out of the residence.

Q: All right. And then wanted your blood, right?

A: Yes, he did.

Q: And you knew -- did you know that the -- did you think there was any way that your -- that they could have your fingerprints out of that little girl's room?

A: I knew there was no way.

Q: All right. And do you think there was any way that anyone could have seen you down there by that little girl's trailer like he told you?

A: No, sir, there isn't. I didn't walk that way.

Q: All right. Did that make you want to give him a blood test where he's saying he can tell a hundred percent sure?

A: No, sir.

Q: In fact, what did you ask for when he wanted the blood test?

[p.480] A: I told him I'd better have the lawyer.

Q: Why did you say that?

A: Because I didn't want to get railroaded into something I didn't do. They had -- they sit there and told me I did something I knew I didn't do.

Q: Did he say, okay, call a lawyer?

A: No. He said, well, we're through with you now, Mr. Brown. He said I could go home.

Q: And they took your blood, right?

A: They took my blood, yes. When I come back here, I told them I'd give it to them when I got back out here and talk to a lawyer.

Q: How long did this guy interview you?

A: Forty-five minutes to an hour.

Q: Did you ever tell Lieutenant Ladd that you committed this crime?

A: No, sir, I did not.

Q: Did you?

A: No, sir, I did not. I'm not guilty. I didn't rape this little girl. Never hurt a child in my life.

MR. LOCKIE: I have no further questions, Judge.

THE COURT: Recross?

RECROSS EXAMINATION

By MARSHALL S. SMITH:

Q: Now, didn't Lieutenant Ladd -- Well, you asked for a lawyer and then you say he said, well, I'm finished with you.

A: He said, "I've got to make some phone calls." I asked him [p.481] if I was under arrest.

Q: And what did he tell you?

A: He said, "No, you're not under arrest, I just need to make some phone calls." And I said, "Well, usually when they make phone calls you're under arrest."

Q: All right. Did he arrest you at that time?

A: No, sir, he did not. He --

Q: Now, also, isn't it a fact that when he said -- when you said, well, you know, I don't know about this stuff, I better get a lawyer. Isn't it a fact that Lieutenant Ladd says, "Well, fine. If you don't want to talk to me and you want to talk to a lawyer, that's fine." Then what did you say?

A: I said, then I want to talk to a lawyer.

Q: Well, didn't you say, "Well, okay. I just want to find out about this." But Lieutenant Ladd -- isn't it fair to say that once you said you wanted a lawyer, he said, "Fine. If you don't want to talk to me that's all." And then you continued the conversation?

A: No. He said, "Well, I've got to make some phone calls."

Q: Okay. Now, you also said that -- about the blood, that -- so are you saying now that when you left there, you said when you went, when you returned to Elko, or Carlin, that you would voluntarily give blood?

A: Yes, sir, I did.

Q: And did you voluntarily give blood?

A: Yes, sir. When I got to the jail, I told them they could take my blood, and they served me a subpoena anyways.

[p.482] Q: That was a search warrant, wasn't it?

A: Yes, it was.

Q: It was a search warrant for your blood.

A: Yes, sir, it was.

Q: All right. And now, let me get this straight, you told them at the jail that you'd voluntarily give blood?

A: Yes, sir, I did.

Q: Okay. Now, when Lieutenant Ladd was saying that, why would there be any reason for there -- for your fingerprint to be in there? That's what made you a little nervous, right?

A: No. I said there shouldn't be.

Q: Well, there shouldn't be, and you don't think so, right?

A: Yes, sir.

Q: And I doubt it.

A: Yes, sir.

Q: And when you're responding to a serious allegation, as opposed to saying, No, sir, there's no way I did this, your response is, "I doubt it."

A: Yes, sir.

Q: Or I doubt it.

A: Yes, sir. I doubt it.

Q: I don't mean to be putting any type of inflection in my voice.

A: When I say it, I say "I doubt it."

Q: Okay. And you say that a lot.

A: Yes, I do.

Q: And you say "I don't think so."

[p.483] A: Yes, I do.

Q: And you say that a lot.

A: Yes, sir.

Q: All right. Thank you, Mr. Brown, that's all I have.

THE COURT: You may have a seat, Mr. Brown.

MR. SMITH: I'd move --

MR. LOCKIE. Judge, I've got some questions based on that.

THE COURT: All right.

MR. LOCKIE: He got into some new areas, the search warrant.

THE COURT: Well, if he got in new areas, you let him. But, I'm going to let you go ahead, Mr. Lockie. Go ahead.

REDIRECT EXAMINATION

By DAVID B. LOCKIE:

Q: Did anybody ever come for a search warrant for any of your hair? Any of your pubic hair?

A: No, sir, they did not.

Q: Did you ever say that you wouldn't talk to Lieutenant Ladd?

A: No, sir, I did not.

MR. LOCKIE: I have no further questions.

THE COURT: Mr. Smith?

RECROSS EXAMINATION

By MARSHALL S. SMITH:

Q: But at some point you told him "I don't want to talk anymore."

A: No, sir, I didn't.

Q: You didn't? All right.

[p.484] MR. SMITH: I'd move for the admission of Exhibit 32.

THE COURT: It's his photograph, Mr. Lockie. Thirty-two's the photograph.

MR. LOCKIE: No objection.

THE COURT: Thirty-two will be admitted.

You may have a seat, Mr. Brown.

Mr. Lockie?

MR. LOCKIE: That's all we have, your Honor.

THE COURT: Okay. And if there's -- you can go through the exhibits with the clerk and offer any that -- if there's something that you've overlooked, I'm not -- you can do that at any time prior to my giving the case to the jury.

Mr. Smith?

MR. SMITH: Yes, I have one witness, Judge, If I could take a brief recess first?

THE COURT: Okay. We'll take a brief recess. If we could stretch and then be back in your jury room after about five minutes, we'd like to get going right away if we can.

During this recess that we're about to take the jury is once again admonished:

Do not converse amongst yourselves or with anyone else on any subject connected with this trial.

Do not read, watch, or listen to any report of the trial, or to any commentary on the trial, or to any person connected with the trial. This includes any medium of information such as newspapers, television, and radio.

Do not form or express any opinion on any subject connected [p.485] with the trial until the case is finally submitted to you.

Do not visit the alleged scene or attempt to make any independent investigations.

Please stretch and be back in your jury room, let's say ten minutes.

Court's in recess.

(Court recessed at 9:20 A.M. for 17 minutes)

THE COURT: Please be seated. The record will reflect the presence of counsel and the defendant. Counsel, will you stipulate to the presence of the jury?

MR. SMITH: For the State, Judge.

MR. LOCKIE: Stipulated.

THE COURT: Call your first rebuttal witness, Mr. Smith.

MR. SMITH: Trent Brown.

THE COURT: Sir, please come forward. Right up here. Face the clerk and raise your right hand.

TRENT MARION BROWN,

called as a rebuttal witness by the plaintiff, was sworn and testified as follows:

THE COURT: Have a seat right here. Sir, what's your name?

THE WITNESS: Trent Marion Brown.

THE COURT: Go ahead, Mr. Smith.

MR. SMITH: Thank you, Judge.

DIRECT EXAMINATION

By MARSHALL S. SMITH:

Q: Mr. Brown, you're the brother of Troy Brown?

A: Yes.

[p.486] Q: You're the older or younger?

A: Older.

Q: And were you living in Carlin during the month of January, 1994?

A: Yes, I was.

Q: Do you know a person by the name of Megan Allred?

A: Yes, I do.

Q: At some point did you send Megan Allred some flowers?

A: Yes, we did.

Q: You say "we did." Who's that?

A: Me and my wife.

Q: And that would be Raquel?

A: Um-hum.

Q: All right. And why did you do that?

A: Because -- well, we've had three babies die and every time something bad happens and people send you flowers. Just makes you feel better.

Q: Thank you, Mr. Brown, that's all I have.

THE COURT: Mr. Lockie?

CROSS-EXAMINATION

By DAVID B. LOCKIE:

Q: Did you have a beard back then?

A: No, I didn't.

MR. LOCKIE: Thank you. I have no further questions.

THE COURT: Anything on that?

MR. SMITH: No, Judge.

THE COURT: You may be excused. Thank you for coming.

[p.487] Call your next witness.

MR. SMITH: Roy Ladd.

THE COURT: Sir, please come forward. Have a seat once again. I would remind you, you're still under oath. Go ahead, Mr. Smith.

MR. SMITH: Thank you, Judge.

ROY LADD,

called as a rebuttal witness by the plaintiff, having been previously sworn, testified as follows:

DIRECT EXAMINATION

By MARSHALL S. SMITH:

Q: Lieutenant, did you have an occasion to meet with, and question, Troy Brown at some point?

A: Yes, I did.

Q: When was that?

A: February 3rd.

Q: 1994?

A: Yes, sir.

Q: And where did that conversation take place -- or questioning take place?

A: In the Sheriff's office at Loa, Utah.

Q: All right. And what was the purpose of that questioning?

A: To gain information concerning a sexual assault.

Q: Okay. Was Mr. Brown a suspect at that point?

A: Yes, he was.

Q: Okay. Who else was present during that conversation?

A: Officer Chris Murphy with the Carlin Police Department.

Q: And where did this take place?

[p.488] A: Inside the Sheriff's office.

Q: All right. Would you -- First of all, describe what Mr. Brown looked like at that particular time.

A: His hair was a little longer than it is now, long in the back, curly.

MR. SMITH: Ms. Clerk, if I could ask you to show Lieutenant number 32, please.

By MR. SMITH (continuing):

Q: Detective Ladd, do you recognize who's depicted in that photograph?

A: Yes, that's Mr. Brown.

Q: Does that photograph depict Mr. Brown as he looked when you spoke to him?

A: Yes, sir.

Q: Now, you asked Mr. Brown about certain events that had transpired on the 28th and 29th of January 1994, is that correct?

A: Yes, I did.

Q: All right. What, if anything, did you ask him concerning whether or not he'd ever been in Megan Allred's residence?

A: I'd asked him if he'd been in the residence and he said that he had.

Q: All right. Had you ever asked him whether or not he'd been in Megan's bedroom?

A: Yes, I did.

Q: How many times did you ask him that?

A: Probably three.

Q: And what was his response to that question each time?

[p.489] A: He didn't think he'd ever been in there.

Q: All right. Now, did you inform Mr. -- Were those his responses -- those are the words he used, or what words did he use?

A: That's pretty much what the response was -- "I don't think so," or "I don't believe so."

Q: All right. And did you then -- Let me ask you this, what inquiry did you make concerning how he got home from the bar to his residence?

A: I remember asking him what time he left The Peacock and he said he couldn't remember. He told me that he recalled his brother telling him that he got home at 1:37, and that he walked following the yellow line.

Q: Okay. Now, did he say he followed a yellow line or a white line?

A: Yellow.

Q: All right. And then, how about any other direction that he took, any other landmarks that he referenced?

A: Yeah. He said something about going by the cop shop. I don't really know what he meant by that.

Q: Well, is the cop shop generally known as something?

A: A police station.

Q: All right. And where is the police station in relation to either The Peacock or the residence?

A: Okay. The Peacock -- to get from The Peacock to the victim's residence, you walk along Chestnut. The police station is located on the other side of the tracks, not really in that vicinity at all.

[p.490] Q: Okay.

A: I don't know the address of the PD there.

Q: Now, how about -- Did you ask him about his drinking that night?

A: Yes, I did.

Q: And when you asked him about this incident, what, if anything, did he -- Let me ask you this, did you directly say, you know, Troy, did you do this crime?

A: The way that the questioning went, because of his drinking and because of his lack of memory for a

period of time there, is I asked if him if it's possible that he could have done this and not remember.

Q: What did he say?

A: Well, he said that he's been thinking about it to the point that it was driving him crazy, something to that effect.

Q: All right. And is this -- you recorded this?

A: Yes.

Q: Transcript? All right. Did you ever -- did you discuss with Mr. Brown, fingerprints?

A: Yes.

Q: And what, if anything, did you tell him?

A: This was in regards to the questioning concerning had he ever been in Megan's bedroom?

Q: Did you ever tell him that, we've got your print in this bedroom?

A: No. What I said was, "Then would there be any reason for your fingerprints to be in there?"

[p.491] Q: At that point in the investigation, were you aware of whether or not the place had been dusted for prints?

A: I was told it had been and that there was a latent developed. I don't -- I didn't know the results of that at that point.

Q: You never told him, that's your print. Why's your print in there?

A: No.

Q: Now, when you spoke to Mr. Brown, he indicated at some point during this conversation that he would like to have a lawyer?

A: Yes.

Q: And what did you do as a result of that?

A: This was during the discussion concerning taking a blood sample, and he said he should talk to a lawyer about that, something to that effect. He kept talking, then I interrupted him and said, "You just mentioned that you want to talk to a lawyer, do you want to stop answering questions now?"

Q: And what did he say?

A: He indicated more that that was in regards to getting advice concerning the blood sample and he just kept on talking, conversation went for several more minutes.

Q: Did you ever ask him about whether he would be concerned about the results of a blood test?

A: Yes, I did.

Q: And what did he say?

A: I don't recall, exactly. But I -- seems to be indicated that he thought it would work out, it would be okay.

[p.492] Q: Well, do you have a copy of the transcript there with you?

A: Um-hum.

Q: All right. If I could direct your attention to, I believe it is page 19 of your interview? About half-way through?

A: Yes.

Q: Does that refresh your recollection as to the question you asked and his response?

A: Yes.

Q: What was the question that you asked?

A: Okay. "Lt. Ladd: Well, I think you're worried about what the results might be."

And, "Troy Brown: Yep."

Q: Okay. Did he ever -- ever a time during that interview, when asked, well, Troy, did you do this, did he ever say, there's no chance in hell?

A: No.

Q: Thank you, Lieutenant, that's all I have.

THE COURT: Cross-exam.

CROSS-EXAMINATION

By DAVID B. LOCKIE:

Q: Lieutenant Ladd, you prepared an application for a search warrant in this case, is that right?

A: Yes, I did.

Q: Do you recall what you put in the search warrant regarding Brown's statement that, "I wish I could remember what went on"? Do you happen to remember?

A: I believe there's something in the affidavit to that [p. 493] effect.

Q: What did you put in your search warrant -- Your application for search warrant was signed under oath, right?

A: Yes.

Q: All right. And what did you put in your application for search warrant in connection with the statement that Brown said, "I wish I could remember what went on"? The one he made to you?

A: I don't recall it verbatim.

Q: All right. Do you have a copy of your application in your file?

A: Yes, I do.

Q: Could you -- would it help to refresh your memory if you looked it over?

THE COURT: Did you review these before you came here today?

THE WITNESS: The transcript, I did, sir.

THE COURT: He has it, Mr. Lockie.

By MR. LOCKIE (continuing):

Q: Could you look at paragraph 22?

A: Pardon?

Q: Could you look at number 22? Does that refresh your memory at all?

A: Um-hum.

Q: What did you say then?

A: Okay. In paragraph 22?

Q: Right.

A: That "during the interview with Brown, you're -- asked Brown about the statement he is reported to have made to Prescott, [p.494] 'I wish I could remember what went on.' And Brown indicated he was referring to the hour after he'd left the bar."

Q: The hour? Okay. All right. Do you recall asking Mr. Brown, "And there's no reason for us to have found your fingerprints in the kids' bedroom"?

A: Correct.

Q: At that time, you hadn't found any of his fingerprints in the kids' bedroom, had you?

A: I wasn't aware whether there was one found or not.

Q: All right. But you did ask Brown, "And there's no reason for us to have found your fingerprints in the kids' bedroom," right?

A: Correct.

Q: Did you also ask Brown, "So, there'd be no reason for your fingerprints to be in there?"

A: I believe so.

Q: And what was his response?

A: They're something to the effect that there shouldn't be -- they shouldn't be.

Q: Okay. Any time during this interview, did Troy Brown admit to you that he committed this crime?

A: No.

Q: Now, did you tell him that you believed that at some point Megan was going to regain her memory and be able to tell you who did it?

A: Yes, sir.

Q: All right. And what was his response? Did he say he [p.495] hoped so?

A: Yes, something to that effect.

Q: He said he hoped so, right?

A: Um-hum.

Q: And then, do you remember asking her -- Do you remember saying "That's one of the things I hope Megan does. I don't think she's going to based on her interview Tuesday, okay?" And what was Brown's response?

A: I don't recall.

Q: Did he say, "There's just no way I could have done it"?

A: Yes, he said that.

Q: And do recall asking Troy Brown whether he'd been hitting on Pam that night, or something to that effect?

A: Yes.

Q: And do you recall what his response to that was?

A: He said no, that Pam was not his type.

Q: All right. What else did he say? About Pam?

A: That he talked about marriage and respecting -- basically respecting that institution.

Q: All right. Did he say, "One thing is, married is married, you don't sleep with your friends"?

A: Right.

Q: And then he said, "It just doesn't make any sense," is that right?

A: Right.

Q: All right. And then you agreed with him. You said, "No crime against a child makes sense," right?

[p.496] A: Correct.

Q: And that "Nothing was going to make this go away," and "What you're going have to do now, is get to the bottom of it, find out what happened"?

A: Yes, sir.

Q: All right. And Troy Brown -- what did Troy Brown say to you after that?

A: I believe he basically agreed with me.

Q: Did he say, "I know there's just no possible way I could have done this"?

A: Yes, sir.

Q: Now, do you remember asking him, "Now, what if we're able to show you getting close to them, independent of what Megan said, and that you were there in the room. What would you say?" Do you remember asking him that?

A: Yes.

Q: All right. And what was his response?

A: Again, I think he -- I believe he said something to the effect that I don't think so, that I -- didn't believe he was in the room.

Q: Did he say, "It can't be. It just can't be"?

A: Correct. I remember those terms.

Q: Pardon me?

A: I remember that term.

Q: "It can't be. It just can't be"?

A: Yes, sir.

Q: All right. Do you recall bringing up DNA testing with [p.497] Troy Brown?

A: Yes, sir.

Q: And asking -- did you ask him if "You were afraid that it might be positive"? If he was afraid that it might be positive?

A: I think it was like afraid of might -- what the results might be.

Q: Did you ask him if he was -- okay. Afraid that it might be positive, or afraid of what the results might be?

A: Something to that effect, yes, sir.

Q: All right. And what was his response?

A: Believe in the affirmative. Yes, that he was worried about that.

Q: Well, wasn't his response, "No. I just don't believe it's necessary because I don't know what my rights are here, or anything, and I know there's no way I could have done it." Wasn't that his response?

A: I think because he was -- at that point, he was not consenting to the blood draw.

Q: Well, do you have a copy of the transcript of your interview?

A: Yes.

Q: Look at page 17. At the top. Did you ask him if he was afraid that the results might be positive?

A: Yes.

Q: And what was his response?

A: "No. I just don't believe it's necessary because I really don't know what my rights are."

[p.498] Q: And then what did he say?

A: "I know there's no way I could have done it. I mean, I know they come and got my bedding and everything like, that should tell them -- should tell them, hey."

Q: Okay. And that picture that Mr. Smith showed you, is that his booking photo?

A: Yes, it is.

Q: All right. Was that taken with a bright flash?

A: I wasn't present when this was taken.

Q: All right. Are you familiar with the booking photos down at the jail?

A: Yes, sir.

Q: Are those taken with a flash?

A: I believe they are.

Q: Believe they are?

A: Yes, sir.

Q: Okay. Does Troy look any different today than when you interviewed him?

A: His hair's shorter and maybe a little darker looking to me.

Q: Okay. Would you have characterized his hair as being blond when you interviewed him?

A: Yeah, kind of sandy-colored.

Q: Sandy?

A: Yeah.

Q: Not blond, though, was it?

A: No, it -- little darker that that, I would think.

[p.499] MR. LOCKIE: Thank you. I have no further questions, Judge.

THE COURT: Redirect?

MR. SMITH: Thank you.

REDIRECT EXAMINATION

By MARSHALL S. SMITH:

Q: After he said that he had some concerns about the DNA -- he doesn't know what that is -- before that, you told him this is a hundred percent, this will either include you as being the person, or exclude as being the person, didn't you tell him that?

A: Yes, sir.

Q: And then, that's when he says, "Well, I don't know about this." Then you ended up here with saying, your question, "Well, I think you're worried about the results might be." And his response was, "Yep."

A: Yes, sir.

Q: All right. And so at that point you concluded the interview.

A: About that time, yes, sir.

Q: Do you recall whether or not Mr. Brown ever told you that -- in response to your question, "Do you remember what happened here?" And he says, "I can't remember a lot." Do you remember him saying that?

A: Yes, sir.

MR. SMITH: Thank you. That's all I have.

THE COURT: Recross?

MR. LOCKIE: Nothing based on that, Judge.

THE COURT: Thank you for coming. You may be excused.

[p.500] Call your next witness.

MR. SMITH: That's all the State would have, Judge.

THE COURT: Any surrebuttal?

MR. LOCKIE: Can I request a brief recess, Judge?

THE COURT: Okay. During this recess we're about to take, just take five minutes and then be in your jury room, the jury is admonished:

Do not converse amongst yourselves or with anyone else on any subject connected to the trial.

Do not read, watch, or listen to any report of the trial, or any commentary on the trial, or to any person connected with the trial. This includes any medium of information such as newspapers, television, and radio.

Do not form or express an opinion on any subject connected with the trial until the case is finally submitted to you.

Do not visit the scene. Do not make any independent investigations. Don't talk about it. Take a stretch, be in your jury room in five minutes.

Court's in recess.

(Court recessed at 10:00 A.M. for 13 minutes)

THE COURT: Please be seated. The record will reflect the presence of counsel and the defendant. Counsel, will you stipulate to the presence of the jury?

MR. SMITH: For the State, Judge.

MR. LOCKIE: Stipulate.

THE COURT: Do you have any surrebuttal, Mr. Lockie?

MR. LOCKIE: I do, your Honor.

[p.501] THE COURT: Call your first surrebuttal witness.

MR. LOCKIE: Call Mr. Troy Brown.

THE COURT: Mr. Brown, please come back up and take a seat. I would remind you you're still under oath.

Go ahead, Mr. Lockie.

TROY DON BROWN,

the defendant, called as a surrebuttal witness, having been previous sworn, testified as follows:

MR. LOCKIE: Ms. Clerk, could I have three exhibits marked? Actually four exhibits.

THE COURT: These are new ones, are they?

MR. LOCKIE: Yes, sir.

THE COURT: Are they photographs?

MR. LOCKIE: Yes.

THE COURT: What letter are we starting with?

CLERK: It's N, O, P, and Q.

THE COURT: N, O, P, Q. You've seen these photographs, Mr. Smith?

MR. SMITH: I've not, Judge.

THE COURT: Okay. As you're marking them, why don't you just show them to Mr. Smith there.

CLERK: N, O, P, and Q.

DIRECT EXAMINATION

By DAVID B. LOCKIE:

Q: Troy, first, I'd like to show you what's been identified as Defense Exhibit N.

A: Yes.

[p.502] Q: What is that?

A: It's a picture of me.

Q: When was that picture taken?

A: In 1990, graduation.

Q: All right. And does that -- how old were you at that time?

A: I was 18.

Q: Does that picture accurately reflect the way you looked then?

A: Yes, sir, it does.

THE COURT: I'm sorry. What was the letter on that?

MR. LOCKIE: N.

THE COURT: Okay.

BY MR. LOCKIE (continuing):

Q: Now, I'd like for you to take a look at Exhibit O.

A: Yep.

Q: And do you know -- Well, what is that?

A: That's a picture of me on my Senior Prom.

Q: All right. How old were you then?

A: I was 19.

Q: And does this accurately reflect how you looked at that time?

A: Yes, it does.

Q: All right. And then, Exhibit P?

A: Yes, sir.

Q: When was that picture taken?

A: That was taken in '89, '90.

[p.503] Q: All right. And how old were you then?

A: I was 18.

Q: Does it accurately reflect what you looked like then?

A: Yes, it does.

Q: And finally, Exhibit Q, when was that taken?

A: The picture was taken in '93.

Q: Does it accurately reflect what you looked like then?

A: Yes, sir, it does.

MR. LOCKIE: All right. Move for the objection -- or for the admission of Exhibits N through Q.

MR. SMITH: I don't know what the relevance of these are, Judge.

THE COURT: Well, objection is overruled. They will be admitted into evidence.

Anything else, Mr. Lockie?

By MR. LOCKIE (continuing):

Q: Now, Troy, do you remember Lieutenant Ladd asking you about DNA testing?

A: Yes, sir, I do.

Q: And he asked you about it twice?

A: Yes, sir, he did.

Q: All right. And the second time, when he asked you if you were worried about the results you said, "Yeah," right?

A: Yes, sir, I did.

Q: Why did you say that?

A: Because all the way through, they've -- they told me they had fingerprints, they said that I'd been seen there, and I knew it [p.504] wasn't possible, that way anyway. And I didn't know anything about DNA, I didn't know how it works or anything, and I still don't understand it so --

Q: All right. And were you worried when he told you that there was fingerprints left?

A: Yes, I was.

Q: All right. Why were you worried about that?

A: Because I knew it couldn't possibly be.

Q: All right.

MR. LOCKIE: I have no further questions, your Honor.

THE COURT: Mr. Smith?

CROSS-EXAMINATION

By MARSHALL S. SMITH:

Q: Isn't it a fact that you told Roy Ladd -- Wasn't it a fact that you never told Roy Ladd that there's no way, no possible way the print could be there. You never told Roy Ladd that, did you?

A: I told him it shouldn't be, and it can't be.

Q: You told him three times, "I don't think so. It shouldn't be."

A: Yes.

Q: All right. How old are you?

A: Right now, I'm 23.

Q: All right. Now, because you're saying that it couldn't be -- your prints couldn't be there because you recall what happened that night.

A: Yes, sir, I do.

Q: All right. Now, you testified previously that you had [p.505] vomited three times, is that correct?

A: Yes, sir, I did.

Q: And that's how many times you told Roy Ladd you'd vomited?

A: I told him I'd thrown up a few times.

Q: Well, isn't it true that you told him that you had "puked in the toilet at The Peacock," came out, got your coat and headed home?

A: Yes.

Q: So is it one time or three times?

A: I told him I'd puked a couple times. I told him I did -- I remember telling him I puked in The Peacock.

Q: Okay. Very good. Thank you.

MR. SMITH: That's all I have.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY DAVID B. LOCKIE:

Q: Where's Chief Kranovich live in Carlin?

A: He lives on the dirt road. There's three roads into Puett Drive, there's --

Q: What do you mean by the dirt road?

A: That's how I know I'm getting close to home. One of them's dirt, the other two are oiled, they've been paved.

Q: All right. And what did you mean by "cop shop"?

A: That's Kranovich's house. He's the Chief of Police. That's where all the cops go to see him.

MR. LOCKIE: Thank you. I have no further questions, Judge.

THE COURT: Mr. Smith?

[p.505] MR. SMITH: Nothing on that, Judge.

THE COURT: You may have a seat and Ms. Clerk will get those photographs.

Anything else, Mr. Lockie?

MR. LOCKIE: Defense rests.

THE COURT: Okay. The evidentiary portion of the case is completed. I want to make a little record after the jury goes, on some housekeeping stuff.

What I'm going to do is I'm going to give the attorneys half an hour to get ready for the final arguments. That's the next stage of the case. And I'll be reading to you the jury instructions, and you'll be

hearing final arguments, and the case will be submitted to you. I'm going to give them about half an hour to get ready.

I'll give them until 11:00 o'clock is when we'll do it, so, let me ask, even though it's difficult for you, let me ask you just to stretch and unless you've really got some business to be out of the jury room, try and stay in the jury room. If you have to go outside to smoke, please avoid anybody that might have anything to do with this case and keep to yourselves and don't talk about the case. Okay.

For the jury, while we're taking this recess until 11:00, I'd ask that you be back in your jury room at 11:00. While we're taking this recess the jury is admonished -- and we'll probably go through the lunch hour, so be ready. You might think about the rest room just before 11:00 because you'll be sitting here for awhile. The jury is admonished:

[p.507] Do not converse amongst yourselves or with anyone else on any subject connected with the trial.

Do not read, watch, or listen to any report of the trial, or to any commentary on the trial, or to any person connected with the trial. This includes any medium of information such as newspapers, television, and radio.

Do not form or express any opinion on any subject connected with the trial until the case is finally submitted to you.

Do not visit the scene. Do not make any independent investigations concerning this matter.

Please be back in your jury room at 11:00 o'clock. And we'll just pause for a minute while the jury exits the courtroom.

(Pause while jury exits the courtroom)

THE COURT: Please be seated. Okay. Just a couple of things. I noticed I miscounted the jury instructions before they were finally numbered. I think I, on settling the jury instructions, I indicated there were, I think 19, maybe I said 20, but I think I said 19, but on recounting there's only 18. Now, I'd ask that you'd -- Have you had a chance to examine them, and is it --

MR. LOCKIE: Not the new ones.

THE COURT: Is it still correct? What happens is that the instruction numbers are identical to page numbers and there was an extra page. I'll represent to you these are the same instructions that we went over last night, just with those notations at the bottom, the authority removed.

Do they appear to be okay to you, Mr. Lockie?

MR. LOCKIE: They do.

[p.508] THE COURT: Mr. Smith?

MR. SMITH: Yes, Judge.

THE COURT: I also want to go on the record -- I don't know if we did this on the settling instructions, or not, but -- when I first read Instruction Number 1, I indicated to the jury that it was not their province to sentence the defendant, and then we found out that

this is one of those very rare crimes where the jury may be required to sentence the defendant if they find guilty, if they find substantial bodily harm.

And what we have agreed to do is to take that paragraph out of Instruction Number 1, and then to address sentencing if, and when, they come back with a guilty verdict, and to allow additional arguments at that time.

Is that accurate, Mr. Lockie?

MR. LOCKIE: It's accurate.

THE COURT: Mr. Smith?

MR. SMITH: It is, Judge.

THE COURT: All right. Anything else you want on the record, Counsel?

MR. SMITH: No.

MR. LOCKIE: No, your Honor.

THE COURT: Okay. You've got until 11:00 o'clock. Please be back in the courtroom at 11:00. Court's in recess.

(Court recessed at 10:24 A.M. for 36 minutes)

THE COURT: Please be seated. The record will reflect the presence of counsel and the defendant. Counsel, will you stipulate to the presence of the jury?

[p.509] MR. LOCKIE: We'll stipulate, your Honor.

MR. SMITH: For the State, Judge.

THE COURT: Okay. I'm now going to read to you the remaining jury instructions. I will not read to you Instruction Number 1 a second time, I've already read that to you. All of the jury instructions have been typed and provided to you. It is my purpose to read those instructions verbatim.

If I notice any significant error in the typing which can sometimes happen, I'll stop and point that out to you, and you can note it. But if I misspeak, please understand that I'm attempting to read verbatim, the instructions, unless I note otherwise.

We'll begin with Instruction Number 2.

(The Court read the jury instructions to the jury)

THE COURT: Now you will see, what follows are the forms of verdict, and if you turn back to Instruction Number 16, wherein we described the forms of verdict that are available to you, you will see that each of those numbers corresponds to a form of verdict. So that's kind of the road map -- 16 is kind of a road map to the forms of verdict.

At this point, we'll begin our closing arguments, and I would remind you once again, that the arguments of counsel are not evidence.

Mr. Smith, you may give your first closing argument.

MR. SMITH: Thank you.

CLOSING ARGUMENT

By MARSHALL S. SMITH:

Ladies and gentlemen, your Honor, Mr. Lockie, Mr. Brown, as I [p.510] indicated -- Well, as the judge indicated, first, the closing argument is the time now, for counsel to review with you, the facts of the case which have been proven, and how those facts relate to the law that the judge has given you. Just as the opening statement was to show what facts the State anticipated showing, the closing arguments now is the time to show what the facts have proven and how they relate to the law.

As I stood before you a few days ago, I informed you that this case was about an unimaginable, horrible rape. A sexual assault and the sodomy of a nine-year-old child, who was then left for dead. As a result of those facts, the State charged the defendant with these crimes: sexual assault of a child under the age of 14 resulting in substantial bodily harm; sexual assault, Count 2, sexual assault of a child under the age of 14; Count 3, attempted murder; and Count 4, child abuse resulting in substantial bodily harm.

Now, what you need to do as the triers of fact, here now, is figure out, and think about each one of the elements which make up each one of those crimes. Now, when you look in your instructions at Instruction -- each one of the instructions defines, specifically, the elements of each one of the crimes. And you are the ones that make the determination, if there's sufficient evidence to support your belief, that that fact occurred beyond a reasonable doubt.

Now, what is the evidence in support of Count 1, sexual assault of a child under the age of 14 resulting in substantial bodily harm? Well, you just need to break those down. First of [p.511] all, that the defendant, Troy Don Brown, committed this act.

What is the evidence that you have to prove and to know and to have belief in a decision beyond a reasonable doubt that the defendant committed these crimes? Aside from the DNA evidence, aside from the DNA evidence, what is the evidence that you have? You have the fact that Troy Brown knew the family, knew Pam Henle, the mother, knew the two children and knew Wayne Henle, the stepfather of Megan; that he'd been over at their house numerous times; that he had opportunity to do this.

When he was at the bar at -- that evening on January 28th, 1994, he received a telephone call from Megan saying, "I'm at home, do you know where my mom is?" He knew where she lived, he knew she was at home, he knew that Pam was at the bar.

Now, we have testimony that he was drinking, heavily, over 20 drinks -- kamikazes and beer. You can use your common sense as to what effect that has on a person's mind.

Now, what else? We have the bartender testifying that he saw, or recognized, or knows that Troy Brown was not there at approximately 12:15 to 12:20. And so you may say, well, why would he notice that, as one of the other bartenders says it was packed in there. Well, so, why do you -- what is it that gives you the faith in your belief that you can believe this guy?

Well, first of all, he wasn't drinking. Second of all, he noticed Troy Brown when he first walked in. He says, oh, boy, this is going to be a long night. It was rowdy, so, as a bartender, he's going to notice those types of things, so he immediately noticed that Troy Brown was there, and he noticed when he left, [p.512] because that's one less problem he has to deal with. 12:15 to 12:20.

The next time frame that we know of is approximately 1:05, as testified by Leah Doke. Now, you recall Leah Doke was the woman who was returning from Elko, she had had her -- celebrated her anniversary and was returning home, and she testified that as she and her husband were driving, they saw a man who matched the description of the clothing that Troy Brown was wearing at The Peacock bar earlier that night: black hat, satin coat, pants and boots.

Now, Leah Doke, and Mr. Doke testified that, well, they believe they saw a green emblem. Well, consider the circumstances there. They're driving along, they are going to pick up their children, and Ms. Doke testified she was already concerned about the fact that she was late. So, they're driving along and they see this person, and they see what they perceived to be green. Well, that's fine. If you look at the two exhibits, the two coats, in the dark as they're driving by, they're both black. This is a satin coat that she testified to.

Now, that is at 1:05. The next time frame we have is 1:15 when Pam Henle calls 911. Something's happened. She comes home and she sees her nine-year-old child covered in blood, she grabs her, and she calls 911. Someone's, something's happened to my baby.

All right. The next time frame we have is 1:18. That's when Officer Mike Terry arrived at the scene. Which the next time frame we have is a few minutes later, approximately 1:25. Travis Brown [p.513] notes that Troy Brown is getting home. How do we know that time? Well, you recall Travis Brown testified that he saw -- excuse me -- the clock, and it said 1:32. And he said that clock was a couple minutes fast -- six minutes fast, actually. That's how we come to those time frames.

You heard Lieutenant Roy Ladd testify that it takes approximately 15 minutes to walk from the bar to his residence. Well, 14 minutes, first to the victim's residence and then a couple more minutes to walk to his residence. That's to show that it's -- that one can walk, because he was walking that night, from the bar to his home.

Now, what other evidence is there, aside from the DNA, that Troy Brown committed this crime? Well, we have the testimony of Megan. Now, she was unable to testify as to who did this to her. Now, consider again, the facts under which she made -- she was living at that particular time. She was awoken sometime between 12:15 and 1:05, strangled, brutally raped and sodomized, choked, and left for dead.

Now, if she is unable to say that's the guy, the evidence would show that that's not unreasonable. However, Megan was able to make a couple of descriptions. As indicated in openings, she made some sketchy observations. One of which is she had told Connie Walker it was blond hair.

However, recall the testimony when Mike Skinner was first there at the scene. He asked what'd the guy looked like. She said he had sandy hair. All right. He had hair that came down around his collar, down to here, she said. He had a small mustache. Look [p.514] at State's Exhibit number 32 -- and you'll be able to take all these exhibits back with you to look at. But, consider that photograph as it relates to this child's description of the person.

Now, still aside from the DNA, what other evidence is there? What else did Megan testify which would lead you to believe, to the reasonable conclusion, that Troy Brown did this? She testified as to one of her senses, the smell. She said, "Well, kind of smelled like cologne." But then, she also said, "It smelled awful. It smelled bad."

Recall the testimony of the defendant himself, who testified that he had vomited three times. Use your common sense as to whether or not that smells bad. Now, and then also, the fact that Troy Brown got home, took his pants off, and put them in the washer.

Now, each one of these facts in and of themselves, if there's only one -- this one fact over here that he was wearing the hat in the bar and there's -- oh, there's another -- by itself. It doesn't mean anything. The fact that he's wearing a jacket, by itself doesn't mean anything. The fact that he's wearing boots, by itself doesn't mean anything. The fact that he knew Megan was at home, by itself doesn't mean anything. The fact that he had been in Megan's house before, by itself doesn't mean anything. The fact that a person matching his description was walking by the house, by itself doesn't mean anything. The fact that he has

curly hair, small mustache, sandy hair, by itself doesn't mean anything. The fact that he washed his clothes, by itself doesn't mean anything. However, you start putting all these together and it means [p.515] something.

Now, aside from those facts, what evidence do you have that Troy Brown committed this crime? What evidence can you say, in your mind, unequivocally, this is what happened, this is the guy that did it? What other evidence is there? There's DNA genetic comparison. DNA comparison evidence.

Now, you heard the testimony of Renee Romero. That's the end. That's the end of the facts concerning DNA. Well, what's the beginning? Well, the beginning is first, somebody putting sperm in that child's panties. That's the first.

So, first thing is the -- Officer Terry went out there, found those bloody panties, picked them up, put them in an evidence bag, and then from there you can trace through the evidence presented here, every step along the way. He put them in this bag. It was transferred to Evidence. It was then transferred to the Washoe Crime Lab. It was then tested by Maria Fassett, the serologist. It was then examined by Renee Romero. It went from the very large picture, the actual panties, to the molecular, to prove beyond a reasonable doubt that the defendant committed these crimes.

Now, and recall that genetic, that DNA number. Now, you think, and don't let the number get to you -- one in three million. You must understand what that means -- one in three million. That means that one person out of the entire population, out of the entire

population, one person in three million will have the same genetic pattern. One out of three million people.

All right. Now, that's just the first element of the first crime. That the defendant committed this crime.

[p.516] Now, the second element of Count 1, that the defendant did sexually assault the child with his penis. You heard the evidence of Dr. Winch, the board-certified Obstetrician, Gynecologist, who does surgery. You heard him testify that these injuries were so traumatic, so brutal they required reconstructive vaginal surgery. You heard, also, that the penetration that he saw was consistent with an adult, erect penis.

You also heard the testimony of Dr. Campbell, who testified he found semen in the vagina. That's the evidence to prove the sexual assault with the penis.

That the child was under the age of 14, the third element. You heard Megan testify that she was born on September 8th, 1984. You heard her natural mother, Pam Henle, testify to that date.

And fourth element of this first count, resulting in substantial mental -- substantial bodily harm, substantial bodily injury. Again, the testimony of Dr. Winch, who testified that these injuries to her vagina required reconstructive surgery. You heard Dr. Campbell testify that she lost nearly 15 percent of her body blood. And that this surgery occurred eight hours -- eight hours after this incident, after this assault.

Now, you are the judges of whether or not the facts have been proven to satisfy your finding, making a

determination beyond a reasonable doubt that that crime happened.

Now, with reference to Count 2. Count 2 is sexual assault of a child under the age of 14, but Count 2 concerns the anal penetration by the penis. That's Count 2, Count 1 is the vagina resulting in substantial bodily harm. Count 2 is that he [p.517] penetrated her with his penis in her anus. This nine-year-old child. Dr. Winch testified, similarly, that the penetration of the anus, although not ripped as badly as the vagina because it gives more, still the penetration was consistent with an adult, erect penis.

And further, similarly, with that Count, with a child under the age of 14. You have the same evidence. Megan testified to her date of birth, as did her natural mother.

Count 3, attempted murder. What are the facts in support of attempted murder? That the defendant, did enact that act, attempted to kill. With the specific intent to kill, that is, that he deliberately and maliciously thought about killing this person, and he attempted to do so. What is the evidence that you have to support your belief beyond a reasonable doubt, that he committed this crime?

First of all, you have the testimony of Megan. Although Megan may not have been able to see who did this to her, she could tell that she was being choked. That she tried to reach a finger up to maintain some blood flow, to keep him from choking her.

You heard the testimony of both Drs. Campbell and Winch. Dr. Campbell is a board-certified emergency

room doctor. Dr. Winch testified that these marks are consistent with pressure being applied to the neck. And you recall, I asked him, "Well, how much pressure is required to make those kind of marks?" And he said, it takes more pressure to apply amount of pressure than it does to strike someone. Consider the amount of pressure that was put there. You determine whether or not there is -- you can find [p.518] intent to kill.

Is there intent to kill? Well, look at these photographs, ladies and gentlemen. Look at the injury that was suffered by this child. These are hard photographs to look at, ladies and gentlemen, but you must. This is the evidence of this case. These are the injuries sustained by this child. You determine whether or not there is sufficient evidence to find that he intended to kill that child.

With reference to Count 4, child abuse resulting in substantial mental harm, that the defendant, caused a child under the age of 18, to suffer unjustifiable pain and mental suffering. You heard the testimony of Dr. Sherman, who is a board-certified Pediatric Psychiatrist, who came and told you that, one, Megan was admitted into a neuropsychiatric hospital for 12 days. That prior to this incident she was doing well in school.

After this incident, she's doing badly in school, she's having nightmares, she's having intrusive thoughts concerning reliving this horrible trauma, she's having panic attacks. And also, that -- Dr. Sherman testified that it is likely that a child who goes through something like this, that lives through something like this, is not going to want to remember who did this.

Now, those are the four counts that the State has charged the defendant with committing. What other evidence is there to show that the defendant committed this crime? The defendant said, when confronted by David Prescott, his roommate that he allowed to live in his house -- David Prescott came up to him and said, after Officer Terry had been there, and knew exactly why Officer Terry [p.519] was there -- asked him, "Well, Troy, did you do this? Did you do this?" Troy says, "I wish I could remember what went on."

Now, the defendant would have you believe, well, he's just trying to remember what time it was. Who cares what time it was. Did you do this? Why would you respond, I wish I remember what time it was, in response to a question like that?

Now, also, recall all the witnesses that the State has presented. The reason all of those witnesses came, some of them testified for a long time, some of them testified for just a short period of time, but the reason, each one of those witnesses puts in a little piece in this puzzle. The -- Dr. Sherman, Dr. Winch, Dr. Campbell testified to the medical aspects and the psychiatric aspects. The bartender, Steve Pennino, who testified he was there, he knows when he left. Ms. Henle, Megan, Travis Brown, Leah Doke, Christopher Murphy, Officer Terry, Roy Ladd, and then finally, Maria Fassett, the forensic serologist, and Renee Romero, who testified concerning the DNA.

Ladies and gentlemen, the State would submit that there is -- that the only reasonable and just verdict in this case, based on this evidence, this overwhelming

evidence, is that the defendant committed these crimes and is guilty as charged.

Thank you.

THE COURT: Mr. Lockie? Are you going to use the projector?

MR. LOCKIE: Yes, I am.

THE COURT: How would you like us to set that up for you?

MR. LOCKIE: Just the way it was set up before would be fine.

THE COURT: How about the lights and the --

[p.520] MR. LOCKIE: I don't think it'd be necessary to dim the lights.

THE COURT: All right. You just, you tell us what we can do. Thank you.

CLOSING ARGUMENT

By DAVID B. LOCKIE:

Your Honor, Ms. Clerk, Mr. Prosecutor, and most of all Troy Brown, I told you at the outset that there isn't any question that a little girl was attacked. There isn't any doubt about that at all. The State, Mr. Smith, has not even come close to proving that Troy Brown is the man who did this. You can't possibly be convinced right now, even after the evidence and after Mr. Smith has testified.

What you have to ask yourselves is, based on the evidence that you heard from here, based on this evidence as to this DNA, are you convinced? Was that presentation enough to convince you? Was that presentation enough for you to rely on for this man's life? Is that enough? Would that do it?

Well, you have to ask yourself, how are we to evaluate DNA testimony? How do we do it? Well, the judge has offered you some help, and he's given you Instruction number 10. And that's the instruction that you ought to use to help you in deciding whether you are going to take this man away for something that the State hasn't proven that he did.

"Instruction number 10. A person who has special knowledge, skill, experience, training, or education in a particular science, profession, or occupation, may give his or her opinion as an expert [p.521] as to a matter in which she is skilled." And what you have, this one in three million thing, is her opinion, okay?

Determining the weight -- "In determining the weight to be given such opinion," here's what you need to look at: "the qualifications and credibility," okay? "And the reasons given for her opinion. You are not bound by such opinion. Give it the weight, if any, to which you deem it to be entitled."

You don't have any instructions from Judge Stringfield that tells you that there's anything presumptively valid about DNA testing. Nothing at all. And the law -- well, it does have some presumptions, but there's no presumption, none at all. You have to look at the reasons given, before you can give that opinion it's weight. Did you get the reasons, did you

get them? Did you understand the presentation? Did they take enough time with you? Did they allow you to understand it? Do you understand it, or don't you?

If you don't understand it, you can't give any weight to the reasons for the opinion. This technology has not proven itself. Did you hear any evidence that this technology has proven itself? Renee Romero testified that yes, she's testified in several different courts before. Was there any evidence that the courts accepted it? Was there any evidence that the juries accepted it? No. Not at all. Not at all. Do you need that? Yes, you need it. Before you can just take a conclusion, you need that information.

Now, if you're confused, you can't be convinced beyond a reasonable doubt, it can't be. It can't.

The only evidence you heard was, yes, it's used in paternity [p.522] cases. Well, what's the standard of proof in a paternity case? What conditions are specimens gathered in paternity cases? What's tested in paternity cases? You don't know. That's the only evidence that you have. Did you hear anything about being accepted in criminal cases? No. No. What juries have accepted it before? You don't know.

Now, Mr. Smith told you in opening that it would be a fingerprint, and it's not a fingerprint. It's a comparison that is apparently made on some form of statistical probabilities, statistics from wherever. From where? Where is the underlying basis? Where are the reasons for her opinion? Okay? Do you understand it, or not?

All right. So that's the big threshold question, all right? You have to ask yourself. And based on that presentation, it can't possibly be. Well, I've taken the liberty to go through Renee Romero's notes so we can go and look, maybe a little more specifically, the reason for her underlying opinion.

This is from the Washoe County Crime Lab. This is the first exhibit that we have. And this is their Forensic Science Division Examination Request Form, prepared by Officer Terry. What did Officer Terry request the crime lab to do? Serology -- When I say Officer Terry, I guess I mean the Carlin PD. Look for the stains. Criminalistics, trace evidence. Well, they didn't bother to do any of that. They didn't look at his bedding, they didn't compare any pubic hairs. And the other, blood-typing, possible DNA. And at the bottom, test for human blood specimens, so that be typed. See any blood-typing? No. Also, if possible, DNA. Okay?

[p.523] Point A. Oh, and it says on there, as well, that the Physical Evidence Recovery Sheet references the material that is to be tested. You'll have this evidence with you in the jury room.

So we look at what was on the Physical Evidence Recovery Sheet, and you can look at all this stuff they had. Didn't do anything with the rape kit, fingerprint didn't pan out, never bothered looking at any of the bedding and so forth from Troy Brown, but one of these items is number 14, okay? And that's the critical item here. You've got red PJ's, white panties, and a blue sock, all right? The white panties is the item that we're zeroing in on, which is the only item that was DNA tested. It's the only item, white panties. So, it's number 14. All right?

Then it comes in to Maria Fassett, and this is a two-page exhibit. Maria gets it. This is all the evidence that she got. Two different waves of evidence. The top wave being all the stuff collected from Megan, the bottom wave being the stuff that was collected from Troy Brown, and we've got the results of her examination. Okay? She's not a DNA expert, this is just her -- she's a serologist, she looks for bodily fluids, she identifies and cuts out the stains and stuff.

All right. Item 14, that's the one that we've got. She says that the entire stain was removed and it will be retained in the lab. Okay? Now is as good a time as any to point this out. Also, they collected hairs of pubic origin, and they were never tested, from Megan's fleece pullover. What are pubic hairs doing in her fleece pullover? And why didn't they test them? See there, that's the top number, it's kind of underneath this side.

[p.524] And at the bottom, "Should hair comparisons become necessary, please contact the undersigned regarding it's submission." This didn't happen. Look at all the items that were never examined. And you'll have it with you.

Okay. So, the next thing we look at is on February 3rd, Renee Romero gets the stuff out. Okay? And there's our number 14 -- 14T1, panty, all right? She's distinguishing these things. And what did she tell you that she does?

The first thing she looks at is the suitability of the material for RFLP testing, RFLP DNA. All those words that you forget. She has a grading system of one to four. She likes to see at least a three before she can

even consider doing a DNA test. And rare is below one. Remember I asked her that? How are these panties rated? Rare. Rare, rare.

The next note, in order, that she made is this. All right. Now, we're -- still got T1, panties, remember that's the only thing that's ever DNA tested -- and that, she said is a diagram of the whole thing that she had. So she looked at it and she's identified three spots on it. All right.

This is your DNA expert, she's looking, she's interested in RFLP testing, in DNA testing, and she's looking, okay? She said first that she looked the whole thing over, saw it was rare, did her little diagram, and identified what she's going to test.

Now, let's look. The next one is micros, which she said is her microscopic examination. So, not only did she look it over and grade it rare, she diagramed the thing that she had, and she's got panties 2, panties 3, and panties 1. And in the middle there's [p.525] "vag" and that means the vaginal swab that was taken from Megan. One, two, three corresponds back to our exhibit, three spots.

Panties 2's got a lot of bacteria, one-plus and heads. That means there's no little squiggly tails on it. One-plus. She said you need a three before you even start DNA testing.

Panties 3, that's the number 3 spot, rare. That's not even a one, and panties 1 is rated as a one-plus. Rare, rare.

Did you get any test from the vaginal swab, the thing that came right out of Megan's vagina? Did you get any tests from that, it's three-plus. No, you got a test from the panties which was rare according to Renee Romero. Okay? panties, panties, panties.

Now, this is why I was questioning her so closely about this control number. I know it was hard for you to follow without seeing the exhibits, but we'll see on that RFLP test, and we'll connect it back that this is what she's testing. That she says the panties, the panties, and the panties is what she's testing here. Not the vaginal swab, which apparently has enough.

This is in February. So let's connect it up. Now, there's a danger, and that's of showing you things in writing, okay? Because when things are in writing, opinions in particular, maybe they'll take on more weight than what just you were told, okay? All right. Now, this says in writing, this one in three million exhibit. That's all you've been told. And the fact that she wrote it doesn't make that any more than her opinion.

But let's look behind the writing. Let's look at the reasons, okay? Again, number 14T1, panties from Megan Allred. I don't know what to tell you. I went back into her notes and these are them. [p.526] And did you get any other notes as to it? When did she begin this DNA testing for the test that you got? The test result was reported when? 9-15-94. When did she start the testing -- in July? When did she collect it -- in February? That's when she looked at it? And what did she testify? She said that she testified at the preliminary hearing that she didn't have enough.

She said she'd done some other DNA tests. What other DNA tests? Her testimony was that she didn't have enough after the preliminary hearing. She said that she testified there that she didn't. She said that she went back to the lab, she got it back out, and looked at it and lo, and behold, she had enough. Okay?

But what did Mike Terry do with this thing? What did Mike Terry do with it? He opened it. Remember four days before the prelim he opened, and I said, "Why?" And he was kind of at a loss for an answer, and finally said, "Well, the DA told me to." That was his only explanation. What business does Mike Terry have to open this exact piece that there wasn't enough? That was four days --

MR. SMITH: I'm going to object, Judge. He's misstating the evidence. That is not what Mike Terry opened.

MR. LOCKIE: Oh. I'm sorry.

THE COURT: If you could correct that for us.

By MR. LOCKIE (continuing):

Mike Terry indicated that, I believe, that he opened State's Exhibit 24.

MR. SMITH: Eleven.

MR. LOCKIE: Eleven.

[p.527] THE COURT: Those are the slides from the lab.

By MR. LOCKIE (continuing):

Oh. The panties. I seem to recall that Mike Terry said that he opened the piece that was the crotch area of the panties, as well, okay? But rely on your own notes and your own memory. All right?

I don't know what happened. I don't know why she got this stuff out in February that she rated that it was not enough. And she testified at the preliminary hearing that it wasn't enough. And she doesn't start any testing until after July? She's interested in the RFLP test. Right away she's looking at this stuff. She's trained, she observed it, she looked at it with a microscope, there's other items, the vaginal swab had the rating that it needs, a three, you saw it, to do DNA testing. Now, the panties, the only rating you've seen is not enough, okay?

So, if we assume, first of all that the presentation convinced you, which is an awfully large assumption to make, then you've got to look at the reasons, all right? And her only reason was was that she missed it. That's her only reason. Is that enough? Is that enough to convict Troy Brown? For the other evidence doesn't even come close.

What else did she tell you? She told you that the DNA evidence degrades over time. It degrades, remember that? February, beginning testing in July. Does that make any sense to you? Well, here it is. It's right on the outside of the envelope -- 14a. No, that's the piece that's cut out. That's not the piece that cuts out, it's the opposite, I'm sorry.

[p.528] Now, this is interesting. Here it is. State's Exhibit 24, she signs at the 14T1, panties, 2 February '94, Maria Fassett. February 3rd, Renee's initials, she got it out. March 21st of '94 she got it out. Apparently got it out of the chain of custody somewhere. And then finally, on July 5th of '94, that's when she began, apparently, this DNA testing, right?

The other evidence in this case is all over the border. The other evidence in this case cannot possibly convince you, prove to you that Troy Brown committed this horrible crime. The Prosecutor explained to you what he thought that the evidence showed. All right?

THE COURT: Mr. Lockie, can we turn this light on?

MR. LOCKIE: Yes.

THE COURT: All right. Let's turn the lights back on, and if you could help us with the doors so we can stop the banging if possible.

I'm sorry, Mr. Lockie.

By MR. LOCKIE (continuing):

Has the State proven that -- Has the State proven that Troy Brown did it, okay? Have they proven it? Well, Troy knew Megan. Yeah, he knew Megan. Did anyone ever have any concern about him before? No. He'd been around Megan, was anybody concerned about Troy? No. Not at all. Sure, he knew her, there was no concern about him.

You heard the unrefuted character testimony is that he's a man of good moral character. That's unrefuted. You didn't hear any evidence to the contrary. He's solid, he's honest, he's [p.529] trustworthy, of good moral character. Yeah, he knew Megan.

The opportunity? Did Megan say she was home alone? No. He talked to Pam afterwards, did he show any interest in the fact that she was home alone? No. Not at all.

The opportunity, that he left the bar? Well, when did he leave the bar? Who knows. Who knows. Troy doesn't remember. Scarlet, the relief bartender said she thinks its sometime around 1:30. Steve Pennino, who's the bartender in the busy bar says, oh, probably around 12:20. But that's not prove it to you as to when he left, but yeah, he left some time.

Let's look at Steve Pennino for a minute. He's -- seem to be kind of a tough-guy, I guess. He's now a -- a bartender, now a juvenile probation officer who tried, I guess, to paint some kind of picture to you of Troy as being some kind of a bad actor, remember that? Well, The Peacock's a rough place, Mr. Pennino. "You ever seen Troy in a fight there?" "No." No. "You ever had to eject him from the bar?" "No, he ejected himself." He left.

The Peacock is not the nicest place on earth, and you got Troy, who's not involved in any violence in there of any kind. All right. So this story of Troy as a bad actor is not corroborated. In fact, all the evidence shows otherwise, okay? And how is Pennino any surer

than Scarlet was? I mean, we just don't know, so nothing is proven by that is the point.

Leah Doke and Jay Doke. Well, I called Jay after Leah said it was a green emblem. Okay. And then Jay is called, and he says bright green. That's what he remembers. They both remember bright green. A bright green emblem there, and that's at 1:05. But so [p.530] what if it is. So what if Troy Brown was here at 1:05.

Now, during the opening statement, this place that Troy Brown was, was characterized -- treated by the Prosecutor as Troy Brown seen walking away from the victim's trailer. It sounded interesting, didn't it? But look where he's walking. He's here, he lives here. Troy testified he walked this way down Chestnut, came down this street and walked this way.

What did the Dokes tell you? They told you that they saw I somebody suddenly. They're driving this way. Now, isn't that consistent with him walking this way? If they're driving this way, their headlights are shining down here, this isn't a huge distance. Aren't they going to see him from a longer distance. But they saw him suddenly, okay? That's where Troy's walking.

Does it have to be that he walked by the trailer and raped a little girl, or can it be that he's walking home? Does that convince you beyond a reasonable doubt of anything? There's a line on this road. He said he used it to walk along. There's a street light right here. He walked right along and home.

Now, the police station's somewhere way out here, and you heard some evidence where he'd say he

walked by the cop shop. You heard him testify Mike Kranovich, he's the Chief out there, lives on this dirt road, okay? And that's where the police often come and that's what he meant, okay?

And just to be sure, you can take these back with you, I just want to show you this is the other one in court, and the marks a little further back here, but it's basically in the same spot that she marked.

[p.531] Now, Megan doesn't identify her attacker. She knew Troy, and she saw well enough to see somebody, and she told Lieutenant Ladd and Connie Walker twice that the man had blond hair, to Marilou Tognarelli, the ambulance attendant, that the man had blond hair. She said she saw him pick up a sock. She knows what Troy looks like and she doesn't identify him as her attacker. Never has. They never even showed her pictures of other people that she knew. And Mike Skinner says sandy-colored hair, that's right. But we've got two times when trained police interviewers where she said it was blond hair.

What other descriptive features did she offer? The hair touched his shoulder. The coat had a "zipper, for sure." Zipper, for sure. This is the coat that Troy was wearing that night. You heard a lot of evidence as to that. Where's the "zipper, for sure"? Here's Troy's coat -- I mean Travis's coat. Enough said.

Now, Roy Ladd -- well, Connie Walker answered, "Megan, do you know what it smells like when somebody's been drinking and stuff?" And her answer was, "Yeah, but he didn't smell like that." All right? Now, later on the stand she testified, "Yeah, beer."

But you heard Dr. Sherman's testimony, okay, that Megan was able to describe the events with clarity way back? That under this Post-Traumatic Stress Syndrome part of the healing process is that you begin to block it out. You begin to not remember. All right. Megan herself says, "If you want to know what's for sure is you go back and you can look at what I told Connie." That's what she said. And that's the best indicator of what she said.

Didn't smell like alcohol? Ten Kamikazes, ten beer chasers. [p.532] She said it smelled like he had on cologne to Connie Walker. Cologne, she said, "It smelled real bad." She's talking about cologne when she was talking to Connie Walker. And then Connie Walker said, "Oh, fou-fou powder?" remember that, "trying to get the girls?" And she said, "Well, at least not me."

Kids know what barf smells like. If there's anything that kids know, they know what barf smells like. When Connie Walker was asking her, you know, about this, she wasn't picking up that she was talking about that. Talking about fou-fou powder, cologne. Pam danced with Troy that night and she didn't smell any strong cologne from him. Okay?

What about Pam's testimony? Well, she definitely left her kids home alone for six or seven hours when she was down at the bar at 12:30. Until, I'm sorry, until she got home around 1:00 -- a little after 1:00. Her acquaintance and history with Troy Brown is that he is a gentleman. She said he didn't make any sexual advances towards her that night.

Yeah, he put around the shoulder and apparently he stumbled, or walked in the bathroom. So what. Okay? This is over a whole night. And her opinion, summing it all up, taking it all into account, is that he was a gentleman, and no, he didn't make any sexual advances towards her.

Remember what Troy told Roy Ladd? You know, when he asked him? "Troy, you know, did you have interest in Pam?" No, his answer is "No. Married is married." Married is married. Pam's married. That's not Troy. That's not the Troy that you heard the people talk about here, okay?

[p.533] Troy had never given Pam any reason for concern. Who did give Pam some reason for concern? You've heard two people say, and pardon me, pardon me, "My ex-husband said that he was going to fuck Megan to get back at me." She said that at the scene. What on earth would possess a woman to say that? Now, she came to the witness stand and says, "Oh, I don't remember saying that" and "It wasn't true." It's a pretty dramatic statement.

Follow-up? I mean, you've got the victim's mother saying that a man that announced his intentions to have sex with a little girl. And I asked Pam, "When did you last talk to this ex-husband?" and she agreed it was about a month ago, on December 30th.

So here we come to the smoking gun with respect to all these circumstantial witnesses is Dave Prescott, all right? Are you going to send -- Are you going to send Troy Brown away for the testimony of the likes of Dave Prescott and what he remembered? This is the man who wasn't drunk, just drink vodka and water and

tequila and kahlua? And he gets there early, can't remember when he got there, went across the street to two different bars ten times, and he goes home and he sleeps in all his clothes, even with his boots on? And then when he reports all this information, he's awake and -- remember he said he was home at 2:30 -- he's awakened about two to two and a half hours later, and at least some witnesses, looked like death warmed over? All right.

So is it evidence to convict Troy Brown that this drunk, basically, says that he came at Troy point blank, "Did you do it?" And Troy says -- Troy remembers that he says that he wished he could remember what time it was. And that's consistent with [p.534] everything you've heard Troy say before. He didn't -- Dave Prescott did not say that Troy admitted to him that he did it at all -- at all.

Megan said he [sic] bit the man, and that he [sic] bit him pretty hard. No bite marks on Troy.

And you heard Lieutenant Ladd testify. And according to Lieutenant Ladd, he took all those responses from Troy as a denial. Now, you heard cross-examination by Mr. Smith with his vocal inflections, but you heard Roy Ladd testify with his vocal, and said, "No, he didn't say he didn't think so." Okay? Roy Ladd, the interrogator who was there, testified that he took all of those responses as being no. Okay?

Now, yeah, you can look at a cold piece of paper and you can look where someone says, I don't think so, and you could say that means something. It didn't mean anything to Lieutenant Ladd. I don't think so. But,

what else did Troy say, other than these few spots that the DA's picked up? "It can't be." "It can't be." "No." "No," is what he said.

He's interrogated for 45 minutes by Detective Ladd. What's he confronted with at that time? Lieutenant Ladd tells him that they've got his fingerprints in the room. They didn't have his fingerprints in the room. "Troy, we've got the fingerprints." "It can't be." He says, "No." Twice Roy Ladd told him fingerprints.

"Lieutenant Ladd: So there'd be no reason for your fingerprints to be in there?"

"Troy Brown: Shouldn't be."

Troy -- "Lieutenant Ladd: And there's no reason for us to [p.535] have found your fingerprints in the kids' bedroom."

"Not that I recall."

"Never been in there?"

"I don't think so."

What else did Roy Ladd tell Troy? The headlights had caught his face. The headlights had caught his face. "Headlights caught your face, so that's why there's got to be an explanation, because you were over there checking on the kids or something."

"Troy Brown: No."

"Lieutenant Ladd: Or you don't remember?"

"Troy Brown: I don't think so."

He says, look -- he tells that Megan's going to be remembering -- going to be regaining her consciousness, you know. He says, and Megan's going start remembering what happened. And what is Troy Brown's answer? "I hope so. I hope so."

Troy's also asked, "Well, what if we have other witnesses that put you right next to Megan, put you right there?" Answer was no. "It can't be."

All right. And then, Roy Ladd asked Troy about DNA twice. First time he says, "Are you concerned that the results might be positive?" And his answer is "No." Then he comes back, and after he's told him all these things, we've got your fingerprints, Troy. We've got the headlights in your face. We've got witnesses putting you close. Then he says, "Well, the DNA test can tell." All right?

And Lieutenant Ladd says, "Well, I think you're worried about what the results might be."

[p.536] And Troy Brown says, "Yep."

Well, what does that mean? Lieutenant Ladd says, "I think that you're worried about the results might be." "Yep." Yeah, what? Yeah, he knows that Lieutenant Ladd thinks that he's worried about what the results might be. All right? And what's his worry? He says, yeah, I'll give you blood and everything, but before we do this, let's get a lawyer. Okay? Why? Because he's been told that there's fingerprints when he knows that that can't be. He's been told that some headlights got him in the face right near the house,

when he knows that can't be. He's been told that other witnesses are putting him close to Megan. He knows that can't be.

Yeah, you bet he's worried. Worried that some kind of presentation like you heard here, without any underlying basis that you've heard of, of any scientific validity to it, that's very questionable in the manner that it was conducted. Yeah.

Fingerprint taken from the mirror the man touched in Megan's room. Exhibit J from the FBI, the latent fingerprint is not the fingerprint of Brown. It's not.

I know that I've taken a lot of your time, but it's obviously a very important case. In fact, I'm just about done.

You made promises to everyone during voir dire in this case. You promised that you'd give Troy the benefit of the presumption of innocence. You promised that you'd follow the law the judge gives you. You promised that you'd decide the case from the evidence that comes from the stand. You promised to decide whether the State has proven Troy Brown's guilt.

Judge told you the Government is strong and that's why Troy [p.537] Brown doesn't have to prove anything. We have no guns, we have no badges, we have no crime lab, we've got no handcuffs, we have no custody, we have no ability to prove what we've suggested. Troy told you that he didn't do it and the evidence doesn't convince you. It can't be. It can't. Not in this case. Not on that presentation. Not without any validity. Not with questions as to the way it was

handled. Not with these witnesses. No way. Not a chance. All right?

The State in this case has, at it's option, an opportunity to speak with you again in order to rebut the things that I've said, and I'm sure that Mr. Smith will get up and do it -- try to do it. This is the last chance that Troy has. It's the last chance that I have to talk to you, so he's going to have to rely on you to please think mentally, when you're hearing Mr. Smith argue, well, what would Troy have to say to that? All right? What if he had another chance? The reason that Mr. Smith gets to talk to you again if he wants to, is because he bears the entire burden of proof.

Now, popularly, well, Mr. Smith may tell you something like an analogy to a squid with ink coming out, or like he's got a good lawyer, or something like that. That's not evidence at all. What I've been talking to you about is evidence, all right? Please think of that.

Please give this case your most careful consideration, and don't convict the man unless you're convinced beyond a reasonable doubt, not to one but beyond one, beyond a reasonable doubt. You know the judge said that the character alone, that's Instruction number 12, of a person is enough to raise a reasonable doubt. That [p.538] alone. You heard the judge tell you that. Unrefuted evidence.

We ask you to return a verdict of not guilty and for each of you to consider the evidence, okay? You have to collectively decide this case, but you're each entitled to your own individual opinion, all right? Whatever your opinion is, you're entitled to stick with it, all right? You deliberate, but if you have an abiding sense of

what's right in this case, you don't feel that that DNA test is enough to send someone away, don't convict him. No matter what everyone else is saying in that jury room. Unanimously agree. Return a verdict of not guilty.

Thank you.

THE COURT: Thank you.

Mr. Smith?

MR. SMITH: Thank you, Judge.

FINAL ARGUMENT

By MARSHALL S. SMITH:

Ladies and gentlemen, I just have a -- I always hate to say just a few points, because I generally have more. But, I would direct your attention to Jury Instruction number 1 again. And on page 2, read carefully all the instructions, this is like the how-to of coming up with at verdict in this case. But a couple of paragraphs down, it says, "The evidence which you are to consider in this case consists of testimony of the witnesses, the exhibits, and any other facts admitted or agreed to by counsel." That's it. Go back in the jury room and say, well, what about this or what about this. You are limited to considering only this evidence and the evidence and the form of testimony.

[p.539] Similarly, on page 3, there's another paragraph that says, "You are to decide all questions of fact in this case from the evidence received in this trial and not from any other source." In other words,

only the evidence which has been presented here today. Only this evidence.

And then, among the most important of the Jury Instructions is found at the top of page 4, that you are to bring with you your everyday common sense. There's no -- this is no side show. This is you use your common sense when you make your decision.

And then, further, on that -- going down that paragraph, it says, "A verdict may never be influenced by sympathy, prejudice, or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with the rules of law."

Now, you look at Troy Brown in his suit and his bolo tie and you see his character witnesses who've testified on behalf of him. And you've got to think to yourself, you know, how can Troy Brown do this? Well, how can anybody do this? How can anybody do this? But the question here is is not why this happened. Motive is not an element. The State need not prove a motive to do this. So, why he did it doesn't matter. We'll never know why he did it. But we do know he did do it. We do know that there's no question about the fact that he did that.

Now, as far as the DNA, you decide if the presentation was sufficient to convince you. Now, every day thousands of people get on a jet airplane and fly all over the world. Now most, probably the vast majority of those people, don't understand what makes a jet engine work or the mechanics or the engineering of it, or how [p.540] the electronics of the radar works, but they still get on that plane and they fly. And the

reason they do that is because it is reliable. It is provable.

In this case, Mr. Lockie indicated, I don't know what happened here with this DNA. Well, I believe, if you followed the evidence, Mr. Lockie, I believe, was under the impression that Exhibit 10, the panties -- and I'm going to show you these panties -- these are part of the bloody panties that was -- these are the bloody panties that were taken out of Megan's trailer.

Now, for some reason, I believe Mr. Lockie may be a little bit confused about this, that when Officer Terry initially, prior to the preliminary examination of this trial, he took these panties out of this package. Because, recall, he testified that he put the red pajamas, blue sock, white underwear, and where he found them onto his evidence tag, and so he puts the underwear, the pink pajamas, and the sock into this bag. All right?

Then, this bag, with the underwear in it, and everything else which he carefully marked on here, was sent to the lab. At that time Maria Fassett took out the underwear, she laid it down, and then what she did is what Mr. Lockie was mistakenly thinking, she then took what is Exhibit 24, which is the cut-out from right here of the crotch, and what Mr. Lockie was pointing out to you -- And as Renee Romero testified to, she made a diagram -- and I'm not going to use the overhead, you can see this -- it says T-1, panties. See, this portion right here was cut out of these panties and placed in here. And these -- this section represents this area.

[p.541] Now, and there's nothing confusing about what Renee Romero did here. In July, when she got to the evidence, she tested, under microscopic analysis, these three areas. And she found out that the semen in those areas was too small. It was not large enough to test. However, subsequent, after the preliminary examination on the matter, being the professional that she is, she re-examined it.

She was asked at the preliminary examination, well, could there be more there? She said, I don't think so. She then went and looked and there she found the semen in the same section, not on -- from the panties that have always been with the police, but with a section that has remained with the lab all this time. There she found the semen with a four-plus. A large amount of semen. That is what she tested, not this. So the fact that, all right, there may be some other confusion with others here, don't you be confused with it.

Now, why is it that you can believe in this DNA? Aside, again, from the circumstantial evidence, all the other factors which show that it's Troy Brown, aside from the DNA, but what is it about the DNA? Well, you heard that Renee Romero is -- she testified concerning her qualifications and, and you'll have this, this is her resume where she lists everything, all her honors and organizations and whatnot.

And you heard, also, that she is a member of a national organization which is committed to the continuing testing and monitoring and quality control of DNA analysis. This is her job. This is what she does for a living. That's what the Washoe County Crime Lab does. That's the reason that such care was taken

from [p.542] finding, first of all, preserving the scene, and you saw the photographs of the scene.

Here, if you look at number seven, this is the photograph here of -- here are the pink pajamas that was in that one bag, and then right here is the underwear. So, it is a photograph to preserve how it looked when the police got there, and to maintain this record, so ultimately it could be shown to the trier of fact. That's the reason that that's done.

And then second of all, to take that evidence, very carefully, as Officer Terry did, put it into this bag with those other articles that were found here, then transport it under lock and key to the Carlin Evidence, then transport it under lock and key to the Washoe County Crime Lab where it's -- the integrity of this evidence was maintained. Why? Why is that?

Why did the State go to the trouble of showing every link along the way? Because if the State didn't, it wouldn't be admissible. The judge would say it's not coming in. You didn't show all the links in this. It would be objected to, but it wasn't.

Now, when I requested this Court to acknowledge Renee Romero as an expert in DNA comparison, there was no objection to it. There was no challenge to her qualifications.

Now, all right, so just a couple more points. Mr. Lockie asked you a couple of times, well, what is the fact that the -- whether or not the fact that Mr. -- Troy was walking here, well, who cares. And he would say is that sufficient evidence to convict beyond a reasonable doubt. Of course it's not. If that was the

[p.543] only evidence that we had we wouldn't be here. If the only evidence we had that he was wearing a black hat, black shirt, black jacket, and boots and jeans, we wouldn't be here.

If -- you can take each one of those, if that was all the evidence that we had, the fact that he knew Megan, the fact that he'd been at her house, the fact that he matched a description, if each one of those were by themselves and that's all the evidence there was saying that Troy Brown was a suspect in this case, we wouldn't be here. However, when you consider all of the facts, and you stack them on top of each other, the conclusion is truly inescapable.

Now, you will -- and as I indicated before, who could commit a crime like this? Well, as Troy sits there, it's difficult to imagine anybody committing a crime, and you're going to see these pictures here. Here's one of young Troy with his cowboy hat on. And here's one of young Troy, his graduation picture, he's a good- looking young man. He's happy there, he just graduated from high school. Here's one with young Troy and his happy family, and all his brothers and sisters and his mom and dad, and they're just as happy as can be. Here's one of Troy down on the farm with a beard. So -- so what, so what. The fact that he is a good-looking young man is not a basis to believe he didn't do this. A basis to believe he did do this was based on the overwhelming evidence of guilt.

Further, the fact that when he was examined, or questioned by Roy Ladd in Utah, just a few days after this -- Now, use your common sense. If he had nothing to do with this case -- nothing to [p.544] do with it, he knew he had nothing to do with it, and Roy Ladd

asked him, had you ever been in that -- that child's bedroom before? No. Why would I be in that kid's bedroom? Did he say that? He said, "I don't think so" or -- you spin that inflection any way you want to, I don't think so. Well, okay.

Well, Troy is it possible -- you were pretty drunk that night, you had ten kamikazes, ten beer chasers -- is it possible you could have been in there? It wasn't, No, I wasn't in there. It was, "I doubt it." "I don't think so."

Troy, do you remember everything that went on there? He says, "I've forgotten a lot." "I don't remember a lot." Not, absolutely I know for sure I left that bar and I went home and that's it, period, paragraph, end of story. No, Troy said, "I've thought about it and I've thought about it and I've thought until it's made me crazy.

We're not talking about whether or not he might have left his keys in his car two months ago where he says, Well, I might have, or, you know, I don't remember. Who cares, you know, whether you parked your car in one spot, do you remember doing it? I don't know.

Did you brutally rape and leave a nine-year-old child for dead, did you do that? Well, "I can't remember a lot." It's not, no, I didn't. I'll take any damn test you want me to take. He's asked will you take the DNA? Well, I'm not sure, you know about this. Well, Troy, it seems like you're kind of afraid of the results. "Yep."

And then his testimony, when he was talking to --

[p.545] MR. LOCKIE: Judge, that's not the question he was asked.

THE COURT: Well, I guess --

MR. LOCKIE: The question is very specific. It's in the record.

MR. SMITH: I --

THE COURT: I don't know if it is in the record. Do --

MR. LOCKIE: Yes, it is, your Honor. I --

THE COURT: Did you put the transcript in the evidence?

MR. SMITH: No, it wasn't.

MR. LOCKIE: No, but I read the question to him and he said it was the question that he asked.

THE COURT: The jury will be instructed to review the evidence to determine that. And if we need to, we'll play it back. At this point we can just have the counsel do the best of the recollections and, Mr. Smith, if it would help, maybe you could refer to the transcript so that you're accurate.

MR. SMITH: All right.

THE COURT: Otherwise, just move on.

MR. SMITH: All right. That's fine.

By MR. SMITH (continuing):

You recall what that evidence was, and you are the ones that decide what the evidence is anyway.

Now, also, at that time he says, well, I remember my way home because I was following a yellow line. And that's two or three days after the event. Now, he gets on the stand and it was a white line. You determine what -- why these inconsistencies.

Why is it that I got to think about this, I'm not sure, I [p.546] forgot a lot, I admit I don't remember a lot of it about what happened. Why? Because this is a crime that no one wants to think they could commit. No one would ever think about committing this kind of crime. Therefore, if you think you might have, you think about it until you go crazy. That's exactly what he said he did. "I've thought about it and I've thought about it and thought about it until I went crazy."

Now, the DNA. When you use the DNA, by itself, it's sufficient to prove beyond a shadow of a doubt that he committed this crime. But, what is it that, when you go back to the jury room and you go over the facts and you say, well, what about this, yes, and what about this, and how about this problem, and what about this?

Consider the fact that, what is the percentage that Troy Brown didn't commit this crime? Was it 75 percent? Are you 75 percent sure? Based on the DNA? 90 percent, 99, sometimes people use the phrase, I'm 99 percent sure about that. Well, in this case the evidence shows -- how sure can you be? 99.999967 percent sure.

Aside from believing this child that night, with horrible trauma, brutal pain and injuries, Troy Brown left something else. He left his semen. And with that semen, able to determine beyond a reasonable doubt, based on reliable scientific evidence that you heard that he committed this crime.

Ladies and gentlemen, the only -- based on this -- truly, the only fair, just, and equitable, and reasonable verdict in this case, with this overwhelming evidence is guilty of all counts.

I thank you very much.

[p.547] THE COURT: Bailiffs, please come forward. Take an oath from the clerk.

(Bailiffs sworn)

THE COURT: Okay. What we're going to do is send you into your jury room to begin your deliberations. As you recall from the instructions, you deliberate only with each other and only in the jury room. For example, if you go to lunch, you don't talk about it at lunch or dinner, you just talk about it only with the jurors, only in the jury room. The alternate will not be with you. She'll be outside in case we need to have her replace one of the jurors.

Finally, the original instructions will be given to you. In addition, you all have your copies. We need the original instructions back. And it's your original instructions that your foreperson will be dating and signing the verdicts. And you can tell they're the original ones. One, is I've signed it, and also, it's the

expensive paper. You know, you can kind of feel that. You've got the cheap paper there, see.

I need the original instructions and all the forms of verdict back. So, your foreperson should kind of care for the original documents. After you leave, we'll start gathering the evidence to take to you as soon as we can.

And concerning meals, there's a couple things you can do. We have some places you can order and we can bring food into you, and that way you can keep working in the jury room, or you can indicate if you'd like to go out and we'll take you to the finest restaurant within walking distance, so you can figure that out yourself.

With that said, I'm going to pause as we allow the jury to [p.548] remove themselves to the jury room. Make sure the alternate stays with the bailiffs. The jury will now retire and deliberate it's verdicts.

(Pause while jury exits the courtroom)

THE COURT: Please be seated. Is there any evidence that for any reason shouldn't go to the jury room that anybody know of?

MR. LOCKIE: Maybe just not the thermofaxes as I don't think that's necessary, but we got the hard copies, too.

THE COURT: All right. That's fair enough.

MR. SMITH: That's fair enough, Judge.

THE COURT: All right. If, Ms. Clerk, you would coordinate with the bailiffs to gather the evidence and take it to the jury room.

I'd ask that the counsel and the defendant be within 15 minutes of the courtroom. Now, if you'd also leave your phone numbers where you can be reached, with my bailiff, and also I'll ask the bailiff to inform you when they go to dinner, or lunch, so that you can do likewise. I assume, if you have a cellular phone or something, that would be helpful.

Anything else?

MR. SMITH: Not for the State, Judge.

MR. LOCKIE: Just on second thought, Judge, I would like the thermofaxes to go back, too, but just, you know, all clipped together.

THE COURT: All right.

MR. LOCKIE: I want the jury to see all the --

THE COURT: We'll clip them. Let's staple them together, [p.549] shall we?

MR. LOCKIE: That'd be fine.

THE COURT: Because the clips get lost. One staple. They'll go in there, everything goes in there.

Please make yourself available for court for a verdict or for sometimes they want to hear something.

Court's in recess.

(Court recessed at 12:52 P.M.)

[p.550] FRIDAY, SEPTEMBER 30, 1994, 6:12 P.M.

THE COURT: Please be seated. The record will reflect the presence of counsel and the defendant.

. . . . . .

Ladies and gentlemen, when we get a verdict back, we're required to have an actual roll call so that we can insure the record, and anybody looking at these proceedings later, that there was -- that the jurors who were sworn to try the matter actually were the same jurors who entered a verdict. So, as your name is called, please simply answer here. We are not asking for your verdict.

(Court Clerk called the roll of the jurors)

THE COURT: Ladies and gentlemen, the next question I'm going to ask you will be answered by your foreperson. Once again, we are not asking for your verdict, we are simply asking for your foreperson to indicate yes or no, whether or not you've reached a verdict.

Ladies and gentlemen of the jury, have you reached a verdict?

FOREPERSON: Yes, we have, your Honor.

THE COURT: Would you please hand the forms of verdict and the jury instructions to my bailiff. Thank you.

The record will reflect that the Court has had returned to it, the jury instructions and the eight

forms of verdict, four of which have been dated and signed by the jury's foreperson.

Ms. Clerk, you will read the verdicts into the record of this court.

(Court Clerk read the 4 verdicts into the record)

THE COURT: Mr. Lockie, do you wish to have the jury polled?

[p.551] MR. LOCKIE: Yes, your Honor.

THE COURT: Simply ask each juror if these are their true and correct verdicts.

(Jury polled)

THE COURT: Ladies and gentlemen, as it turns out, there is an additional task you have to undertake, which is rare in these cases. I'm not going to discuss it with you right now other than to tell you that it won't, hopefully, be too long, but I'm going to have to require that you once again go to the jury room.

There's an addition issue we have to present to you and I'll explain it to you in a few moments, and I know you weren't prepared for this, but we are approaching the end of it, but there is one additional thing we have to have you do for us.

So at this time I'm going to pause as all the jurors will exit. Now, I think I can at this point release the alternate. I don't think she could participate, in any case, in the sentencing. So, I'm going to release the alternate now.

Ma'am, you can stay and watch the proceedings or you can leave. Whichever you prefer.

I'm going to ask the jury to remove themselves once again to the jury room, and I'll try and get you right back into the courtroom and explain to you what's happening.

(Pause while jury exits the courtroom)

THE COURT: Okay. Following a conviction of NRS 200.366, when there is a requirement -- when one of the elements was substantial bodily harm, in this case the jury does sentence the defendant, as we find out. There are two possibilities for the jury to sentence [p.552] the defendant: life with the possibility of parole, or life without the possibility of parole.

Gentlemen, I've given you my proposed instructions on this matter. It will just take me a moment to prepare the final. I want to review them with you. I've got -- and I'll also allow you the opportunity to argue before counsel, unless you wanted to just submit it as it is, but it's up to you. But this is what I propose. Do you need additional time to look at this or can we go forward?

MR. SMITH: Judge, as far as the State is concerned, I would -- I believe that this instruction is a fair and accurate rendition of the law. And I would be satisfied with just submitting the instruction to the jury without further argument.

THE COURT: All right. But Mr. Lockie, what's your favor?

MR. LOCKIE: The instruction looks legally correct, however, we would like the chance to address the jury.

THE COURT: All right. Please look at Instructions number One, Two, and Three. Can we settle them on the record? I will go prepare finals, I'll represent to you number Two is our standard stock instruction. And so is number Three. The verdicts are simply adapted to the two things, but if we can settle -- Can we settle these on the record? Is there any additions or objections to these instructions, Mr. Smith?

MR. SMITH: None for -- no additional instructions, nor objections to these, Judge.

THE COURT: Mr. Lockie?

MR. LOCKIE: Those are fine, your Honor.

[p.553] THE COURT: All right. The defendant will be taken back into custody, will not be allowed to leave the courtroom. I'll take about five minutes to prepare an original of these and when I do, I'll alert the bailiff, he'll bring the jury back, I'll read these instructions and we'll go from there.

Court's in recess.

(Court recessed at 6:25 P.M. for 10 minutes)

THE COURT: Please be seated. The record will reflect the presence of counsel and the defendant. Counsel, will you stipulate to the presence of the jury?

MR. SMITH: For the State, Judge.

MR. LOCKIE: We will.

THE COURT: Okay. Ms. Clerk, I'd ask that you'd hand counsel one of these and then hand a copy to each juror.

Ladies and gentlemen, in my opening instruction I told you that you would not be concerned with sentencing. And as it turns out, this is one of the rare cases in Nevada law that you are responsible for sentencing. I will read this instruction to you. Once, again, it's my intent to read the instruction. If I err without telling you I've found a correction, please understand I'm trying to read these instructions to you.

(Court read the jury instructions to the jury)

THE COURT: The next two forms are very similar to what we did in the guilt phase in this matter. We have 1a, which is life without possibility of parole. 1b, life with possibility of parole after 10 years have been served, and 1b is two pages, keep that in mind. I notice there is a typo, the word "foreperson" came over to [p.554] the top of page 1b, but I don't think that should interfere with us.

Counsel, any problems?

MR. SMITH: If you strike it out, Judge, that's fine.

THE COURT: I'll strike it out on 1b and, simply your foreperson, Ms. Quist, should sign it. And I think that won't be a problem. At this time, I'm going to only go through it once.

Mr. Smith, I'm going to allow you first. There will not be a final rebuttal, and then Mr. Lockie.

Mr. Smith.

MR. SMITH: That's fine. Thank you, Judge.

STATE'S ARGUMENT

By MARSHALL S. SMITH:

Ladies and gentlemen, I'm not going to take much time. I know it's been a very long day for you and it's been a very taxing day for you. Not only today, but for the last number of days where you've had to listen and think very carefully about the evidence in this case.

This is, as the Court has indicated, a very unique proposition which you are in now. That is, that the Nevada legislature has determined that in a case like this -- the sentencing is generally done by the Judge. In this case, however, the legislature has determined that when a person is convicted of sexual assault causing substantial bodily injury, then it is to the jury to make the determination. You can imagine the reason for that, and the reason that would push legislation like this.

Now, and I'm not going to go over all the facts of the case [p.555] with you, I know you've been thinking about them exceedingly hard for the last five hours, other than to say that you heard the cry of anguish of the defendant when the verdict was rendered. You were not there to hear the cries of anguish of that child that night when she was brutally raped and sodomized.

You heard his family, their anguish and their grief, when you rendered the verdict. But you didn't hear the anguish of the mother that she suffered after this incident, and since this incident, nor the pain that Megan has suffered and will continue to suffer, most likely, for the rest of her life.

It's a very difficult decision. Rendering your verdict was a very difficult decision. You rendered a verdict based on the evidence which was proven to you beyond a reasonable doubt. The State would request, therefore, that you continue to do your duty and that you return a verdict, a sentencing verdict, of life imprisonment without the possibility of parole.

Now, Mr. Brown is a young man, and that seems like that would be too hard a punishment, but don't detach yourselves from the facts of this case. That child is going to live with that night for the rest of her life. The defendant should pay for that night with the rest of his life. You are not rendering this sentencing verdict simply for Megan, but you're also sending the message to this community that you will not tolerate this type of horror on children.

Thank you very much.

THE COURT: Mr. Lockie?

MR. LOCKIE: Thank you.

[p.556] DEFENDANT'S ARGUMENT

By DAVID B. LOCKIE:

Ladies and gentlemen, obviously it's a very different type situation for me, as Troy Brown's advocate, to now be standing before you in this present context. But I have had the opportunity to talk to Troy and he talks to you through me. And I would first like to say that he does, in fact, thank you for your service. He considers you all to be honest people and he knows that you came to this trial honestly.

In that sense, he accepts what you've decided. He understands that. He has no quarrel whatsoever with your service as jurors, and he knows that all of you answered the questions truthfully when you came to court, and that you have given this case fair and honest consideration and the best of your judgment.

You've heard me say, already, that we've all agreed that what happened to Megan this night, and we've all agreed that it's been a terrible thing this did happen. On the other hand, you do, at least -- at least you've had some window of opportunity to look and understand that Troy is a person who does have a family. He has been, at least, of good moral character. At least there's no evidence that he has done this to other children; that this is the case that you're deciding now.

And all he asks now is that you, once again, bring your honest discretion to the case. And he respectfully requests that you do return a verdict of life in prison, but that that verdict be with the possibility of parole.

First time he would be eligible would be after he's served at [p.557] least 10 years. That's when parole basic eligibility would begin. That doesn't mean that he would be released after 10 years, that means that

would be the first he could even go before a parole board and they would have an opportunity to look and see how he's done it prison and to evaluate him and his conduct and determine whether he would be a fit person to be considered for release under parole conditions, or whether he would not.

It's difficult to say what, you know, a person will be like 10 years from today. And it may be within your discretion to allow another tribunal, another board, to take another look at a man who's a young man now, in 10 years and see if he's possibly fit for release. It doesn't at all necessarily mean that he would automatically be release after 10 years. It doesn't mean that, it means that's the first he can come before a panel of people and be evaluated to determine whether he would be a fit person for release.

The other thing that he's respectfully requested of you is that you not spend a great deal of time deliberating. It's been a long and trying time for his family who've come and travelled a long ways. And he does respectfully request that you reach a decision as quickly as you possibly can, and that you return an honest judgment, promptly, and we can be finished with this case.

Thank you very much.

THE COURT: Thank you, Mr. Lockie.

Once again, the bailiffs are still under oath. You will take this jury to their jury room and the Court will await the verdict of the jury on sentencing. Once again, we will pause while the jury exits and goes to their jury room to deliberate.

(Pause while jury exits the courtroom)

THE COURT: Please remain near the courtroom. I don't think it's going to be very long.

Court's in recess.

(Court recessed at 6:43 P.M.)

THE COURT: Please be seated. The record will reflect the presence of the defendant and counsel. And Ms. Clerk, you'll take another roll call quickly, please.

Simply answer, here, when your name's called.

(Court Clerk called the roll of the jurors)

THE COURT: Ms. Foreperson, has the jury reached a verdict?

FOREPERSON: Yes, it has, your Honor.

THE COURT: Will you please hand it to the bailiff.

Okay. The record will reflect that the foreperson has returned to the Court, the instructions and the forms of verdict, one of which has been dated and signed.

Ms. Clerk, you will read the verdict into the record.

(Court Clerk read the verdict into the record)

THE COURT: Thank you. Mr. Smith, do you want the jury polled?

MR. SMITH: No, Judge.

THE COURT: All right. It's late, and I won't keep you any longer. We have these critique forms to help me and the attorneys. There is a form and an envelope -- one for Mr. Smith, one for Mr. Lockie and one for me. If you would do us the favor of filling out this form, I've asked you on the form not to sign it, not to [p.559] indicate who you are, and each of these go to use individually. We do not share them, so your letter to me would not be shared by Mr. Smith or Mr. Lockie. Your letter to Mr. Smith would not be shared with me or Mr. Lockie. It's an effort to get information back on how we can make the system work better. And the main thing is there's no rating involved here, it's just information back to individuals, the two attorneys and myself, to help improve our services in the criminal justice system.

It's been a long night. This is one of the most difficult trials, and I really, sincerely thank you for your services.

Another thought, from time to time you may be asked about your deliberations, and you may wonder whether or not you're allowed to talk about your deliberations. Well, a lot of questions in this country can be answered by, it's a free country, you do what you want to. You have the perfect right to just say, I'm not going to discuss them. I'd suggest that no real good's going to come to you for talking about it, but it's up to you, it's a free country.

If you have questions about the trial, and that you are very curious about, sometimes after a trial we talk, but I think it's better to get this over with. My phone

number is in the phone book and you're welcome to call me. I'll answer any questions you have to the extent I can. Anyway, I thank you for your services. You're released from duty.

Sentencing will be December the 12th at 2:30. The defendant is remanded to the custody of Elko County Sheriff.

Court's in recess.

(Court recessed at 7:02 P.M.)

[p.560] CERTIFICATE

I, Kathleen Miller, Official Recorder for the Fourth Judicial District of the State of Nevada, do hereby certify that the foregoing is a true, accurate, and complete transcript of the proceeding held in the captioned case in Elko County, Nevada on Septmeber 27, 28, 29, and 30th, 1994.

Dated this 7th day of August, 1995

/s/

Kathleen Miller
Official Court Recorder

127

No. 08-559

FILED
MAY 1 - 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

E. K. MCDANIEL, WARDEN and THE ATTORNEY GENERAL OF THE STATE OF NEVADA,
Petitioners,

v.

TROY BROWN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX, Volume 3

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FOR THE DISTRICT OF NEVADA
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Attorneys for Petitioners

May 2009

Petition for a Writ of Certiorari filed October 24, 2008
Petition for Writ of Certiorari granted January 26, 2009

TABLE OF CONTENTS

VOLUME 1

Relevant Docket Entries United States District Court for the District of Nevada (Reno) . . . . JA 1

Relevant Docket Entries United States Court of Appeals from the Ninth Circuit . . . . . JA 19

Fourth Judicial District Court, Criminal Information, filed July 20, 1994 . . . . . JA 28

Fourth Judicial District Court, Jury Trial Transcript Day 2, September 28, 1994 . . . . JA 34

VOLUME 2

Fourth Judicial District Court, Jury Trial Transcript Day 3, September 29, 1994 . . . JA 330

Fourth Judicial District Court, Jury Trial Transcript Day 4, September 30, 1994 . . . JA 588

VOLUME 3

Fourth Judicial District Court, Trial Exhibit H, Renee Romero Report, February 11, 1994 . JA 746

Fourth Judicial District Court, Trial Exhibit I, Renee Romero Report, June 6, 1994 . . . . . JA 749

Fourth Judicial District Court, Trial Exhibit G, Renee Romero Report, September 15, 1994 . . . . . JA 752

Fourth Judicial District Court, Exhibit 31, RFLP picture 100.000000 - 99.999976% . . JA 754

Fourth Judicial District Court, Exhibit 28A (same as J10), Renee Romero Curriculum Vitae . . . . . JA 755

Fourth Judicial District Court, Exhibit K, Wayne County Medical Clinic, Inc., physicial examination report . . . . . JA 761

Fourth Judicial District Court, Instructions 1-18, filed September 30, 1994 . . . . . JA 762

Fourth Judicial District Court, Instructions 1-3, filed September 30, 1994 . . . . . JA 781

Fourth Judicial District Court, Verdict 1A, filed September 30, 1994 . . . . . JA 783

Fourth Judicial District Court, Verdict 2A, filed September 30, 1994 . . . . . JA 784

Fourth Judicial District Court, Verdict 3B, filed September 30, 1994 . . . . . JA 785

Fourth Judicial District Court, Verdict 4A, filed September 30, 1994 . . . . . JA 786

Fourth Judicial District Court, Verdict 1B, filed September 30, 1994 . . . . . JA 787

Fourth Judicial District Court, Transcript of Proceedings, Sentencing Hearing, June 23, 1995 . . . . . JA 789

Supreme Court of Nevada, Appellant's Opening Brief, November 9, 1995 . . . . . JA 812

Supreme Court of Nevada, Respondent's Answering Brief, December 18, 1995 . . . . JA 852

Supreme Court of Nevada, Appellant's Reply Brief with Exhibit A (9 fold-out pages), January 29, 1996 . . . . . JA 878

Fourth Judicial District Court, Sentencing Rough Draft Transcript of Trial Proceedings, March 13, 1998 . . . . . JA 923

Fourth Judicial District Court, Petition for Writ of Habeas Corpus (Post-Conviction), August 30, 2001 . . . . . JA 1036

Fourth Judicial District Court, Points and Authorities In Suppport of Petition for Writ of Habeas Corpus (Post-Conviction) (2 fold-out pages), August 30, 2001 . . . . . JA 1081

Fourth Judicial District Court, Answer in Opposition to Petition for Writ of Habeas Corpus (Post Conviction) and Motion to Dismiss Petition, December 14, 2001 . . . . . JA 1160

VOLUME 4

Fourth Judicial District Court, Rough Draft Transcript of Prodeedings Motion to Dismiss and Writ of Habeas Corpus Hearing, Febraury 21, 2002 . . . . . JA 1202

Fourth Judicial District Court, Findings of Fact, Conclusions of Law, And Order Denying Writ of Habeas Corpus, March 7, 2002 ..... JA 1489

Supreme Court of Nevada, Order of Affirmance, November 21, 2003 ..... JA 1500

United States District Court, Response in Opposition to Motion to Dismiss, April 15, 2005 ..... JA 1507

United States District Court, Petitioner's Reply, March 1, 2006 ..... JA 1530

United States District Court, Exhibits 196, 197 and 198 to Motion to Expand Record, March 1, 2006 ..... JA 1552

United States District Court, Reply to Opposition to Motion to Expand the Record and Motion to Strike, May 30, 2006 ..... JA 1587

United States District Court, Order, July 31, 2006 ..... JA 1595

United States District Court, Motion For Reconsideration of Leave to File Supplemental Answer, August 21, 2006 ..... JA 1599

United States District Court, Response in Opposition to Motion for Reconsideration of Leave to File Supplemental Answer, September 22, 2006 ..... JA 1606

United States District Court, Order, October 18, 2006 ..... JA 1614

The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

Appendix A: Ninth Circuit Order Amending Opinion and Amended Opinion, dated July 21, 2008 ..... 1a

Appendix B: United States District Court, Judgment in a Civil Case, dated December 15, 2006 ..... 29a

Appendix C: United States District Court, Order on Merits, dated December 14, 2006 . 31a

Appendix D: United States District Court, Order, dated July 22, 2005 ..... 55a

Appendix E: Fourth Judicial District Court, Amended Judgment of Conviction, dated March 18, 1998 ..... 63a

Appendix F: Nevada Supreme Court Opinion, dated February 26, 1997 ..... 68a

Appendix G: Ninth Circuit Order denying rehearing, dated July 30, 2008 ..... 97a

Appendix H: Statutes 99a

Appendix I: Nevada Supreme Court, Appellant's Opening Brief, dated November 20, 1995 .. 111a

Appendix J: Nevada Supreme Court, Appellant's Reply Brief, dated March 4, 1996 ..... 122a

Appendix K: United States District Court, First Amended Petition for Writ of Habeas Corpus By A Person In State Custody Pursuant to 28 U.S.C. § 2254, dated November 12, 2004 .. 130a

Appendix L: United States District Court, Motion to Dismiss, dated March 28, 2005 . 175a

Appendix M: United States District Court, Answer, dated October 19, 2005 ..... 186a

Appendix N: United States District Court, Motion to Expand Record, dated March 1, 2006 ..... 219a

Appendix O: United States District Court, Opposition to Motion to Expand Record and Motion to Strike, dated March 30, 2006 ... 222a

WASHOE COUNTY SHERIFF'S OFFICE
VINCENT G. SWINNEY, SHERIFF
FORENSIC SCIENCE DIVISION
911 PARR BLVD.
RENO, NV 89512-1000

02/11/94

LABORATORY NUMBER:	L0277-94-A
AGENCY:	CARLIN P.D.
AGENCY CASE #:	0194-0070
SUSPECT:	BROWN, TROY
VICTIM:	ALLRED, MEGAN
PERSON REQUESTING:	ROY LADD-ELKO PD
DATE OF SUBMISSION:	02/08/94
OFFENSE:	SEXUAL ASSAULT

Received from WCSO EVIDENCE SECTION, on 02/03/94

The submitted items were identified as:

1. Blood standard from Allred, Megan
2. Blood Standard from Brown, Troy
3. #14 T_1 panties from Allred, Megan
4. #14 T_1 and T_2 pajamas
5. R03692 vaginal swabs from Allred, Megan
6. R03692 gauze pad

RESULTS OF EXAMINATION:

The above items of evidence (3-6) were differentially extracted and semen was identified on all of the items. DNA was isolated from the above items and subjected to PCR amplification.

Examination at the HLA DQ- genetic loci gave the following results:

ALLRED	BROWN	EPITHELIAL PANTIES
3,4	3,3	3,3

SPERM PANTIES	EPITHELIAL PAJAMAS	SPERM PAJAMAS
3,3	3,4	3,3

No results were obtained on the remaining items of evidence at this time. A stipulation is required to consume the remaining vaginal swab for RFLP testing. Based on the above results Troy Brown is consistent with being the source of the sperm fraction from the stain on the panties and the pajamas. The frequency of occurrence of a 3,3 in the Caucasian population is 4.4%.

Additional testing will begin when a stipulation is obtained and will require a minimum of three months to complete.

/s/_____
ANALYST
RENEE L. ROMERO, CRIMINALIST

Marked for Identification

Defendant H
Case No. 5833 Criminal
sp Clerk

Offered Admitted
Date_____

WASHOE COUNTY SHERIFF'S OFFICE
VINCENT G. SWINNEY, SHERIFF
FORENSIC SCIENCE DIVISION
911 PARR BLVD.
RENO, NV 89512-1000

06/06/94

LABORATORY NUMBER:	L0277-94-A (SUPPLEMENTAL REPORT)
AGENCY:	CARLIN P. D.
AGENCY CASE #:	0194-0070
SUSPECT:	BROWN, TROY
VICTIM:	ALLRED, MEGAN
PERSON REQUESTING:	ROY LADD-ELKO PD
DATE OF SUBMISSION:	02/08/94
OFFENSE:	SEXUAL ASSAULT

1. Blood standard from Allred, Megan
2. Blood Standard from Brown, Troy
3. #14 T_1 panties from Allred, Megan
4. #14 T_1 and T_2 pajamas
5. R03692 vaginal swabs from Allred, Megan
6. R03692 gauze pad

RESULTS OF EXAMINATION:

The above items of evidence (3-6) were differentially extracted and semen was identified on all of the items. DNA was isolated from the above items and subjected to PCR amplification. Examination at six different genetic loci gave the following results:

	HLA DQ∝	LDLR	GYPA	HBGG	D7S8	GC
ALLRED	3,4	AB	BB	AB	AA	CC
BROWN	3,3	AB	AA	BB	AB	AA
EPITHELIAL PANTIES	3,4	AB	BB	AB	AA	CC
SPERM PANTIES	3,3	AB	AA	BB	AB	AA
EPITHELIAL PAJAMAS	3,4					
SPERM PAJAMAS	3,3					

No results were obtained on the remaining items of evidence at this time. Based on the above results Troy Brown is consistent with being the source of the sperm fraction from the stain on the panties and the pajamas. The frequency of occurrence of a 3,3 is 1 in 22 in the Caucasian population, 1 in 110 in the Black population and 1 in 4 in the Hispanic population. The frequency of occurrence of the pattern from all six markers obtained for the standard from Troy Brown and the sperm fraction from the panties is 1 in 18,900 in the Caucasian population, 1 in 2,460,000 in the Black population and 1 in 4,800 in the Hispanic population.

The statistics were calculated using the population data available through Roche Molecular Systems.

/s/ _____
ANALYST
RENEE L. ROMERO, CRIMINALIST

Marked for Identification

Defendant I
Case No. 5833 Criminal
sp Clerk
Offered Admitted
Date _____

WASHOE COUNTY SHERIFF'S OFFICE
VINCENT G. SWINNEY, SHERIFF
FORENSIC SCIENCE DIVISION
911 PARR BLVD.
RENO, NV 89512-1000

09/15/94

LABORATORY NUMBER:	L0277-94-1
AGENCY:	CARLIN P.D.
AGENCY CASE #:	0194-0070
SUSPECT:	BROWN, TROY
VICTIM:	ALLRED, MEGAN
PERSON REQUESTING:	ROY LADD-ELKO PO
DATE OF SUBMISS1ON:	02/08/94
OFFENSE:	SEXUAL ASSAULT

The submitted items were identified as:

Blood standard from Megan Allred
Blood Standard from Troy Brown
#14 T-1 Panties from Megan Allred

RESULTS OF EXAMINATION:

High molecular weight DNA was isolated from the above items and processed with the Hae III restriction enzyme. DNA fragments for five polymorphic loci were measured: D2S44 (YNII24), D4S139 (PII30), D10S28 (TBQ7), D14S13 (CMM1O1), and D17S79 (V1).

Examination of the DNA fragments from the sperm fraction from the panties shows that each fragment matches the comparison sample from Troy Brown.

While this analysis does not constitute an absolute identification of the suspect Troy Brown as being the source of the sperm fraction from the panties, the frequency of this matching pattern is rarer than 1 in 3,000,000 in the Caucasian, Black, and Hispanic populations. This statistic was calculated using the "Ceiling Principle" as recommended in the 1992 National Research Council Report. This method of statistical analysis assumes an arbitrary minimum frequency of 10% for each DNA fragment and results in conservative estimates.

/s/ _____
ANALYST
RENEE L. ROMERO, CRIMINALIST

Marked for Identification

Defendant G
Case No. 5833 Criminal
sp Clerk
Offered Admitted
Date 9-29-94

JA 754

Exhibit 31

RFLP

100.000000

- 99.999967%

.000033

Brother

10000

99.982

.02

RENEE ROMERO
Wesley Drive
Reno, NV 89503
(702) 746-3184

EDUCATION:

1/90 - Present

Masters of Science, Cell and Molecular Biology
24 Credits completed, Thesis project required
University of Nevada, Reno, Nevada
Emphasis: DNA Technology

9/84 - 6/88

Bachelor of Arts in Chemistry with the fulfillment of Bachelor of Science in Criminalistics, June 1988
Michigan State University, East Lansing, MI
Emphasis: Forensic Laboratory Work, Chemistry and Criminal Justice

TRAINING:

3/29/93 - 4/2/93

Forensic Science Research and Training Center
FBI Academy
Quantico, Virginia
The Second International Symposium on The Forensic Aspects of DNA Analysis.

11/16/92-11/20/92

Forensic Science Research and Training Center
FBI Academy
Quantico, Virginia Advanced Aspects of Forensic DNA Analysis School

11/30/92-12/9/92

The Perkin-Elmer Corporation
Forensic Training Program
Amplitype HIA-DQ alpha Forensic DNA Amplification and Typing Workshop
Alameda, California

1/13/92 - 2/8/92

Forensic Science Research and Training Center
FBI Academy (University of Virginia 6 Grad. Credits)
Quantico, Virginia
Forensic Appl. of DNA
Lab Appl. of DNA

6/24/91 - 6/28/91

Forensic Science Research and Training Center
FBI Academy
Quantico, Virginia
An International Symposium on the Forensic Aspects of Trace Evidence

9/90 - 12/90

Washoe County Sheriff's Office/ University of Nevada, Reno
Reno, Nevada

DNA laboratory rotation
Emphasis: RFLP analysis

10/24/90

Southwest Association of Forensic Science
Tucson, Arizona
Serial Numbers Restoration

10/2 - 10/6/89

Bureau of Alcohol, Tobacco, and Firearms
Rockville, Maryland
Arson Accelerant Detection and Identification

7/31 - 8/4/89

California Criminalistics Institute
Sacramento, California
Hairs and Fibers Identification

6/88 - 9/88

Washoe County Sheriff's Office
Reno, Nevada
Criminalist Intern
Emphasis: Controlled substances and crime scene investigation

EMPLOYMENT:

3/89 - Present

Washoe County Sheriff's Office
Forensic Science Division
Reno, Nevada
CRIMINALIST

Currently responsible for DNA analysis and development. Have been cross trained in controlled substance identification and several aspects of trace evidence.

TEACHING APPOINTMENTS:

3/93 University of Nevada, Reno
Reno, Nevada
Guest Speaker-DNA Evidence

7/92 National Judicial College
Reno, Nevada
DNA Technology

7/92 Nevada Highway Patrol Crime Scene Investigation
Reno, Nevada
Evidence; Hair and DNA

12/90 Arson Investigation III
Carson City, Nevada
Arson Accelerant Collection and Identification

8/90 Crime Scene Investigation School
Reno, Nevada
Controlled Substance Collection, Packaging, and Identification

8/89 Crime Scene Investigation School

Reno, Nevada
Controlled Substance Collection, Packaging, and Identification

ORGANIZATIONS:

1988-1991	Trainee Affiliate, American Academy of Forensic Science
1992-1994	Provisional Member, American Academy of Forensic Science
1993-present	Technical Working Group DNA Analysis Methods

PUBLICATIONS:

Shipp, E., **Roelofs, R.**, Togneri, E., Wright, R., Atkinson. D. and Henry, B. (1992). Effects of Argon Laser Light, Alternate Light Source and Cyanoacrylate Fuming on DNA Typing of Human Bloodstains. The Journal of Forensic Science (Jan, 1993).

ABSTRACTS:

Roelofs, R., Shipp, E., Togneri, E., Wright, R. Atkinson, D. and Henry, B. (5/1992). Effects of Argon Laser Light, Alternate Light Source and Cyanoacrylate Fuming on DNA Typing of Human Bloodstains. Northwest Association of Forensic Scientists, Reno Nevada.

Roelofs-Romero, R., Shipp, E., Togneri, E., Wright, R., Atkinson, D., and Henry, B.

(3/1993). Effects of Fingerprint Enhancement Techniques on DNA Analysis by Restriction Fragment Length Polymorphism (RFLP) and Polymerase Chain Reaction (PCR) Methods. The Second International Symposium on The Forensic Aspects of DNA Analysis. FBI Academy, Quantico, Virginia.

Romero, R., Fassett, M., (2/1992). Effects of Various Laundering Conditions and Substrate Materials on the Results of Presumptive, Species Identification and HLA DQα Typing of Bloodstains (part II). The American Academy of Forensic Sciences 46th Annual Meeting. San Antonio, Texas.

JA 761

EXHIBIT K

94 WED 13:54 LOA UT FAX NO. 18018362479 P.01

David Locke

WAYNE COUNTY MEDICAL CLINIC, INC.
P.O. BOX 303
BICKNELL, UTAH 84715
Phone 425-3744

Jeffery J. Brown, D.O.
962715020

Richard B. Nay, M.D.
AN 2228294

Cory L. Britton, PAC
2243014

Von S. Pratt, M.D.
AP7046851

[illegible] PAC

NAME Troy Brown AGE ____ DATE 2/2/94

ADDRESS _____ CITY _____ UTAH

Rx

Was examined on 2-2-94 & found to be free of any & all abrasions, scratches, bruises &/or lacerations. Total body.

Refill _____ Times

_____ M.D.
Dispense as Written

/s/ _____ M.D.
Substitution Pormissible

In the District Court of the Fourth Judicial District of the State of Nevada, in and for the County of Elko

Case No. 5833
Dept. I

[Filed September 30, 1994]

THE STATE OF NEVADA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
TROY DON BROWN,	)
	)
Defendant.	)
	)

INSTRUCTION NO. 1

LADIES AND GENTLEMEN OF THE JURY:

This instruction is being read to you now in order to assist you in hearing the case. Additional instructions will be read to you at the close of the case. The instruction that I am now reading to you will not be read again at the close of the case, however all of the instructions, including this one, will be reduced to writing and provided to you for your review during your deliberations.

This is a criminal case. It was commenced by the State of Nevada, which I may sometimes refer to as "the State." The State is represented by Marshall

Smith, whom I may sometimes refer to as "the prosecutor." The defendant is represented by David Lockie, whom I may sometimes refer to as "defense counsel."

This case is based upon the criminal information which has been read to you by the court clerk. The criminal information is simply a charge and is not in any sense evidence of the allegations it contains.

The defendant has plead "not guilty" to the criminal information. The State, therefore, has the burden of proving the defendant's guilt beyond a reasonable doubt. The purpose of the trial is to determine whether the State can meet this burden.

It is my duty as judge to instruct you in the law that applies to this case. It is your duty as jurors to follow these instructions and to apply the rules of law to the facts as you find them from the evidence. You must not be concerned with wisdom of any rule of law stated in these instructions. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your oath to base a verdict upon any other view of the law than that given in the instructions of the Court.

The evidence which you are to consider in this case consists of the testimony of the witnesses, the exhibits, and any facts admitted or agreed to by counsel. Statements, arguments and opinions of counsel are not evidence in the case. However, if the attorneys stipulate as to the existence of a fact, you must accept the stipulation as evidence and regard that fact as proved.

You must not speculate to be true any insinuations suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer. You must disregard any evidence to which an objection was sustained by the Court and any evidence ordered stricken by the Court. Anything you may have seen or heard outside the courtroom is not evidence and must also be disregarded.

The personal opinions or beliefs of the attorneys are not evidence. I have admonished the attorneys not to inject their personal opinions or beliefs during the trial. If you sense that any attorney has given his personal opinion or belief on any issue during this trial, I admonish you to disregard such comment. The attorneys represent their clients and they will do so to the best of their abilities. The opinions and beliefs they state during the trial are the positions of their clients, not their own.

I have also admonished the attorneys not to curry favor with the jurors, and I admonish you not to consider any act or statement by the attorneys which appear to flatter or compliment you. The attorneys have been instructed by the Court to avoid communicating with the jurors. Please understand that the attorneys are obeying my order and that they do not intend to be rude or disrespectful to you during the trial.

You must decide all questions of fact in this case from the evidence received in this trial and not from any other source. You must not make any independent investigation of the facts or the law or consider or discuss facts as to which there is no evidence. This

means, for example, that you must not on your own visit the scene, conduct experiments, or consult reference works for additional information.

Although you are to consider only the evidence in the case in reaching a verdict, you must bring to the consideration of the evidence your everyday common sense and judgment as reasonable men and women. Thus, you are not limited solely to what you see and hear as the witnesses testify. You may draw reasonable inferences from the evidence which you feel are justified in light of common experience, keeping in mind that such inferences should not be based on speculation or guess. A verdict may never be influenced by sympathy, prejudice or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law.

The attorneys may sometimes present objections to some of the testimony or other evidence. It is the duty of a lawyer to object to evidence which that lawyer believes may not properly be offered, and you should not be prejudiced in any way against a lawyer who makes objections or against the party that lawyer represents. At times I may sustain objections, or direct that you disregard certain testimony or exhibits. You must not consider any evidence to which an objection has been sustained or which I have instructed you to disregard.

No statement, ruling, remark or comment which I may make during the course of the trial is intended to indicate my opinion as to how you should decide the facts. At times I may ask questions of witnesses. If I do so, it is for the purpose of bringing out matters which

I feel should be brought out and not in any way to indicate my opinion about the facts or to indicate the weight I feel you should give the testimony of the witnesses. I may also find it necessary to admonish the lawyers and if I do, you should not show prejudice toward a lawyer or the lawyer's client because I have found it necessary to admonish him.

If, during this trial, I say or do anything which suggests to you that I am inclined to favor the claims or position of any party, you will not be influenced by any such suggestion. I have not expressed, nor intend to express, nor do I intend to intimate, any opinion as to which witnesses are or are not worthy of belief, what facts are or are not established, or what inference should be drawn from the evidence. If any expression of mine seems to indicate an opinion relating to any of these matters, I instruct you to disregard it.

There are two kinds of evidence; direct and circumstantial. Direct evidence is direct proof of a fact, such as testimony of an eyewitness. Circumstantial evidence is indirect evidence, that is, proof of a chain of facts from which you could find that another fact exists, even though it has not been proved directly. You are entitled to consider both kinds of evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence. It is for you to decide whether a fact has been proved by circumstantial evidence.

In determining whether any proposition has been proved, you should consider all of the evidence bearing on the question without regard to which party produced it.

The credibility or "believability" of a witness should be determined by his or her manner upon the stand, his or her relationship to the parties, his or her fears, motives, interests or feelings, his or her opportunity to have observed the matter to which he or she testified, the reasonableness of his or her statements and the strength or weakness of his or her recollections. If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of his testimony which is not proved by other evidence.

Discrepancies in a witness's testimony or between his testimony and that of others, if there are any discrepancies, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innocent misrecollection is not uncommon. It is a fact, also, that two persons witnessing an incident or transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing it significance.

An attorney has a right to interview a witness for the purpose of learning what testimony the witness will give. The fact that the witness has talked to an attorney and told him what he would testify to does not, by itself, reflect adversely on the truth of the testimony of the witness.

The trial will proceed in the following order:

First: The prosecutor will make an opening statement. Defense counsel may make an opening statement following the prosecutor's opening statement or may reserve it until the close of the

prosecutor's evidence. What is said in the opening statements is not evidence. The statements simply serve the purpose of an introduction to the evidence which the party making the statement intends to produce.

Second: The prosecutor will then introduce evidence in support of the charges.

Third: After the State has presented its evidence, defense counsel may present evidence but is not obliged to do so. The burden is always on the State to prove the defendant's guilt beyond a reasonable doubt. The law never imposes on the defendant in a criminal case the burden of calling any witnesses or introducing any evidence.

Fourth: After the evidence has been presented, I will then read to you the remaining jury instructions which instruct you on the applicable law.

Fifth: After I have read the instructions, the prosecutor and defense counsel have the opportunity to present oral arguments in support of their case. What is said in closing argument is not evidence, just as what is said in the opening statements is not evidence. The arguments are designed to present to you the contentions of the parties as to what the evidence has shown and what inferences may be drawn from the evidence. The prosecutor has the right to open and close the arguments.

Sixth: After the attorneys have completed their final arguments, I will then turn the case over to you for your deliberation. During your deliberations you will have all of the written jury instructions, including

this instruction, which I have read to you in order that you can review them during your deliberation. You will also have all exhibits which have been admitted into evidence in order that you can examine or review them during your deliberation. You will be instructed to deliberate with the purpose of reaching a verdict which must be agreed upon unanimously, by all twelve (12) jurors.

Until this case is submitted to you, you must not discuss it with anyone, not even with your fellow jurors. After the case is submitted, you must discuss it only in the jury room and only with your fellow jurors. It is important that you keep an open mind and not decide any issue in the case until the entire case has been submitted to you under instructions from this Court.

INSTRUCTION NO. 2

In order to prove the commission of the charged offense of Count I, SEXUAL ASSAULT ON A CHILD UNDER THE AGE OF 14 YEARS, CAUSING SUBSTANTIAL BODILY HARM, A FELONY AS DEFINED BY NRS 200.366, each of the following elements must be proven beyond a reasonable doubt:

1. That the defendant subjected another person under the age of 14 years to sexual penetration; and

2. Against that person's will; or

3. Under conditions in which the defendant knew or should have known the person was mentally or physically incapable of resisting or understanding the nature of the defendant's conduct; and

4. Resulting in substantial bodily harm to that person.

As used in this instruction, "sexual penetration" means any intrusion, however slight, of any part of a person's body, and includes sexual intercourse in its ordinary meaning.

As used in this instruction, "substantial bodily harm" means:

1. Bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ;

2. Prolonged physical pain.

The failure to prove any element beyond a reasonable doubt must result in a verdict of "Not Guilty" for Count I.

INSTRUCTION NO. 3

In order to prove the commission of the charged offense of Count II, SEXUAL ASSAULT ON A CHILD UNDER THE AGE OF 14 YEARS, A FELONY AS DEFINED BY NRS 200.366, each of the following elements must be proven beyond a reasonable doubt:

1. That the defendant subjected another person under the age of 14 years to sexual penetration; and

2. Against that person's will; or

3. Under conditions in which the defendant knew or should have known the person was mentally or physically incapable of resisting or understanding the nature of the defendant's conduct.

As used in this instruction, "sexual penetration" means any intrusion, however slight, of any part of a person's body, and includes sexual intercourse in its ordinary meaning.

The failure to prove any element beyond a reasonable doubt must result in a verdict of "Not Guilty" for Count II.

INSTRUCTION NO. 4

In order to prove the commission of Count III, ATTEMPTED MURDER, A FELONY AS DEFINED BY NRS 200.010, 200.020 and 193.330, each of the following elements must be proven beyond a reasonable doubt:

1. That the defendant did an act or acts;

2. Which tended but failed to kill a human being; and, [TLS 9/30/94]

3. That said acts were done with express malice, namely, with the deliberate intention unlawfully to kill.

Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof.

The failure to prove any element beyond a reasonable doubt must result in a verdict of "Not Guilty" for Count III.

INSTRUCTION NO. 5

In order to prove the commission of the charged offense of Count IV, ABUSE OR NEGLECT OF A CHILD UNDER 18, RESULTING IN SUBSTANTIAL MENTAL HARM, A FELONY AS DEFINED BY NRS 200.508, each of the following elements must be proven beyond a reasonable doubt:

(1) That the defendant did willfully;

(2) cause a child who was less than 18 years of age; and

(3) to suffer unjustifiable substantial mental harm as a result of abuse or neglect.

As used in this instruction, the term "abuse or neglect" means physical or mental injury of a nonaccidental nature, sexual abuse, sexual exploitation, negligent treatment or maltreatment of a child under circumstances which indicate that the child's health or welfare is harmed or threatened with harm.

As used in this instruction, the term "substantial mental harm" means an injury to the intellectual or psychological capacity or the emotional condition of a child as evidenced by an observable and substantial impairment of the ability of the child to function within her normal range of performance or behavior.

The word "willfully", when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act or to make the omission in question. The word does not require in its meaning any specific intent to violate law, or to injure another, or to acquire any advantage.

The failure to prove any element beyond a reasonable doubt must result in a verdict of "not guilty" for Count IV.

INSTRUCTION NO. 6

In every crime or public offense there must exist a union, or joint operation of act and intention.

Intention is manifested by the circumstances connected with the perpetration of the offense, and the sound mind and discretion of the person accused.

INSTRUCTION NO. 7

A defendant in a criminal action is presumed to be innocent until the contrary is proved; and in the case of a reasonable doubt whether the defendant's guilt is satisfactorily shown, the defendant is entitled to be acquitted.

INSTRUCTION NO. 8

A reasonable doubt is one based on reason. It is not a mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an

abiding conviction of the truth of a charge there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.

INSTRUCTION NO. 9

In evaluating the testimony of a child ten years of age or younger you should consider all of the factors surrounding the child's testimony, including the age of the child and any evidence regarding the child's level of cognitive development. Although, because of age and level of cognitive development, a child may perform differently as a witness from an adult, that does not mean that a child is any more or less credible a witness than an adult. You should not discount or distrust the testimony of a child solely because he or she is a child.

"Cognitive" means the child's ability to perceive, to understand, to remember, and to communicate any matter about which the child has knowledge.

INSTRUCTION NO. 10

A person who has special knowledge, skill, experience, training, or education in a particular science, profession or occupation may give his or her opinion as an expert as to any matter in which he or she is skilled. In determining the weight to be given such opinion, you should consider the qualifications and credibility of the expert and the reasons given for his or her opinion. You are not bound by such opinion. Give it the weight, if any, to which you deem it entitled.

A question has been asked in which an expert witness was told to assume that certain facts were true and to give an opinion based upon that assumption. This is called a hypothetical question. If any fact assumed in the question has not been established by the evidence, you should determine the effect of that omission upon the value of the opinion.

INSTRUCTION NO. 11

Neither side is required to call as witnesses all persons who may have been present at any of the events disclosed by the evidence or who may appear to have some knowledge of these events, or to produce all objects or documents mentioned by the evidence.

INSTRUCTION NO. 12

Evidence has been received which may tend to show the good character of the defendant for those traits ordinarily involved in the commission of a crime, such as that charged in this case.

If the defendant's character as to certain traits has not been discussed among those who know him, you may infer from the absence of such discussion that the defendant's character in those respects is good.

Good character for the traits involved in the commission of the crime charged may be sufficient by itself to raise a reasonable doubt as to the guilt of a defendant. It may be reasoned that a person of good character as to such traits would not be likely to commit the crime of which the defendant is charged.

INSTRUCTION NO. 13

A statement made by a defendant other than at this trial may be an admission.

An admission is a statement by a defendant, which, by itself, is not sufficient to warrant an inference of guilt, but which tends to prove guilt when considered with the rest of the evidence.

You are the exclusive judges as to whether an admission was made by the defendant, and, if so, whether such statement is true, in whole, or, in part. If you should find that any such statement is entirely untrue, you must reject it. If you find it is true, in part, you may consider that part which you find to be true.

Evidence of an oral admission of the defendant ought to be viewed with caution.

INSTRUCTION NO. 14

It is your duty as jurors to consult with one another and to deliberate with a view toward reaching an agreement, if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the

opinion of the other jurors. Whatever your verdict is, it must be the product of a careful and impartial consideration of all the evidence in the case under the rules of law as given you by the Court.

INSTRUCTION NO. 15

If, during your deliberation, you should desire to be further informed on any point of law or hear again portions of the testimony, you must reduce your request to writing signed by the foreperson. The officer will then return you to court where the information sought will be given you in the presence of, and after notice to, the district attorney and the defendant and defense counsel.

Playbacks of testimony are time consuming and are not encouraged unless you deem it a necessity. Should you require a playback, you must carefully describe the testimony to be played back so that the court reporter can arrange her tapes. Remember, the Court is not at liberty to supplement the evidence.

INSTRUCTION NO. 16

1. In this case there are TWO (2) possible verdicts for Count I: SEXUAL ASSAULT ON A CHILD UNDER THE AGE OF 14, CAUSING SUBSTANTIAL BODILY HARM, A FELONY AS DEFINED BY NRS 200.366. Only one of the possible verdicts may be returned by you for Count I. Those forms of verdict are:

1A. GUILTY of Count 1.

1B. NOT GUILTY.

2. In this case there are TWO (2) possible verdicts for Count II: SEXUAL ASSAULT ON A CHILD UNDER THE AGE OF 14, A FELONY AS DEFINED BY NRS 200.366. Only one of the possible verdicts may be returned by you for Count II. Those forms of verdict are:

2A. GUILTY of Count II.

2B. NOT GUILTY.

3. In this case there are TWO (2) possible verdicts for Count III: ATTEMPTED MURDER, A FELONY AS DEFINED BY NRS 193.330, 200.010 AND 200.020. Only one of the possible verdicts may be returned by you for Count III. Those forms of verdict are:

3A. GUILTY of Count III.

3B. NOT GUILTY.

4. In this case there are TWO (2) possible verdicts for Count IV: ABUSE OR NEGLECT OF A CHILD UNDER 18, RESULTING IN SUBSTANTIAL MENTAL HARM, A FELONY AS DEFINED BY NRS 200.508, and 432B.070. Only one of the possible verdicts may be returned by you for Count IV. Those forms of verdict are:

4A. GUILTY of Count IV.

4B. NOT GUILTY.

The jury must return one verdict for each of the four counts.

INSTRUCTION NO. 17

Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence, as you understand it and remember it to be, and by the law as given you in these instructions, and return a verdict which, according to your reason and candid judgment, is just and proper.

INSTRUCTION NO. 18

When you retire to consider your verdict, you must select one of your number to act as foreperson, who will preside over your deliberation and will be your spokesman here in court.

During your deliberation, you will have all the exhibits which were admitted into evidence, these written instructions and verdict forms which has been prepared for your convenience.

In order to reach a verdict, all twelve jurors must agree to the decision. As soon as all of you have agreed upon a verdict for each count, you shall have it dated and signed by your foreperson and then shall return with it to this courtroom.

Instructions 1 through 18, Given by this Court, this 30th day of September, 1994.

/s/
THOMAS L. STRINGFIELD
District Judge

INSTRUCTION NO. 1

Although normally you must not discuss or consider the subject of penalty or punishment in your deliberations, since you have unanimously found that the defendant is guilty of Count I, SEXUAL ASSAULT ON A CHILD UNDER THE AGE OF 14 YEARS, CAUSING SUBSTANTIAL BODILY HARM, A FELONY AS DEFINED BY NRS 200.366, our legislature has stated that you must also unanimously determine the sentence to be imposed upon the defendant upon conviction of that particular crime. Sentencing on any of the other counts for which a guilty verdict has been returned will be determined by the Judge.

There are two possible sentences which may be imposed by you in this case, for which two verdict forms are provided:

1A. Imprisonment in the state prison for life, without possibility of parole; or

1B. Imprisonment in the state prison for life with possibility of parole, eligibility for which begins when a minimum of 10 years has been served.

You must unanimously decide which of these two sentences shall be imposed as a result of the "Guilty" verdict for Count I, and only for Count I.

INSTRUCTION NO. 2

Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by

showing the application thereof to the law; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence, as you understand it and remember it to be, and by the law as given you in these instructions, and return a verdict which, according to your reason and candid judgment, is just and proper.

11.03

INSTRUCTION NO 3

During your deliberation, you will have these written instructions and two verdict forms which has been prepared for your convenience. As soon as all of you have agreed upon one of the sentencing verdicts provided, you shall have it dated and signed by your foreperson and then shall return with it to this courtroom.

Sentencing instructions, 1 through 3, Given by this Court, this 30th day of September, 1994.

/s/
THOMAS L. STRINGFIELD
District Judge

In the District Court of the Fourth Judicial District of the State of Nevada, in and for the County of Elko

No. 5833
Dept. I

[Filed September 30, 1994]

THE STATE OF NEVADA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
TROY DON BROWN,	)
	)
Defendant.	)
	)

VERDICT NO. 1A

WE, THE JURY, duly impaneled to try this case, do hereby find the defendant, TROY DON BROWN, "GUILTY" of Count 1: SEXUAL ASSAULT ON A CHILD UNDER THE AGE OF 14 YEARS, CAUSING SUBSTANTIAL BODILY HARM, A FELONY AS DEFINED BY NRS 200.366.

DATED this 30th day of September, 1994.

/s/ Kaye Quist
FOREPERSON

In the District Court of the Fourth Judicial District of the State of Nevada, in and for the County of Elko

No. 5833
Dept. I

[Filed September 30, 1994]

THE STATE OF NEVADA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
TROY DON BROWN,	)
	)
Defendant.	)
	)

VERDICT NO. 2A

WE, THE JURY, duly impaneled to try this case, do hereby find the defendant, TROY DON BROWN, "GUILTY" of Count II: SEXUAL ASSAULT ON A CHILD UNDER THE AGE OF 14, A FELONY AS DEFINED BY NRS 200.366.

DATED this 30th day of September, 1994.

/s/ Kaye Quist
FOREPERSON

In the District Court of the Fourth Judicial District of the State of Nevada, in and for the County of Elko

No. 5833
Dept. I

[Filed September 30, 1994]

THE STATE OF NEVADA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
TROY DON BROWN,	)
	)
Defendant.	)
	)

VERDICT NO. 3B

WE, THE JURY, duly impaneled to try this case, do hereby find the defendant, TROY DON BROWN, "NOT GUILTY" of Count III.

DATED this 30th day of September, 1994.

/s/ Kaye Quist
FOREPERSON

In the District Court of the Fourth Judicial District of the State of Nevada, in and for the County of Elko

No. 5833
Dept. I

[Filed September 30, 1994]

THE STATE OF NEVADA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
TROY DON BROWN,	)
	)
Defendant.	)
	)

VERDICT NO. 4A

WE, THE JURY, duly impaneled to try this case, do hereby find the defendant, TROY DON BROWN, "GUILTY" of Count IV: ABUSE OR NEGLECT OF A CHILD UNDER 18, RESULTING IN SUBSTANTIAL MENTAL HARM, A FELONY AS DEFINED BY NRS 200.508, 432B.020 and 432B.070.

DATED this 30th day of September, 1994.

/s/ Kaye Quist
FOREPERSON

In the District Court of the Fourth Judicial District of the State of Nevada, in and for the County of Elko

No. 5833
Dept. I

[Filed September 30, 1994]

THE STATE OF NEVADA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
TROY DON BROWN,	)
	)
Defendant.	)
	)

VERDICT NO. 1B

WE, THE JURY, duly impaneled to try this case, having found the defendant, TROY DON BROWN, "GUILTY" of Count 1: SEXUAL ASSAULT ON A CHILD UNDER THE AGE OF 14 YEARS, CAUSING SUBSTANTIAL BODILY HARM, A FELONY AS DEFINED BY NRS 200.366, do hereby sentence him to:

IMPRISONMENT IN THE STATE PRISON FOR LIFE, WITH POSSIBILITY OF PAROLE, ELIGIBILITY FOR WHICH BEGINS WHEN A MINIMUM OF 10 YEARS HAS BEEN SERVED.

DATED this 30th day of September, 1994.

/s/ Kaye Quist
FOREPERSON

In the District Court of the
Fourth Judicial District of the State of Nevada,
in and for the County of Elko

[caption omitted in printing]

RECORDER'S TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE
THOMAS L. STRINGFIELD, DISTRICT JUDGE
FRIDAY, JUNE 23, 1995, 2:15 P.M.

SENTENCING HEARING

[p.2] THE COURT: Okay. This is a criminal action, number 5833, State of Nevada vs. Troy Don Brown. We have with us Mr. John McGimsey from the DA'S office, Mr. Robert Streif from the Division of Parole and Probation. The defendant is present, in custody, together with his attorney, Mr. David Lockie.

Some preliminary matters, I received a fax and then a follow-up letter from Dorothy Nash Holmes.

Did you get a copy of that, Mr. Lockie?

MR. LOCKIE: I did, Judge.

THE COURT: And that will be filed with the clerk here when we're done.

MR. LOCKIE: Is that letter addressed to me?

THE COURT: No, it's addressed to me.

MR. LOCKIE: I didn't get a copy of the one to you, then. I've got a letter from them that was to me.

THE COURT: Okay. This is a short letter and you can sure have a copy when we're done.

Mr. McGimsey, do you have a copy?

MR. McGIMSEY: I do not, your Honor.

THE COURT: I'll read it into the record. It's addressed to me, faxed, then mailed.

"Dear Judge Stringfield: This letter is to advise you that Donald K. Coppa, Esq., of Holmes and Coppa, have been retained by Troy Brown. Mr. Coppa is out of town until Monday, June 26th, and is unable to appear at the hearing scheduled for June 23rd, 1995.

[p.3] Matt Stermitz" -- is he here?

MR. LOCKIE: Yes.

MR. STERMITZ: Yes.

THE COURT: Oh, there you are.

"Matt Stermitz will be requesting a 60-day continuance from the Court to file a motion for a new trial. If you do not agree to the continuance then Mr. Coppa will substitute in for Mr. Lockie after the sentencing.

If you have any questions please do not hesitate to contact this office."

So, Mr. Stermitz, I'm not sure what your role is since no one's been substituted in for Mr. Lockie, but I assume -- Well, what are you here for? You tell me.

MR. STERMITZ: They had directed me to see if I could assist in getting a continuation because the short notice and I just communicated to Dave Lockie their desire that he seek the continuation because there wasn't sufficient time for me to get prepared to substitute in and potentially deal with sentencing issues. So, I just communicated to Dave Lockie that they're requesting a continuation. That's the extent of my role.

THE COURT: When you say short notice, you mean short notice from the firm of Holmes and Coppa –

MR. STERMITZ: Yes, sir.

THE COURT: -- because we've had this set for sentencing for quite some time.

Well, Mr. Lockie, do you want to say something about this?

MR. LOCKIE: Basically, the information that the Court's just [p.4] read into the record is the same information that I received. My contact has been limited to one fax communication, and then a phone call with Mr. Stermitz.

I understand that I'm being, essentially directed, and also requested by Mr. Brown, to ask the Court for a continuance of a 60-day period. Apparently, the attorney's been retained by Mr. Brown and what they intend to do is to prepare a motion for a new trial to the Court and so that these attorneys can have an opportunity to look into the case and to prepare that motion, they feel that a continuance would be in the interests of justice to allow that to happen, and so,

accordingly, I do make the request for a 60-day continuance.

THE COURT: Thank you.

Mr. McGimsey, I intend to deny it, would you state the position of District Attorney's office?

MR. McGIMSEY: Yes, your Honor. Mr. Woodbury, apparently, was contacted by the firm -- at least I've received information through the secretary -- and Mr. Woodbury's indicated here we are opposed to a continuance. We feel that that the conviction was in September of '94, eight months later it's been plenty of time, ample opportunity to make a motion for a new trial, and we feel that since the victim's mother is here, we feel the sense it should go forward.

THE COURT: Motion for continuance is denied. This has been delayed too long. I'm going to make a record for everybody to go back through these horrible events and so we know what we're dealing with here.

[p.5] The alleged -- the crime for which the defendant was convicted of occurred back on the late January of 1994. So, we're here, approximately a year and a half later. Of course, the defendant has been incarcerated during most of that time. He was brought to this court first by --

We might indicate that Mr. Lockie is not the first attorney for Mr. Brown. The first attorney was Mr. Brad Bittan, an excellent attorney in the Public Defender's office. He successfully requested, and retained this Court's order to have the defendant sent

to Lake's Crossing for a mental health examination. That was done.

Upon the return from Lake's Crossing, the Court, at the competency hearing, found the defendant competent, remanded him to Justice Court for a continuation of the proceedings. The Court also reduced his bail to -- or set bail, I never reduced the bail, I set bail at $100,000. No bail had been previously set in the case.

I am going to consider the Lake's Crossing document. At sentencing, I'm going to review portions of that with the defendant and the other persons here. I thought that they did an excellent job with Mr. Brown. He was down there for, it looks to me like, well over a month. It was probably over a month. In any case, the Lake's Crossing report -- these are, of course, mental health experts -- and they did an excellent job of telling us a lot about Mr. Troy Don Brown.

I guess one of the underlying things here that one cannot help but notice is that Mr. Brown and his family have declared [p.6] themselves to be the victims in this case, on some sort of idea that somehow they've been -- their son, Mr. Brown have been wrongfully accused and wrongfully convicted and so forth.

What's interesting about the Lake's Crossing report is there is good support for the fact that Mr. Brown is, in fact, a victim. Not the victim the way he thinks he is, or wants to believe he is, but he's a victim of parents who have subjected him to abuse and neglect all his life and I think his parents probably owe, or are as much responsible for this young man's situation here today as anyone.

Let me review that report. This is Mr. Brown discussing these matters with the mental health people at Lake's Crossing. First, I'm just picking out portions that I think are of significance. Of course, he had at least two DUI's in recent years. He participated in alcohol rehabilitation, but he says he was "disenchanted with the program because they were picking" on him -- the rehabilitation program.

He also says the Sheriff of, wherever he came from, picked on him and wanted to make an example out of him. Always the victim. Always the victim.

The defendant revealed to these people that he had been taken -- it says, "the client was taken for psychiatric -- or psychological consultation by his parents for two visits. They thought I was crazy. The client further defines that his parents were concerned due to his violence when intoxicated." This is his parents own observation of him as a young man.

It goes on, "He reports a reputation and personal awareness of [p.7] significant personality change in fighting and acting crazy."

Later in the report he indicates a girlfriend left him. And, of course, she left him to get even with him. Once again, the victim, the victim, the victim.

There were objective test, an MMPI, which were administered at the Lake's Crossing, which are -- the results of that are interesting. As results of the MMPI test administered to Mr. Brown, they found that he was defensive and unwilling to acknowledge psychological problems. "These individuals are typically immature, egocentric, moody, and insecure.

Sexual acting out and substantial abuse are likely. Very poor self-concept. Self-pitying, a lack of self-confidence."

Finally, the report goes into what I think is the real basis for Mr. Brown's status as a victim, not the one he's chosen, but the real status of it. He talks about his youth and being raised by these two parents. He states that his parents had been divorced and remarried twice during his lifetime. He states that his father has a drinking problem and gets drunk with his male friends weekly or monthly, and he's been doing it for 22 years.

He goes on to say "Troy reports his father beat his mother on weekly basis until his mother beat up his father and stabbed him with a fork in the foot. Troy says his father also beat the two older boys up when they tried to stop him from hitting their mother. Troy comes from a dysfunctional family in which alcoholism, domestic violence, and child abuse were present."

Later on in the report it says, "Troy, his father, and three brothers abuse and/or are alcohol dependant. The family is [p.8] dysfunctional due to Troy's father's heavy drinking and violent and abusive behavior.

It then talks about Troy's demeanor when dealing with him, which I think indicates that this is the one time that Mr. Brown's been honest about anything in this proceeding. The report states, "Mr. Brown was weeping, angry, sad during the interview when discussed his dysfunctional family origin. Troy feels close to both parents, but has only recently begun to get along with his father because his father has nearly

stopped drinking. He reports insomnia, alcohol abuse, and crying spells since childhood."

So, yes, Mr. Brown, you were a victim. Not the victim, the way you think, of some Carlin conspiracy. I frankly don't think the Carlin Police Department's capable of conspiring against you if they decided to.

After the Court received those reports we found him competent to stand trial. The matter went to trial on four counts. The defendant was found guilty of three of those four counts. The Count three, attempted murder, he was found not guilty of. He was found guilty, first, Count one, of sexual assault on a child under 14, resulting in substantial bodily harm.

This is one of the unique crimes in Nevada, where the jury sentences the defendant. The jury had the option of sentencing the defendant to life with or without probation. They showed leniency to the defendant, they sentenced him to life with the possibility of probation. Under our statutory law, that would be available to him after he serves ten years.

The remaining two counts are Count two, sexual assault. Let [p.9] me go back for a minute. Count one was rape -- a vaginal rape, which almost killed this young girl because she lost so much blood. So, Count one, vaginal rape, was with substantial bodily harm.

Count two is rectal rape, and that was simply a sexual assault. And the jury found him guilty of that. That's a completely separate crime, as it should be.

Count three was the attempted murder. The defendant was found not guilty of that.

Count four was felony abuse or neglect of a child with substantial harm. The jury found the defendant guilty of Count four.

The Court's role at this point, is to sentence the defendant on Counts two and four, and it's going to make a tremendous difference, Mr. Brown, that's why I'm going to talk to you about it, and I'm going to do something unusual here in a minute. It makes a tremendous difference how I treat Counts two and four. As I sit here today, I haven't seen you, of course, or talked to you for some time. But if you're going to continue to maintain --

First, as I sit here, there is no doubt in my mind whatsoever of your guilt. And there's no doubt in my mind that you know it. I believe you've taken up this position in defense of your own personality and dealing with your parents, who I think are are greatly responsible for your acts in this case.

However, if you're going to continue that position, and show no remorse, I can show you no pity. This, if I give you consecutive sentences on these remaining two convictions, I suspect that you will never be released from prison and you will spend your [p.10] entire life in prison. And that would be just under these facts, if you continue with your present position in this case.

Now, also for the record, after sentencing, this matter has been delayed for some time. It was delayed at the request of the defendant and his counsel. I've watched -- not spoken to, but watched the parents throughout these proceedings, and particularly the

mother, and I know it's been hard on the parents and they have been unable and unwilling to accept this.

When this matter was brought to me by the defense counsel, I discussed it with the District Attorney, I've never known of this being done before, but the defendant wanted additional DNA testing done because, obviously, they were convinced he was not guilty.

And I believe, Mr. Lockie, you located this lab, is that right?

MR. LOCKIE: Your Honor, the laboratory had been located by the Public Defender's office prior to my involvement in the case.

THE COURT: Well, in any case, I --

MR. LOCKIE: They were located by the defense, yes.

THE COURT: In any case, I didn't do it, and the State didn't do it. Somehow, the defendant got his own lab, the -- I might be mistaken on this, but I think I'm correct, and correct me if I'm wrong -- but the semen that was tested at trial was a match to the semen on the panties, the DNA was a match to the semen on the panties. Is that correct?

MR. LOCKIE: That's correct. There was a more limited DNA test done on the vaginal swab, but the RFLP testing, which was the testing that had astronomical probabilities was done off the [p.11] panties.

THE COURT: So, Mr. Lockie requested that we take a vaginal swab, is that correct?

MR. LOCKIE: That's correct, your Honor.

THE COURT: And send the vaginal swab, which, of course, is from the young girl herself, and send it to a lab that Mr. Lockie found for us. And I allowed it. I appropriated public funds for it and I granted the request for a continuance of sentencing.

I did so, primarily, to help the parents in dealing with it. And at some point of why we grant that, I required Mr. Lockie to talk to his parents -- talk to the parents and tell me exactly what it was that they were trying to accomplish.

What date was that document, Mr. Lockie, do you know?

MR. LOCKIE: The order?

THE COURT: No. The one signed by the parents. I required an affidavit be signed by them.

Do you remember that? Here we go. I think it's here.

Affidavit by Marion Brown, and an affidavit by Stella Brown. It was filed on November 21st. I'll read the mother's.

"I am the natural mother of Troy Don Brown. I have a great interest in the case. Along with my family, I'm very interested in obtaining an independent test of the DNA recovered from Megan

through testing conducted at a facility not affiliated with the State of Nevada, so that we may achieve peace of mind in knowing the certainty of whether Troy committed this crime."

Well, of course, after the results were done, they showed -- the results have been returned to the Court. Of course, all this [p.12] stuff is difficult to read, but we're becoming more familiar with it, all of us, as we learn of this new science. And what I gather from this, is you can continue to do further DNA comparisons, and it's a matter of how far you go, how big a number you want, and which type of test you use. Whatever testing they did, I don't claim to be an expert.

They did the testing that eliminated all possible person's with the exception of people like Mr. Brown. It was 99.99 percent. In other words, one one-hundredth -- or is it --

MR. LOCKIE: One in 10,000, whatever that is.

THE COURT: One in 10,000. Only one in 10,000 Caucasians have DNA like this. He could not be eliminated. It simply is just further proof of what we already knew from the first DNA testing, that this vicious crime was committed by Troy Don Brown. Of course, when you're a victim, you're a victim, you're a victim. So, of course, there is just a greater conspiracy and it never ends.

I do intend to sentence the defendant today. Let me remind counsel before we're done, there is a new statute in this area requiring that person's convicted of crimes such as Mr. Brown has been, are required to submit to DNA testing and that information is filed in

a central repository for the -- so that they'll -- it's an investigative tool, like fingerprints. I think it's 176.111. So my final order I'll, of course, have that.

In a moment, we're going to come back. I'm going to take a half hour break. And the reason I'm going to take this half hour break, Mr. Brown, I've not asked for you to say anything so far. I [p.13] feel comfortable that I understand you. And I feel comfortable I understand exactly where you're sitting now. I'm going to continue the matter for half an hour for you to talk to Mr. Lockie, not to your parents, but to Mr. Lockie, so that he can explain to you the significance of what I'm trying to convey to you.

If you are going to continue this status as a victim, if you are not man enough now, and this is not just going to hurt you, it's going to hurt the lives of your brothers, your two brothers' families, your other siblings, and your parents, particularly your mother, who I think has been a victim of a lot of things, like you have, too. They're going to carry -- as long as you carry it, they're going to carry it. As long as you take the position, they'll take the position.

I'm offering you the opportunity to be a man, and to explain exactly what happened that night, and to get it off your shoulders morally, spiritually, and every other way, and to take the burden off your parents shoulders. I will show you pity if you do that. But if you're going to be -- if you show no remorse, if you are unable to be reformed because of your attitude, then I cannot show you any pity.

Court will be in recess for one half-hour.

(Court recessed at 2:32 P.M. for 30 minutes)

THE COURT: Please be seated. The record will reflect that we are once again, here in the matter of State v. Brown, 5833. Once again, we have present with us, Mr. John McGimsey from the District Attorney's office, Mr. Robert Streif from the Division of Parole and Probation. The defendant's present, in custody, together with [p.14] his attorney, Mr. David Lockie. We've been in recess fro half an hour, the purpose of which was reflected on the earlier tape.

The defendant will stand and face the Court.

Mr. Brown, did you have an opportunity to review the pre-sentence report as prepared by the Division of Parole and Probation?

THE DEFENDANT: Yes, sir, I did.

THE COURT: On the last page of that document the Division recommends that you pay the $25 administrative fee; that for Count one, you've already been sentenced for that by the jury; for Count two that you be sentenced to life with the possibility of parole after the service of ten years, concurrent with Count one; and Count four, that you be sentenced to 20 years and that that sentence be consecutive with the two concurrent sentences of Count one and two.

Did you understand the recommendation of the Division?

THE DEFENDANT: Yes, sir, I did.

THE COURT: On the prior pages, they attempted to inform me about your past. Did you find any significant errors or omissions in that document?

THE DEFENDANT: No, sir, I didn't.

THE COURT: I'll be back with you -- Well, I'll talk to you now, before we go through the rest of the people.

Mr. Brown, are you, in fact, guilty of this crime?

THE DEFENDANT: No, sir, I'm not.

THE COURT: Please be seated.

Mr. McGimsey, what's the position of the State in this matter?

[p.15] MR. McGIMSEY: With the Court's permission, we'd like to call the mother of the child.

THE COURT: All right. Do you just have that one witness?

MR. McGIMSEY: Yes.

THE COURT: Okay. Ma'am, if you'd please come forward. Face the clerk, raise your right hand.

PAM ALLRED,

called as a witness by the plaintiff, was sworn and testified as follows:

THE COURT: Have a seat right here. That door will pop right open. If you'd just pull the door shut.

Just help me make a record, ma'am, what's your name?

THE WITNESS: Pam Allred.

THE COURT: Could you pull that microphone right up in front of you?

Pam, and your last name?

THE WITNESS: Allred.

THE COURT: Will you spell it for us, please?

THE WITNESS: A-L-L-R-E-D.

THE COURT: Okay. Mr. McGimsey?

DIRECT EXAMINATION

By JOHN S. McGIMSEY,

Q: Mrs. Allred, what is your relation to Megan Allred?

A: She's my daughter.

Q: And was she living with you at the time of the occurrence of these tragedies?

A: Yes, she was.

[p.16] Q: Has this had an adverse affect on Megan?

A: Yes, it has.

Q: And in what manner? Has it affected her emotionally?

A: She doesn't sleep at night. She has nightmares all the time. When she's outside playing with her friends, if they're riding their bikes and a car slows down to get around them, she's afraid somebody's going to jump out and get her.

Q: Has this -- has this affected you also, Mrs. Allred?

A: Yes. I don't sleep at night. I've lost so much weight that they've put me on medication to gain weight. I've developed ulcers. I don't trust anyone anymore.

Q: If the judge was to sentence the defendant to the maximum possible sentence, would that alleviate your concerns somewhat?

A: Yes, it would.

Q: Would you like to see the judge sentence the defendant to the maximum possible sentence?

A: Yes, I would.

Q: Do you have anything else that you'd like to tell the Court?

A: My daughter Megan wanted me to tell you that she wished he could have the electric chair. And if he can't, then she'd like to see him stay in jail for the rest of his life, and his body be kept there five years after,

so she doesn't have to worry about him coming near her again.

Q: Do you have anything else?

A: No.

MR. McGIMSEY: That's all we have, your Honor.

[p.17] THE COURT: Mr. Lockie.

CROSS-EXAMINATION

By DAVID B. LOCKIE:

Q: I know that Megan saw the psychiatrist over at, I think it was University Medical Center, when we were getting ready for this case?

A: Yeah.

Q: Has she been getting any help along those lines since the case was over?

A: Yes. She still goes to see a therapist twice a month.

Q: Are you getting some help financially for that?

A: Now we are, yeah.

Q: Does it seem to be doing her any good?

A: Yes. It's -- She's -- works things out, she's learning how to talk about things a little better.

Q: Are you getting any help over there, too?

A: I go with her, but there's a lot of things I can't talk about in front of her.

Q: All right. I was just wondering if it was helping you at all, too.

MR. LOCKIE: That's all I have, Judge.

THE COURT: I want to thank you for coming. And I don't know if it would help, but I guess one thing that I think you could tell you daughter is that this is the type of things that happen when people don't take care of their children, because that's what happened to this defendant. His parents robbed him of what he deserved -- a decent childhood. And this is what happens when you [p.18] are mean and brutal to children, they become mean and brutal.

Thank you for coming today.

Mr. McGimsey.

MR. McGIMSEY: Your Honor, it's the States recommendation that the defendant be sentenced to serve life without the possibility of parole for Count two, and for Count four, we recommend that he be sentenced to serve 20 years in the Nevada State Prison, and each of the sentences to run consecutive to one another.

THE COURT: Thank you.

Mr. Streif, did you have anything to add?

MR. STREIF: If you're going to consider credit for time served, figured that it would be approximately 360 days.

THE COURT: 360 days, thank you.

MR. STREIF: The Department stands on it's recommendation.

THE COURT: Thank you.

Mr. Lockie.

MR. LOCKIE: Thank you, your Honor. The case has been, obviously, considered at great length by this Court. And the Court's heard all the facts and it doesn't do me any good to talk about the facts any further.

The thing that has struck me is that the jury had an opportunity to conduct the sentencing in this case, and the jury had an option of giving him life with the possibility of parole or without. And that the jurors concluded that he deserved a sentence of life with the possibility as opposed to without.

That's not the only entity that's taken a look at this case, and an informed look at this case, and come to somewhat of a [p.19] similar conclusion. The other entity is the Division of Parole and Probation, who is supposed to be, at least, expert in developing recommendations to the Court which are consistent with the interests of criminal justice. And in this case, the Division of Parole and Probation has seen fit to make the recommendation to the Court that, at least the two life sentences run concurrently.

And so, it just seems that 12 people from the community have addressed the issue, as well as the Division of Parole and Probation, which is charged with the responsibility for making informed recommendations to the Court, and that those ought to carry some consideration to the Court in it's sentencing decision in this case, and would request that the Court impose the sentences concurrently.

THE COURT: The defendant will stand and face the Court.

Mr. Brown, what do you have to say, personally, to the Court?

THE DEFENDANT: Just that I know that I'm not guilty. I know there was evidence presented that -- that convinced 12 honest people of this community that I was, and all I'd like to say is I -- I'm not guilty.

THE COURT: That's what you know. What I know is that you're lying to me right now. You know you're guilty, you know what you did, and I feel like I'm dealing with a mad dog. A dog that has been brutalized by it's owners and regardless of the love and the care that anyone can give him, can never be changed. You have been destroyed, your life has been destroyed by your parents and it can no longer be repaired.

I am going to sentence you to the absolute maximum, and I do [p.20] it with the hopes that you will never be a free person for the rest of your life, because I do not believe you can be repaired and that you will never live a life as a decent human being.

The jury has ruled on Count one; Count two, the defendant will be sentenced to life with the possibility of parole after ten years; Count four, 20 years in Nevada State Prison, although with credit for 360 days, all three convictions will be consecutive, one after the other.

There will also be restitution. For what it's worth, the Court would note that all the attorneys in this case, of course, have been paid for by the taxpayers, but the restitution to the -- I'll review it with the -- there's been a recent case on restitution to law enforcement at sentencing, but there's the amount to restitution here of 32,000. I may have to reduce that. But I notice 25,000 of it, already, was to the Western Institute of In-Patient for in-patient care of the child. But it will not exceed the 32,000, and then I'll determine the accurate number of that.

Mr. Brown, I truly do feel sorry for you, but I will not subject another human being to be a victim of you and that is why I have done what I did.

Court's in recess.

(Court recessed at 3:14 P.M.)

CERTIFICATE

I, Kathleen Miller, Official Recorder for the Fourth Judicial District of the State of Nevada, do hereby certify that I was present at this proceeding and that the foregoing is a true, accurate, and complete transcript of the proceeding held in the captioned case in Elko County, Nevada on June 23, 1994.

Dated this 9th day of August, 1995.

/s/ Kathleen Miller
Kathleen Miller
Official Court Recorder

IN THE SUPREME COURT
OF THE STATE OF NEVADA

No. 27426

[Dated November 9, 1995]

TROY DON BROWN,	)
	)
Appellant	)
	)
vs.	)
	)
STATE OF NEVADA,	)
	)
Respondent.	)
	)

APPELLANT'S OPENING BRIEF

Appealed From Judgment of Conviction
The Fourth Judicial District
County of Elko
Case No. 5833

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii-v
STATEMENT OF THE ISSUES	2
STATEMENT OF THE CASE	3
STATEMENT OF THE FACTS	3-10
ARGUMENT	10-33
CONCLUSIONS	33-34
CERTIFICATE OF COMPLIANCE	35
CERTIFICATE OF MAILING	36

TABLE OF AUTHORITIES

PAGE

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Blockburger v. United States
284 U.S. 299, 52 S.Ct. 180,
76 L.Ed. 306 (1932) 19

Daubert v. Merrell Dow Pharmaceuticals, Inc.
__U.S. __, 113 S. Ct. 2786,
125 L.Ed2d 469 (1993) 26

Grady v. Corbin
495 U.S. 508, 110 S.Ct. 2084,
109 L.Ed2d 548 (1990) 19

No Carolina v. Pearce
395 U.S. 711, 89 S.Ct. 2072,
23 L.Ed 2d. 656 (1969) 17,19

United State v. Dixon
__U.S. __, 113 S.Ct. 2849
125 L.Ed.2d 556 19

FEDERAL CASES:

Frye v. United States
293 F.1013 (D.C. Cir. 1932) 25

States v. Wolfswinkel
44 F.3d 782 (9th Cir. 1995) 19

Thomas v. United States
368 F.2d 941 (5 Cir. 1966) 17

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993 F.2d 191,193 (9th Cir. 1993) 20

U.S. v. Rodriquez
498 F.2d 302 (5th Cir. 1974) 17

NEVADA STATE COURT CASES:

Athey v. State
106 Nev. 520, 797 P.2d 956 (1990) 20

Bushnell v. State
97 Nev. 591, P.2d (1981) 13

Costello v State
110 Nev. Adv. Op. 68 (May 23, 1994) 14

Deeds v. State
97 Nev. 216, 626 P.2d 271 (1981) 26

Fairman v. State
83 Nev. 137 425 P.2d 342 (1967) 22

Goodson v. State
98 Nev. 493,495-96, 654 P.2d 1006,
1007 (1988) 14

Hardeson v State
84 Nev. 125, 437 P.2d 868 (1968) 12,20

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97 Nev. 503,634 P.2d 1226 (1981) 19

McCraney v. State
110 Nev. Adv.Op. 28 (March 3, 1994) 12

Meador v. State
101 Nev. 765, 711 P.2d 852 (1985) 19

Randell v, State
109 Nev. 5, 846 P.2d 278 (1993) 13

Randolph v. Sheriff
93 Nev. 532, 569 P.2d 408 (1977) 22

Robinson v. State
110 Nev. Adv. Op. 133
(September 28, 1994) 21

Santillanes v. State
104 Nev. 699, 765 P.2d 1147 (1988) 25

Sipsas v. State
102 Nev. 119,125,
716 P.2d 231,235 (1986) 12

St. Pierre v Sheriff
90 Nev. 282, 524 P.2d 1278 (1974) 11

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97 Nev. 520, 634 P.2d 1214 (1981) 12

Talancon v. State
102 Nev. 294, 712 P.2d 764 (1986) 20

Thomas v. State
99 Nev. 757,758, 670 P.2d 111 (1983). 17

OTHER STATE CASES:

Caldwell v. State
393 S.E.2d 436 (Ga. 1990) 29

Commonwealth v. Lannigan
596 N.E.2d 311 (Mass. 1992) 29

In Re Lewallen
590 P.2d 383 (Ca. 1979) 17

People v. Barney
10 Cal.Rptr 2d 731 29

People v. Pizarro
10 Cal.App 4th 57 (1993) 29

State v. Anderson
853 P.2d 135, 142 (N. M. 1993) 28

State v. Bible
858 P.2d 1152, 1185 (Ariz 1993) 29

State v. Bloom
516 N.W.2d 159, 163 (Minn. 1994) 30

State v. Cauthron
846 P.2d 502 (Wash. 1993) 31

State v. Streich
638 A.2d 38 (Vt. 1995) 29

State v. Vandebogart,
616 A.2d 482, 494 (N.H. 1992) 28

Taylor v. State
889 P.2d 319 (Okla. 1995) 27

Yearty v State
805 P.2d 987 (Alaska 1991) 22

STATUTES:

NRS 178.484	11
NRS 200.366	21
NRS 200.366(2)(c)	20
NRS 200.508	21
NRS 200.508(2)	20,21
NRS 200.508(3)(a)	23

OTHER AUTHORITIES:

AB 199	24
Nev. Const. Art. 1 s 7	11
Nev. Const. Art. 1 s 8	19
S.C.R. 172	12
S.C.R. 179	12
U.S.C.A. Const. Amend. V	19

STATEMENT OF THE ISSUES

1. WAS IT ERROR TO DENY TROY BROWN BAIL IN A NON-CAPITAL CASE?

2. SHOULD TROY BROWN BE RE-SENTENCED?

3. IS IT DOUBLE JEOPARDY FOR TROY DON BROWN TO BE CONVICTED AND SENTENCED FOR BOTH SEXUAL ASSAULT OF A CHILD AND CHILD ABUSE BY MEANS OF SEXUAL ASSAULT?

4. WAS THE DNA EVIDENCE IMPROPERLY ADMITTED INTO EVIDENCE?

5. IS THE EVIDENCE SUFFICIENT TO CONVICT TROY BROWN?

STATEMENT OF THE CASE

This is an appeal from convictions in a criminal jury trial. Troy Don Brown ("Troy") was convicted of Count I: Sexual Assault of a Child Under Age 14 with Substantial Bodily Harm (vaginal penetration) (ROA 2, 386); Count II: Sexual Assault of a Child Under Age 14 (anal penetration) (ROA 2, 387); and Count IV: Child Abuse by Sexual Assault Causing Substantial Mental Harm (ROA 2, 391). Troy was acquitted of Count III: Attempted Murder (ROA 2, 390). The jury sentenced Troy to Life With the Possibility of Parole (after 10 years served) on Count I. After several continuances, the Court sentenced Troy on June 23, 1995. (ROA 1, 469-473). The judge gave Troy 30 minutes to think about admitting his guilt and showing remorse. When Troy refused to admit guilt, the court angrily sentenced him to the maximum

penalties on all counts and ordered all sentences to run, consecutively to one another. Troy received a sentence of Life With the Possibility of Parole (after serving 10 years) on Count II; and 20 years imprisonment, with credit for 360 days served, on Count IV. Restitution of $32,000 was ordered. Final Judgment was entered on June 28, 1995. (ROA 2, 476-481 (sic). Troy filed his Notice of Appeal on July 21, 1995. (ROA 2, 485-486 (sic).

By stipulation of the parties timely filed, and approved by the Court, Troy was given a 30-day extension of time to file his Opening Brief.

STATEMENT OF FACTS

In the early morning hours of Saturday, January 29, 1994, 9-year-old Megan Allred ("Megan") was sexually assaulted in the bedroom of her trailer at 1637 Puett St in Carlin. (ROA 4, TR 112) She and her 4-year-old sister ("Dallas") were home alone while her mother, Pam Henle ("Pam") was out drinking at a nearby bar (ROA 4, TR 111) and her step-father, Wayne Henle ("Wayne") was allegedly at work. (ROA 5, 1053-1246, TR 246) According to Megan, a blond man with curly hair, (ROA 4, TR 119, 370, 382) who smelled of cologne, (ROA 5, TR 385) entered her bedroom, raped her in her front and rear. (ROA 4, TR 112-113; ROA 5, TR 379). She "played dead" and he left. (ROA 4, TR 113) She then noticed that a lighted make-up mirror she used as a night light had been turned off and turned away from the room. (ROA 4, TR 123; ROA 5, TR 378) (Police later found one fingerprint on that make-up mirror). (ROA 5 TR 364-366) When she discovered she was bleeding profusely from between her legs, Megan telephoned her mom at the

bar between 12:00 to 12:30 a.m. (ROA 4 TR 88-89) Pam came home, called 911 and EMT-ambulance crew and Carlin Police arrived at 1:18 a.m.. (ROA 4, TR 156-157) Pam blurted out to them that her ex-husband had done this because he threatened "to fuck my daughter to get even with me". (ROA 5, TR 180, 406)

Megan described to the police her assailant as a man who knew Wayne, but could not identify him further. She said he wore a black coat "with a zipper for sure" (ROA 5, TR 379) because it scratched her, and a watch which scratched her face. (ROA 5, 380) She said the man wore no hat or cap (ROA 5, 382) and she saw that he had very little hair on top of his head. (ROA 4, TR 118-119; ROA 5, 378) When pressed by police to tell who the man "reminded her of" she said "Troy." the police asked who?" and Megan replied "Trent, yes Trent" (ROA 5, TR 383), indicating two brothers named Troy Brown, the appellant, and Trent Brown ("Trent") both of whom were friends of Wayne's and both of whom had been to the trailer to visit before. ROA 4, TR 126) Megan also said she bit her assailant on the hand. (ROA 4, TR 124)

At the hospital, examination confirmed sexual penetration both vaginally and anally. (ROA 5, TR 353) Megan suffered extensive blood loss and required a vaginal reconstruction. (ROA 5, TR 353) She had bruises on her neck consistent with choking, and a scratched face. A "sexual assault kit" was taken, including a vaginal smear because sperm was present, and a blood sample was taken. (ROA 5, TR 353-354) Debris was collected off Megan's teeth by the emergency room doctor because Megan said she bit her assailant. (ROA 5, TR 355) All physical and medical evidence was kept by Carlin Police and later taken to

Washoe County's Crime Lab. (ROA 5, TR 354) Later Megan was put in a Salt Lake City children's hospital for 12 days of therapy for her emotional condition. (ROA 4, TR 38-49)

By the late hours of January 28, 1994, 20 year-old Troy Brown was highly intoxicated. He had been "power drinking" (kamikazes chased with beer) steadily for several hours at two different bars. (ROA 5, TR 444-445) Because he did not own a watch, he could not say what time he left the bar. (ROA 5, 448) One bartender said 12:20 a.m. or so; (ROA 4, TR 133) another testified it was closer to 1:30 a.m. (ROA 5, TR 437-438) Troy was wearing dark jeans and a black satin coat with no zipper. Covering his sandy brown hair was a black cowboy hat with a silver rim. When Troy left the Peacock Bar he walked home, vomiting along the way. (ROA 5, TR 449) According to his roommate and younger brother, Travis, Troy got home at 1:32 a.m. (A policeman later determined Travis' digital clock was about 6 minutes fast). (ROA 4, TR 200) Troy put his pants and shirt into the washer to get rid of the vomit and went to bed. (ROA 4, TR 202-203; ROA 5, TR 449) Travis saw no blood on his brother anywhere. (ROA 4, TR 205)

At 5:00 a.m. on the morning of the assault, Carlin Police Officer Michael Terry ("Terry"), who had known Troy previously in their home-state of Utah, went to Troy's trailer at 1717 Puett St. (ROA 4, TR 202) He awoke and questioned Troy who was sleeping in only his underwear. (ROA 4, TR 170) No blood was seen and no bites were seen on Troy's hands. (ROA 4, TR 171) Later that day, after Troy had left for a previously-planned trip to his parent's house in Loa, Utah, police came back with a search warrant and took

Troy's bedding. (ROA 5, TR 452). Travis telephoned Troy in Utah to tell of the search warrant, so on Sunday, January 30, Troy telephoned Terry to inquire if he was wanted. Terry said "no". (ROA 5, TR pgs. 452-453) Nevertheless, rumors persisted, so four days later at a barbeque, Troy flagged down police and voluntarily went in for questioning by Carlin police on Thursday, February 3, 1994. (ROA 5, TR 455) He gave them his black coat and cowboy hat. (ROA 4, TR 252) He consistently denied any involvement, telling police he had been in two bars in Carlin that night with Pam and others, and that he had answered the telephone at the Peacock Bar when Megan called about 10:00 or 10:30 p.m. (ROA 4, TR 81-84; ROA 5, TR 446) (Megan and Dallas had been at Trent's at 1709 Puette Drive trailer babysitting for their 2 younger children while Trent and his wife, Raquel, were out drinking with Pam; Trent and Raquel left earlier and Raquel took Megan and Dallas back to their own trailer about 9:30 P.M. while Trent went to bed. (ROA 4, TR 71) Megan called to say they were now home.) (ROA 4, TR 81) Troy told Megan that Pam was at CG's Bar and he'd go deliver the message that she had called. (ROA 4, TR 115; ROA 5, TR 446) Troy went across the street but Pam was already on the phone with Megan by then so Troy returned to CG's Bar and kept drinking. (ROA 4, TR 81-82; ROA 5, TR 447) He stayed there drinking until he started getting sick and left. (ROA 5, TR 448)

In Utah, Troy's father suggested Troy see a doctor to confirm he had no bites or scratches on his body. He did so on Wednesday, February 2, 1994. (ROA 5, TR 453) (The police lost the doctor's letter Troy gave them but Troy testified to it at trial.) (ROA 5, TR 454)

While interviewing Troy on Thursday, February 3, the police lied to him saying they found his fingerprints in Megan's bedroom and that a car light had shone upon his face in front of her trailer, but Troy still denied involvement. (ROA 5, TR 479) Police then asked him to give blood for a DNA test and, mistrusting the police after their lies, he declined, saying he wanted to speak to a lawyer first. (ROA 5, TR 480) Troy was not arrested. He went back to his parents' home, returned to Carlin on Friday, February 4, and volunterily surrended to Police on Monday, February 7, 1994, when he learned of the warrant. He then volunteered to give blood but the police got a seizure warrant anyway for his blood and DNA tests were done. (ROA 5, TR 481)

While in a foster home in the days after the assault, Megan saw a TV report of Troy's arrest and yelled "I knew it was him. . .he sent me flowers. Police were called and they responded with a photo line-up containing Troy's photo but no one else Megan knew. She identified Troy Brown as someone she knew, but not as her assailant. (ROA 4, TR 125-12.6) She got the card from the flowers she'd received and showed it to police. It was signed "Trent and Raquel." (ROA 4, TR 125; ROA 5, TR 387)

Troy Brown was denied bail by the Justice of the Peace, at the suggestion of the District Attorney. After two months at Lakes Crossing for a psychiatric evaluation, he was returned for trial. On May 2, 1994, the district judge learned no bail had ever been set and set it at $200,000. (ROA 3, TR 5) After a bail hearing two days later, he reduced it to $100,000. (ROA 3, TR 1-18) The Preliminary Hearing, which had been conditionally waived for the psychiatric evaluation,

was held July 6, 1994 (ROA 3, 526-758). At that time, Renee Romero ("Romero"), Washoe County's DNA specialist, testified there was not enough vaginal stain in Megan's panties to do an RFLP-type DNA test. (ROA 3, TR 172-175) She testified that the PCR test she'd done in February gave a frequency of 1 in 22 likelihood that the semen found compared with Troy's. (ROA 3, TR 160) He was bound over.

Troy went to trial September 27-30. Romero testified that after the Preliminary, she went back and on August 8, 1994, now found additional vaginal stain evidence in the panties and performed an RFLP DNA test. (ROA 5, RT 316) She said the statistical probabilities indicated a 1 in 3 million frequency for Troy's DNA and the sperm found in the new vaginal stain, as compared with all White, African and Mexican males and females in the population. (ROA 5, TR 320-322) It was also revealed that Troy's bedding was never examined or tested in the crime lab because serologist Marie Fassett was told by police that the suspect never went back to his bed. (ROA 5, TR 288-89; 291-292) At trial, although a policeman testified he saw it, the ER doctor had no recollection of taking teeth debris scrapings to see if Megan had bit the assailant, nor was any ever located or tested by the lab. (ROA 5, TR 281)

At trial, Jay and Leah Dokes who were picking up their kids from the babysitters testified they saw a man in the street at 1:05 a.m. on Puett St. wearing a black jacket with a bright green emblem on the back. Troy's black satin jacket was shown to the jury and it had no such emblem. Travis testified Troy's jacket had orange and yellow on the back and no zipper. (ROA 4, 208) Pam testified that she had danced with Troy that

night and he had no cologne on. (ROA 4, TR 92) Troy's brother Trent had moved his family to Utah (ROA 4, TR 66) but he returned to testify at the trial. By now he had grown a beard, as well. (ROA 5, 486) He said he sent Megan flowers because when he and Raquel had lost babies, it "made it feel better." (ROA 5, TR 186) Megan did not identify Troy Brown at trial as her assailant. The fingerprint lifted from the make-up mirror turned out not to be Troy Brown's. (ROA 5, TR 364-366) A neighbor, Ellen Johnson from 1365 Puett Drive, testified that two or three days after the crime a young man with longer dirty blonde hair who had lived in the same trailer park dissappeared and suddenly reappeared clean shaven and with real short hair. (ROA 5, TR 433) Nevertheless, he was convicted of three of the four counts charged.

ARGUMENT

1. WAS IT ERROR TO DENY TROY BROWN BAIL IN A NON-CAPITAL CASE?

The first issue raised in this appeal is the denial of bail to Troy Don Brown. Troy self-surrendered to Carlin police on February 7, 1994, upon learning that there was a warrant for his arrest. (ROA 5, TR p 481)[1].

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[1] While the Clerk of the Elko Court apparently consecutively numbered the Record on Appeal, including pleadings, court documents and all transcripts in this case, and those page numbers are referred to in the Index to the Record on Appeal, Brown's counsel was provided individual transcripts of the various hearings and proceedings, each separately numbered. To properly correlate this brief to the Record on Appeal, citations to the record herein reflect the Clerk's pagination, but also cite Transcript

He was held without bail From February 7, 1994 until May 2, 1994 because the Justice of the Peace refused to set bail, at the suggestion of the District Attorney. (ROA 3, 759-766 TR p 5). When the district court judge learned of this, he immediately set bail at $200,000 (ROA 3, 759-766; TR 4-6) and, in a bail reduction hearing two days later reduced that amount to $100,000. (ROA 3, 767-788; TR 18).

Bail is a constitutional right. Nev. Const. Art. 1 s 7. In addition, NRS 178.484 provides that "A person arrested for an offense other than murder of the first degree must be admitted to bail." Only non-capital offenses are non-bailable. St. Pierre v Sheriff, 90 Nev 282, 524 P.2d 1278 (1974).

The sexual assault of a 9 -year-old child is a repugnant crime and in a small community like Carlin, and Elko County, understandably it caused public furor. Nevertheless, the Justice of the Peace has an obligation to enforce the law and not succumb to public outcries. Further, a prosecutor has an obligation to enforce the laws, not counsel or encourage a public official to ignore them. The failure of the Justice of the Peace to set bail violated the Nevada Constitution and the Nevada Revised Statutes. The actions of the District Attorney in advising or suggesting that no bail be set amount to misconduct, whether he was acting in his capacity as the case prosecutor or as the legal advisor to the Justice Court. (See S.C.R. 179, Special Responsibilities of a Prosecutor and S.C.R. 172, Candor Toward the Tribunal.) In either case, he had

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pages (TR) for the specific hearing being discussed for this Court's ease in locating cited passages.

an obligation to properly state the law to the Justice of the Peace.

The Record on Appeal contains no transcript of Troy's initial appearance before the Justice of the Peace, nor does the Record on Appeal reflect any objection by Troy's defense counsel to lack of bail or a motion to set bail, both of which would constitute "plain error" by defense counsel.[2] Where a defendant has failed to object, ordinarily he loses the right to complain on appeal, but where prosecutorial misconduct exists and is prejudicial, the court may *intervene* sua sponte *to protect the defendant's right to* a fair trial. McCraney v. State, 110 Nev. Adv.Op. 28 (March 3, 1994); Sipsas v. State, 102 Nev. 119, 125, 716 P.2d 231, 235 (1986). Furthermore, bail is a constitutional right and a constitutional question can be raised on appeal even if the defendant didn't object at trial. Hardeson v State, 84 Nev. 125, 437 P.2d 868 (1968).

On February 28, 1994, Troy conditionally waived his Preliminary Hearing and stipulated to his commitment to Lakes Crossing so his public defender could get an opinion regarding his competency and ability to assist counsel. (ROA 1, 58-65.) Troy was returned from Lakes Crossing in early May. Certainly, once Troy agreed to his commitment to Lakes, from

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[2] Failings of defense counsel are appropriately subject to review in a post-conviction habeas corpus action where "ineffective assistance of counsel" will be examined in depth after a lower-court evidentiary hearing that develops all the facts. State v. Gibbons, 97 Nev 520, 634 P.2d 1214 (1981). However, some acts must be discussed in the context of defendant's constitutional protections if they appear to constitute "plain error."

February 28 to May 2nd, he was not being prejudiced by his lack of bail setting. But arguably, had Troy received a bail setting immediately after his arrest at his first appearance, as the law requires, he might not have agreed to a commitment to Lakes Crossing where he would be held the next two months. Clearly, it was error to deny Troy Brown bail.

2. SHOULD TROY BROWN BE RE-SENTENCED?

While the Supreme Court will not ordinarily interfere with the broad discretion of the trial court in sentencing, the reviewing court will examine the issue if the facts indicate the defendant was given a harsher sentence because he maintained his innocence or because the court considered prejudicial material. Randell v State, 109 Nev. 5, 846 P.2d 278 (1993); Bushnell v. State, 97 Nev. 591, P.2d (1981).

In the instant case, the jury sentenced Troy on Count I when it found him guilty of Sexual Assault of a Child Causing Substantial Bodily Harm. They sentenced him to Life with the Possibility of Parole (after serving 10 years). The trial court later sentenced Troy on the remaining Sexual Assault of a Child charge and on the Child Abuse (by sexual assault) Causing Substantial Mental Harm. At the time set for sentencing, the trial court decided to "make a record for everybody to go back through these horrible events and so we know what we're dealing with here." (ROA 5, 1382-1402, TR 4). In doing so, the court reviewed the Lakes Crossing report on Troy and his family and the next 5 pages of transcript show the court ripping into the dysfunctionality of Troy's family (ROA 5, 1382-1402, TR 4-8) and emphasizing how Troy and his

family thought they were "victims" in this case because Troy and his family always maintained Troy's innocence. The court went over Troy's father's drinking and physical abuse of family members and how that made Troy the "victim" he is today.

If the sentencing judge relies on prejudicial matters in sentencing, it is an abuse of discretion that necessitates a resentencing hearing before a different judge. Costello v State, 110 Nev. Adv. Op. 68 (May 23, 1994); Goodson v. State, 98 Nev. 493, 495-96, 654 P.2d 1006, 1007 (1988).

Troy Brown asserts herein that the court's recitation of the Brown family history, as characterized by Lakes Crossing, and its subsequent ridiculing of it, constituted prejudicial matter because the court should have been sentencing Troy for his alleged commission of crimes; not for his poor social upbringing or his continuing to maintain his innocence. It is unfortunate, but not criminal, to grow up in a dysfunctional family. The matter that followed demonstrated the real sentencing error which occurred next. The trial judge then said to Troy:

> "...and it's going to make a tremendous difference Mr. Brown, that's why I'm going to talk to you about it, and I'm going to do something unusual here in a minute. It makes a tremendous difference how I treat Counts two and four. As I sit here today, I haven't seen you, of course, or talked to you for some time. But it you're going to continue to maintain--
>
> First, as I sit here, there is no doubt in my mind whatsoever of your guilt. And there's no doubt

in my mind that you know it. I believe you've taken up this position in defense of your own personality and dealing with your parents, who I think are greatly responsible for your acts in this case.

However, if you're going to continue that position, and show no remorse, I can show you no pity. This, if I give you consecutive sentences on these remaining two convictions, I suspect that you will never be released from prison and you will spend your entire life in prison. And that would be just under these facts, if you continue with your present position in this case." (ROA 5, 1382-1402, TR 9-10).

In a moment, we're going to come back. I'm going to take a half hour break. And the reason I'm going to take a half hour break, Mr. Brown, I've not asked for you to say anything so far. I feel comfortable that I understand you. And I feel comfortable that I understand exactly where you're sitting now.

I'm going to continue the matter for half an hour for you to talk to Mr. Lockie [Troy's defense counsel], not to your parents, but to Mr. Lockie so he can explain to your the significance of what I'm trying to convey to you.

If you are going to continue this status as a victim, if you are not man enough now, and this is not just going to hurt you, it's going to hurt the lives of brothers, your two brothers' families, your other siblings, and your parents, particularly your mother, who I think has been

a victim of alot of things, like you have, too. They're going to carry --as long as you carry it, they're going to carry it. As long as you take the position, they'll take the position.

I'm offering you the opportunity to be a man, and to explain exactly what happened that night, and to get it off your shoulders morally, spiritually, and every other way, and to take the burden off your parents' shoulders. I will show you pity if you do that. But if you're going to be--if you show no remorse, if you are unable to be reformed because of your attitude, then I cannot show you pity. (emphasis added)."
(ROA 5, 1382-1402, TR 12-13).

Thereupon, the court recessed for a half-hour to let the defense attorney talk to Troy about his continuing to maintain his innocence. (ROA 5, 1382-1402, TR 14). Afterward, the court inquired of Troy "Mr. Brown, are you in fact guilty of this crime?" When Troy answered "No Sir, I'm not," the court ordered him to sit down. (ROA 5, 1382-1402, TR 14). The court then went on to hear from the victim's mother then went into sentencing saying, "Mr. Brown, what do you have to say, personally, to the court?"

Troy responded:

"Just that I know that I'm not guilty. I know there was evidence presented that--that convinced 12 honest people of this community that I was, and all I'd like to say is I--I'm not guilty." (ROA 5, 1382-1402, TR 19).

The court then launched into a tirade accusing Troy of lying, stating he was guilty and calling him a "mad dog". The court then said

> "I am going to sentence you to the absolute maximum, and I do it with the hopes that you will never be a free person for the rest of your life, because I do not believe you can be repaired and that you will never live a life as a descent human being." (ROA 5, 1382-1402 TR19-20).

It is an abuse of discretion for a trial court to sentence a defendant to a harsher sentence for the reason that the defendant maintains his innocence, refuses to speak or otherwise exercises his constitutional rights. Thomas v. State, 99 Nev. 757, 758, 670 P.2d 111 (1983). A defendant retains his Fifth Amendment rights after a jury verdict because the appellate process is till open to him. U.S. v. Rodriguez, 498 F.2d 302 ( ). Thomas v. United States, 368 F.2d 941 (5 CA); North Carolina v. Pearce, 395 U.S. 711 (1969); In Re Lewallen, 590 P.2d. 383 (Ca. 1979). This sentencing judge continually characterized Troy's maintaining his innocence as his "playing the victim" and because he would not "be a man" and admit his guilt, he sentenced him to the "absolute maximum" penalty possible. Clearly, his conduct shows the kind of abuse of discretion this court repudiated in Bushnell.

The final sentencing error, and another example of the trial court considering prejudicial matters, was the court's reference to post-trial DNA testing and results. The record in this case shows that after trial, the defense counsel approached the court with a request to allow additional independent DNA testing to help

Troy's parents achieve peace of mind with the results of the trial. Troy's parents filed affidavits and defense counsel filed a motion seeking the court's permission to use some of the DNA-expert money not used for trial to pay for a post-trial independent analysis of the panties and a vaginal swab which had not been tested before. (ROA 5, 426-440, 450-454). The court did so apparently hoping that the results would convince the parents of Troy's guilt and help them personally reconcile the convictions. The results of the DNA testing were reported back to the court and the District Attorney, and the judge discussed them at sentencing, clearly showing that the court considered this additional matter:

> "One in 10,000. Only one in 10,000 Caucasians have DNA like this. He could not be eliminated. It simply is just further proof of what we already knew from the first DNA testing, that this vicious crime was committed by Troy Don Brown. Of course, when you're a victim, you're a victim. So, of course, there is just a greater conspiracy and it never ends." (ROA 5, 1382-1402. TR 10-12).

Not only was the post-trial DNA testing prejudicial, but it was taken into consideration by the court in sentencing, without any evidentiary scrutiny, laying of foundation, establishment of methods or reliability. The court's entire posture on sentencing, taking all these errors into consideration, mandates that Troy Don Brown receive a new sentencing before a different judge who will not penalize him for maintaining his innocence and who will not necessarily impose a greater sentence because of other prejudicial matters.

3. IS IT DOUBLE JEOPARDY FOR TROY DON BROWN TO BE CONVICTED AND SENTENCED FOR BOTH SEXUAL ASSAULT OF A CHILD AND CHILD ABUSE BY MEANS OF SEXUAL ASSAULT?

The United States and Nevada Constitutions both provide a bar against Double Jeopardy. ("No person shall be subject for the same offense to be twice put in jeopardy of life or limb." U.S.C.A. Const. Amend. V; "No person shall be subject to be twice put in jeopardy for the same offense." Nev. Const. Art 1, s 8.) This protection applies to successive punishments as well as successive prosecutions. No Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed 2d. 656 (1969).

In Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), the United States Supreme Court utilized the "same elements" test to determine if a defendant can be tried or punished for two similar offenses. That test inquires whether or not each offense contains an element not included in the other offense, in other words, whether each provision requires proof of a fact which the other does not. Subsequently, the U.S. Supreme Court complicated matters in this area by its decision in Grady v. Corbin, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed2d. 548 (1990) which added to the Blockburger test the fact that a subsequent prosecution must satisfy a "same conduct" test to avoid a Double Jeopardy bar. In 1993, United States v. Dixon, __U.S. __, 113 S.Ct. 2849, 125 L.Ed.2d 556, overruled the Grady v. Corbin standard and fully reinstated the Blockburger test for Double Jeopardy. The Ninth Circuit Court of Appeals has recently applied the Dixon decision in United States v. Wolfswinkel, 44 F.3d. 782 (1995). Nevada has long

recognized the Blockburger test. Litteral v. State, 97 Nev. 503, 634 P.2d. 1226 (1981); Meador v. State, 101 Nev. 765, 711 P.2d 852 (1985).

In the present case, there is no indication that defense counsel made a Double Jeopardy objection nor argued merger or cumulative punishment when Troy Brown was convicted and sentenced on both sexual assault of a child under age 14 counts and child abuse committed by means of sexual assault. (The "substantial bodily harm" or "substantial mental harm" portions of those charges constitute "penalty enhancements" [see NRS 200.366(2) (c) and 200.508 (2)] rather than additional elements of the crimes, so are not relevant to this discussion). Constitutional rights can be reviewed even if defense counsel failed to object (which would be "plain error" on his part). See Hardeson v. State, supra. The question of whether Double Jeopardy rights have been violated is a question of law and is reviewed de novo. United States v. Horodner, 993 F.2d. 191, 193 (9th Cir. 1993).

To determine if there is a Double Jeopardy violation in this case, we must first examine the elements of both charges and then look to see if the Legislature intended that the two crimes be punished separately. Talancon v. State, 102 Nev. 294, 712 P.2d 764 (1986).

In the area of child abuse, this Court has held that only one punishment may be imposed for murder caused by child abuse, when the defendant is convicted of both murder and felony child abuse resulting in murder. Athey v. State, 106 Nev. 520, 797 P.2d 956 (1990). In the area of sexual assault, this Court has recognized that Statutory Sexual Seduction may be a

lesser included offense of Sexual Assault, entitling the defendant to a jury instruction. Robinson v. State, 110 Nev. Adv. Op. 133 (September 28, 1994).

With regard to the comparison of sexual assault of a child under age 14 and child abuse by means of sexual assault, this appears to be a case of first impression for this Court.

Sexual assault is defined, in relevant part, as follows:

> N.R.S. 200.366 Sexual assault: Definition
>
> A person who subjects another person to sexual penetration, . . . against the victim's will or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his conduct, is guilty of sexual assault.

Child abuse committed by means of sexual assault is defined, in relevant part, as follows:

> N.R.S. 200.508 Abuse, neglect or endangerment of child: Definitions.
>
> 1. Any person who:
> (a) Willfully causes a child who is less than 18 years of age to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect . . . is guilty of a gross misdemeanor unless a more severe penalty is prescribed by law . . . .

> 3. As used in this section:
> (a) "Abuse or neglect" means physical or mental injury of non-accidental nature, sexual abuse, sexual exploitation . . . .

By definition, a perpetrator who sexually assaults a child is also committing a sexual abuse on that child. Both crimes would be based upon events that occurred at the same time and resulted from the same conduct. If the child abuse charge could not be brought without the use of the same facts relating to the sexual assault, then the charges are statutorily related and only one conviction can be had for that act. Randolph v. Sheriff, 93 Nev. 532, 569 P.2d. 408 (1977); Fairman v State, 425 P.2d 342 (1967). When a child is involved and the allegation is a physical sexual penetration (as opposed to an attempt or a lewdness), neither crime requires proof of an element the other does not have.

The Alaska Court of Appeals dealt with this very issue in Yearty v State, 805 P.2d 987 (1991). The court analyzed whether or not first-degree sexual assault charges should merge with first-degree sexual abuse of a minor charged, where each pair of charges was based on precisely the same conduct. The court examined the elements and then found that both statutes were aimed at the same basic purpose: to protect child victims from socially unacceptable contacts. The court concluded that

> "Virtually every case involving sexual abuse of a child is, in this respect, nonconsensual; because no case of child sexual abuse involves conduct that is truly consensual, it is difficult to conceive of a situation in which an act of sexual abuse on a child would not also be an act of

> sexual assault. Thus, while the degree of force or coercion used by the defendant and the extent of resistance by the child can certainly be considered in determining the seriousness of the defendant's conduct for sentencing purposes, affirmative proof of a child's actual lack of consent does not establish a new or separate crime.
>
> For this reason, we conclude that a single act of sexual penetration with a child cannot properly support separate sentences and convictions for both sexual assault in the first degree ad sexual abuse of a minor in the first degree. p 994-995.

In the present case, two different types of sexual assault were charged -- vaginal penetration and anal penetration. Each additionally specified the age-of-the-victim enhancer (which provides a different minimum prison sentence than sexual assault of an adult). Clearly each is a separate kind of assault and each can support an independent sexual assault charge and punishment. The substantial bodily harm allegation in count I is related to the extent of injury, and that, too, is an enhancer rather than a qualitatively different element of the crime.

However, the child abuse by means of sexual abuse charge arose from the same acts of sexual penetration described in the other counts. The charging document did not specify whether it was the vaginal assault or the anal assault that constituted the specific abusive sexual act but that is not determinative as either act would constitute a child abuse by sexual assault. Nor does the age element add anything dispositive to the

comparison, as a child under age 14 is, by definition, a child under age 18.

Similarly, the substantial mental harm allegation is a penalty enhancer rather than a new and different element of the crime of child abuse. Clearly, under the facts of our case, there is no distinction to be seen from the Yearty case decided in Alaska. The same result should follow for yet another reason.

In examining the legislative history of the bill which added "sexual abuse" to the list of things which constitute "abuse and neglect" in NRS 200.508(3) (a), it becomes clear that the identical acts are contemplated. Assembly Bill 199 was introduced and passed at the 1985 session of the Nevada Legislature. It was part of a huge bill designed to protect our children. In discussing the definitional sections of AB 199 to the Joint Senate and Assembly Committees on Judiciary on February 27, 1985, at page three, Assemblyman David Humke stated that "Section 8 defines "physical injury. Section 9 defines sexual abuse, and **this [sic] identical language to the current law in the statute at this time."** (emphasis added). He then differentiated Section 10 "sexual exploitation" indicating that it "expands the definitions somewhat, to include allowing or encouraging pornographic films, literature, . . . modeling and live audience depictions with children."

Clearly, the Legislature fully duplicated the sexual assault crime into the definition of sexual abuse, and did, thereby create a lesser-included crime of child abuse by means of sexual assault.

Nor do the facts of our case provide any other factual predicate for the child abuse charge; the essence of the alleged abuse to the child which caused her to be hospitalized for 12 days of psychiatric care was the sexual assault and its resulting trauma. The testimony of Dr. Sherman (ROA 4, 826-1052, TR 34-50) and the closing argument of the District Attorney (ROA 5, 1247-1381, TR 518) both attest to this.

Where, as in this case, the child abuse by means of sexual assault arises from the identical set of facts that constitutes the separately charged crime of sexual assault of a child, and the penalty for the sexual assault of a child is greater than that of the child abuse, the child abuse must merge allowing only one conviction and one penalty to arise from the single transaction. To allow a conviction for both, and impose a separate sentence for both, is to sanction a violation of the Double Jeopardy Clauses of both the United States and Nevada Constitutions. Therefore, Troy Brown's separate conviction and sentence for NRS 200.508, Count IV, must fall, as it is necessarily included in either of the other sexual assault of a child under age 14 counts.

4. WAS THE DNA EVIDENCE IMPROPERLY ADMITTED INTO EVIDENCE?

Deoxyribonucleic acid (DNA) evidence was admitted in this case, both at the Preliminary Hearing (ROA 3, 526-758, TR 152-178), and at the trial (ROA 5, 1053-1246, TR 268-345). Clearly Nevada law allows blood evidence to be admitted for purposes of identity, in a criminal action. N.R.S. 56.020. In determining the admissibility of scientific evidence, and later the value

of an expert's testimony about that evidence, preliminary reviews are necessary.

While much of the nation followed the "general scientific acceptance" test of Frye v. United States, 293 F 1013 (D.C. Cir. 1932) for the last 63 years, Nevada has always looked to a scientific test's trustworthiness and reliability in deciding the acceptance of new forms of scientific evidence. Santillanes v. State, 104 Nev. 699, 765 P.2d 1147 (1988). Once trustworthiness and reliability are established, relevance and prejudice vs. probative value (NRS 48.025, 48.035) must also be considered. After admissibility is determined by the court, the weight to be accorded the evidence is a jury determination. Deeds v State, 97 Nev. 216, 626 P.2d. 271 (1981).

The United States Supreme Court caught up with Nevada's approach in 1993 in the case of Daubert v. Merrell Dow Pharmaceuticals, Inc., __ U.S. __, 113 S. Ct. 2786, 125 L.Ed 2d. 469, when the Frye test was held to have been superseded by Federal Rule of Evidence 702 which occupied the field. That rule, is identical to the language of N.R.S. 50.275 which says:

> If scientific, technical or other specialized knowledge will assist the trier of act to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge."

While Nevada cases have variously dealt with different kinds of scientific evidence and tests, such as polygraph, serological electrophoresis of blood, and

other areas of forensic technology in criminal investigation, no definitive DNA rulings have yet emanated from this court. Appellant asserts that the facts of this case provide the vehicle for a legal analysis and definitive rule with regard to the methods for handling DNA evidence in a criminal trial.

Because Daubert is identical in spirit and intent with Nevada's long-standing approach to analyzing scientific evidence and expert testimony about it, we assert that Nevada should formally adopt the Daubert test insofar as it requires that a pretrial deermination of admissibility be made by the trial court with regard to DNA evidence specifically. Although the Oklahoma Court of Appels recently ruled that its state courts need not conduct pretrial admissibility hearings on DNA evidence, it did so only after doing a comprehensive analysis of the entire development of DNA forensics and population genetics, and based upon a record in which extensive information was presented to the court in the context of the case being considered. Taylor v State, 889 P.2d. 319 (Okla 1995). That is not the situation in the present case and it is exactly those failings that makes the admissibility of DNA evidence, and "frequency of population" testimony so prejudicial to Troy Brown.

At the Preliminary Hearing held July 6, 1994, Washoe County Crime Lab DNA specialist Renee Romero testified that her lab had just begun doing DQ Alpha testing in October, 1993, (ROA 3, 526-758, TR 162-163) and had only started reporting PCR DNA test results two months earlier and they were still evaluating the system and completing proficiency tests. (TR 163). She further testified that the national technical working group (TWG-DAM) which is working

on DNA analysis methods, is trying to set standards for quality control or quality assurance in the area of DNA testing and reporting, but that so far, they've only issued non-mandatory guidelines. (TR 164). She further testified that the population database used by her lab was the FBI's Roche Molecular Systems database, which was not yet even published as of that date. ("I have a pre-publication and it will be published in the Journal of Forensic Science in July." TR 166).

Romero acknowledged that there are several different population databases in the field and that she was using the FBI's and would be looking at additional information at the end of the month. (TR 168). In discussing polymarker acceptance, Romero admitted she had not yet had polymarker evidence admitted in court (TR 177) and, to her knowledge, it had only been accepted in evidence a few times. (TR 178). She then testified that the frequency of Troy Brown's PCR polymarker in the Caucasian population base 1 in 22. With the DQ Alpha test she placed it at 1 in 18,900 for the Caucasian population; 1 in 2,460,000 for the Black population; and 1 in 4,800 for the Hispanic population. (TR 179).

Finally, Romero testified that she did not think she had enough vaginal stain sample in the panties to do an RFLP type DNA test, (TR 172-176), although, by the time of trial, sufficient stain sample had materialized casting suspicion on the entire process. (ROA 5, 1053-1246, TR 299-345).

While some databases have gained acceptance in DNA work, the FBI database has been criticized compared to that of other specialized agencies like Cellmark and Lifecodes, and their DNA results have

even been declared inadmissible. State v. Anderson, 853 P.2d 135, 142 (N. M. 1993); State v. Vandebogart, 616 A.2d. 482, 494 (N.H. 1992). Population frequency statistics generated by the "product" or "unmodified product" method have been found inadmissible, as have statistical calculations determined under the "fixed bin" method. State v Streich, 638 A.2d. 38 (Vt. 1995). Georgia disallowed Lifecodes population database as insufficiently reliable and unacceptable. Caldwell v. State, 393 S.E.2d. 436 (1990). Other courts that have not allowed population frequency statistics because of the many different methods or differing levels of acceptance in the scientific community include State v. Bible, 858 P.2d 1152, 1185 (Ariz 1993); People v. Barney, 10 Cal Rptr 2d. 731; Commonwealth v. Lannigan, 596 N. E. 2d 311.

Clearly Romero's Preliminary Hearing testimony alone established the infancy of the Washoe Crime Lab in conducting DNA work and that, alone, should have prompted the defense counsel to seek, and the trial court to require, a pretrial hearing on DNA before admittiing the evidence at trial in this case. But not only was that not done, Romero's own credentials were barely discussed and instead, her curriculum vita was simply introduced into evidence with little or no discussion.

Some courts have found that the testimony of a single expert on DNA and pooulation genetics is insufficient to pass muster for scientific acceptance. People v. Pizarro, 10 Cal.App 4th 57 (1993). Romero was the only witness to testify on DNA methods or statistics, and the defense, even though it had been provided with funds for a DNA expert at trial (ROA 2, 285-295), produced no expert to challenge anything at

trial and virtually no cross-examination about population genetics or statistics took place, even though this is the single biggest area of substantial controversy in this field.

Forensics use of DNA evidence is a very recent development; the first use was less than 10 years ago. State v. Bloom, 516 N. W.2d 159, 163 (Minn. 1994). No actual resolution of the controversy in population database statistics has really been achieved yet. Rather, when the Committee on DNA Technlogy in Forensic Sciences was formed at the National Research Council, its purpose was to negotiate some kind of compromise that would allow population genetics use to go forward while the NRC continued its search for a final solution to the problems. The 1992 report which resulted in todays "interim ceiling method" for estimating random match probabilities (which was what Renee Romero used by the time of trial to increase Troy Brown's frequency to 1 in 3 million of the White, Black and Hispanic male and female population) simply accepted the validity of the challenge and changed their minimum standards to come up with a more conservative population range.

In Bloom, the court noted that "the NCR Report has not put an end to the controversy, noting that the FBI had agreed to fund a new study by the NCR to end the "crisis" in competing population statistics methods. Given todays "trial by mathematics" mentality, a man's freedom should not depend upon nor await a meeting of the minds of the world's statistical geniuses. Even though the conservative ceiling method has gained broader acceptance, a DNA specialist should not be allowed to testify to it, and even to her methodology, until the court has conducted a thorough

pre-trial admissibility hearing on the DNA methodology used, which database is being relied upon, what is the current state of acceptance of various techniques in the courts, and finally, the specific application of this technology to the case at bar. None of that was done in this case. A reading of the entire direct and crosss examination of Renee Romero at the trial (ROA 5, 1053-1246, TR 299-345) reveals that neither the court, the prosecutor nor the defnse attorney in this case seemed to sufficiently understand DNA. Certainly, the defense counsel's closing argument, wherein he simply questioned "did you understand it?" attests to his lack of understanding.

Additionally, courts that have admitted DNA evidence, have nevertheless restricted the manner of presentation of the comparison testimony, holding that the expert cannot talk about "matching" DNA, State v. Cauthron, 846 P.2d 502 (Wash. 1993) or give his or her opinion about the strength of the DNA evidence. In this case, Washoe Lab serologist Maria Fassett did just that at trial when she commented upon the fact that other trace evidence examinations were not done for the reason that "the DNA was so overwhelming (ROA 5, TR 295).

Fassett also testified that in this case, the Carlin police appeared to lack knowledge on evidence labeling for lab work. She said she was told that the suspect never went back to his own bed after the attack, thus there was no point in examining the bedding taken from Troy's bedroom. Of course, the evidence from Troy, Travis, Dave Prescott and Officer Terry all disproved that statement. There was also testimony about the "lost" teeth scrapings from Megan, who

claimed to have bitten her assailant. Given these kinds of evidentiary problems with this particular case, it is incomprehensible that no pre-trial evidentiary hearings were held to establish the integrity of the evidence gathering, the lab techniques, and the overall scientific process, before the court would allow the jury to hear expert testimony. There was a poor showing of expertise, a total lack of appropriate foundation and virtually a non-existent cross-examination of the experts and evidence custodians in this case. That was prejudicial to Troy Brown, and in the face of the other evidence which strongly indicated Troy was not the assailant and that there were other likely suspects, the effect of these evidentiary failing was fatal to Troy.

The prejudice to Troy from the lack of challenge to the DNA evidence is evident in comparing the earliest DNA testimony at Preliminary Hearing, and the later, more developed theories and results and methods used by the time of trial. Either the lab was incredibly inexpert and deficient in July, 1994, or it drastically changed its methods and databases, and perhaps techniques, by the time of trial. That change alone should have been thoroughly explored but instead was virtually ignored.

Thus, Troy Brown urges this Court to require a full examinaion of the status of DNA technology to determine standards of acceptance for the courts in Nevada by way of mandatory pretrial evidentiary hearings to insure the evidence collection methods, the expertise of experts and foundation for their testimony, and the reliability of population genetics statistics before DNA evidence can be presented to a jury in a trial. Because of the absence of such in this

case, Troy Brown's convictions should be reversed and he should be awarded a new trial.

5. IS THE EVIDENCE SUFFICIENT TO CONVICT TROY BROWN?

Given the plethora of evidence that the assailant was not Troy Brown, including the hair which did not match, the coat which was different, the lack of watch and zipper, the fact that Megan repeatedly named Trent every time the police brought up Troy to her, the lack of blood on Troy when he first came back home at 1:32 a.m., the absence of scratches or bites from Megan on Troy's body and the total failure of the DNA evidence to be established as trustworthy and reliable in this particular case, Appellant submits that there was insufficient evidence to convict Troy Brown of these crimes.

CONCLUSIONS

1. Troy Brown was unconstitutionally denied bail.

2. Troy Brown should be re-sentenced by a different judge who does not seek to punish him for maintaining his innocence, and who will not consider prejudicial material.

3. Troy Brown's conviction for Child Abuse by means of sexual assault should be set aside and his sentence for that crime should be reversed.

4. Because of the inadequacies in the DNA admission process, and the presentation of the evidence, Troy Brown should be granted a new trial with instructions for the trial court to conduct a

mandatory pre-trial admissibility hearing to establish the integrity of the techniques used and the trustworthiness and reliability of the DNA evidence in this case.

Respectfully submittedtthis 9th day of November, 1995.

/s/
DOROTHY NASH HOLMES

[certificate of compliance and
certificate of mailing omitted in printing]

IN THE SUPREME COURT
OF THE STATE OF NEVADA

No. 27426

[Dated December 18, 1995]

TROY DON BROWN,	)
	)
Appellant,	)
	)
THE STATE OF NEVADA,	)
	)
Respondent.	)
	)

Appealed From The Fourth Judicial District Court
Of The State of Nevada
In And For The County of Elko

RESPONDENT'S ANSWERING BRIEF

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TABLE OF CONTENTS

PAGE NO.

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

STATEMENT OF ISSUES 2

I. DID BROWN SUFFER PREJUDICE FROM A TEMPORARY DENIAL OF BAIL? 2

II. WAS THE SENTENCING IMPROPER? 2

III. DO THE CRIMES OF SEXUAL ASSAULT AND CHILD ABUSE INVOLVE DIFFERENT ELEMENTS? . 2

IV. WAS THE DNA EVIDENCE PROPERLY BEFORE THE COURT? 2

V. WAS THE EVIDENCE SUFFICIENT FOR A CONVICTION? 2

STATEMENT OF THE FACTS 3

I. THE FAILURE TO IMMEDIATELY SET BAIL DID NOT RESULT IN PREJUDICE 5

II. THE SENTENCING WAS NOT IMPROPER 9

III. CHILD ABUSE REQUIRES A DIFFERENT ELEMENT THEN SEXUAL ASSAULT: DOUBLE JEOPARDY DOES NOT APPLY 13

IV. THE DNA EVIDENCE WAS PROPERLY ADMITTED 15

V. THE EVIDENCE WAS SUFFICIENT FOR A CONVICTION 19

CONCLUSION 20

CERTIFICATE OF COMPLIANCE 20

AFFIDAVIT OF SERVICE 21

TABLE OF AUTHORITIES

PAGE NO.

Athey v. State, 196 Nev. 520, 523, 797 P.2d 956 (1990) 15

Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) 15

Brecht v. Abrahamson, 507 U.S. __, 123 L.Ed. 2d 353, 113. S.Ct. 1710 7

Bushnell v. State, 97 Nev 591 (1981) 9, 10

Canape v. State, 109 Nev. 864, 871, 859 P.2d 1023 (1993) 16

Chapman v. California, 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1967) 7

Childers v. State, 100 Nev. 280, 283, 680 P.2d 598, 600 (1984) 16

Cole v. State, 101 Nev 585 (1985) 11

Com. v. Crews, 640 A.2d 355, 403 (Pa. 1994) . . . 17

Commonwealth v. Curnin, 565 N.E.2d 440 (1991) 16

Costello v. State, 110 Nev Ad.Op. 68 11

Daubert v. Merrell DOC Phamaceticals, Inc., __U.S. __, 113 S.Ct. 2786, 125 L.Ed.2d. 469 . . 15

Davis v. State, 107 Nev. 600, 604, 817 P.2d 1069 (1991) 17

De Pasquale v. State, 104 Nev. 338, 341, 757 P. 2d 367 (1988) amd 18

Deveroux v. State, 96 Nev. 388, 391, 610 P.2d 722 (1980) 20

Emmons v. State, 107 Ne. 53, 61, 807 P.2d 718, 723 (1991) 16

Ewell v. State, 105 Nev. 897, 900, 785 P. 2d 1028 (1989) 18

Gibbons v. State, 97 Nev. 520, 522, 523, 634 P. 2d 1214, 1216 (1981) 18

Goodson v. State, 98 Nev 493 (1988) 11, 12

Grady v. Corbin, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990) 15

Grooms v. State, 96 Nev 142 (1980) 6

Heglemeier v. State, 110 Nev. Advance Opinion 98. 13 - 14 19

Homick v. State, 108 Nev at page 137 (1992) . . . 10

Jones v. State, 110 Nev 730 (1994) 8

Riker v. State, 95 NCR 504 12

State v. Anderson, 881 P.2d 29, 40 (N.M.1994) . . 17

State v. Cauthron, 846 P.2d 502 (Wash. 1993) . . 16

State v. Teeter, 65 Nev 583 (1948) 5, 6

State v. Weeks, 891 P.2d 477, 489 (Mont. 1995) . 16

State v. Woodall, 385 S.E.2d 253, 260 (W.Va. 1989) 17

Sterling v. State, 108 Nev. 391, 394, 834 P.2d 400 (1992) 16

Taylor v. State, 889 P.2d 319, 332 - 33 (Okl. Cr. 1995) 17

Thomas v. State, 99 Nev 757 (1983) 10

Wallach v. State, 106 Nev. 470, 474, 796 P.2d 224 (1990) 18

Wilson v. State, 105 Nev 110 (1989) 11

NRS STATUTES

NRS 200.366 13
NRS 200.508 13
NRS 200.364 14
NRS 200.5083(d) 14
NRS 200.508(1)(a) 14
NRS 50.275 17
NRS 174.255 18

STATEMENT OF THE CASE

Respondent adopts Appellant's Statement of the Case.

STATEMENT OF ISSUES

I. DID BROWN SUFFER PREJUDICE FROM A TEMPORARY DENIAL OF BAIL?

II. WAS THE SENTENCING IMPROPER?

III. DO THE CRIMES OF SEXUAL ASSAULT AND CHILD ABUSE INVOLVE DIFFERENT ELEMENTS?

IV. WAS THE DNA EVIDENCE PROPERLY BEFORE THE COURT?

V. WAS THE EVIDENCE SUFFICIENT FOR A CONVICTION?

STATEMENT OF THE FACTS

In addition to the facts cited in Brown's Opening Brief, the jury heard testimony that Brown knew Megan's family and had been to her home on numerous occasions; TR 78. That on the evening of January 28, Brown was aware that Megan was home alone. TR 81-82. TR 115-116. That the bartender testified that Brown was not at the bar at approximately 12:15 to 12:20. TR 133. Mr. and Mrs. Doke testified that they saw a person in the vicinity of Megan's home at the time of the commission of the crimes, and that the person had clothing that, with the exception of the emblem, matched the clothing that

Brown was observed to have been wearing earlier in the bar; TR 147. That, in addition to the physical description, Megan indicated that the smell was like cologne but that it smelled bad. It was gross smelling like beer or puke or something; TR 121. That immediately after the commission of the crime Brown washed his clothes. TR 203. The jury also learned that Brown's roommate, after receiving a visit from the police, asked Brown if he had committed these crimes and Brown's response was, "He wasn't sure what did happen or would like to know what happened." TR 219-220. The transcript indicates that Megan was doing badly in school, having nightmares and intrusive thoughts concerning reliving the trauma, and after an examination by Dr. Marion Sherman, a child and adolescent psychiatrist, Megan was found to have been suffering from Post-Traumatic Stress Disorder. TR 39. Dr. Sherman further opined that because of the brutal attack, Megan's ability to function within the normal range and performance of her behavior would be substantially impaired. TR 46. Finally, Dr. Sherman testified that someone who experiences this type of attack might consciously omit details. TR 48.

After the jury returned its verdict, but before sentencing, an affidavit by Stella Brown, mother of the Appellant, was filed requesting that an independent test of the DNA be conducted to provide the family with peace of mind. ROA, Vol. II, 443-444. Brown then filed a Motion for an order releasing a vaginal swab and slide for the purpose of testing by Brown's expert. ROA, II, 426-428. The Court issued an Order allowing Brown to have the material tested. ROA, II, 450-453. The testing was conducted by the Forensic Science Associates. ROA, II, 511-514. The results of the test conducted by Brown's expert confirmed the findings of

the DNA experts who testified at trial for the State. ROA, V, 1393.

The facts relating to the denial of bail at the time of Brown's first appearance are as follows:

On February 7, 1994, Brown first appeared before the Justice Court at which time Brown was appointed counsel. ROA, Vol. I, page 47.

On February 23, 1994, Brown conditionally waived his preliminary hearing. ROA, Vol. I, page 42.

On February 28, 1994, Brown moved to be examined by a psychiatrist or psychologist. ROA, Vol. I, page 49.

On February 28, 1994, the State and Brown stipulated that he be committed to Lakes Crossing. The Stipulation was filed with the district Court on March 2, 1994. ROA, Vol. I, page 58-60.

On March 7, 1994, Brown was ordered transported and committed to Lakes Crossing, ROA, Vol. I, page 61.

A Motion to set bail was filed on April 26, 1994. ROA, Vol. I, page 118.

The preliminary bail hearing was set for May 2, 1994. ROA, Vol. III, page 759. At that time, the district court set bail at 200,000 Dollars. ROA, Vol. III, page 763.

At the time of the bail hearing, May 2, 1994, the District Attorney acknowledged that no bail had been

set for Brown at the request of the District Attorney. ROA, Vol. III, page 763, line 9, et. seq.

I. THE FAILURE TO IMMEDIATELY SET BAIL DID NOT RESULT IN PREJUDICE.

The State acknowledges that the District Attorney erred in requesting a no bail hold and that the Justice of the Peace erred in holding Brown without setting bail. The question before the Court on this assignment of error then, is whether Brown has a remedy at this stage of the proceedings.

In State v. Teeter, 65 Nev 583 (1948), this Court dealt extensively with the question of erroneously holding a defendant without bail. That case differs from this, however, because there the Defendant waited until appeal from a jury verdict to raise the issue before the Supreme Court, thus the Defendant was incarcerated throughout the investigation, discovery and trial stage.

After concluding the analysis of whether bail had been wrongfully denied in Teeter, the Court reached the issue of whether such a denial affected the validity of the judgment (at page 609 of the decision).

The Court found three areas of prejudice. First, "... It operated to curtail and restrict, as counsel for Defendant has urged, the opportunity of Defendant to prepare properly for trial."

In the instant case, Brown had bail established on May 2, 1994, and trial commenced September 27, 1994, a period of over four months. Moreover, it was Brown who sought commitment to Lakes Crossing for

examination, which examination subsumed virtually the entire time Brown was without bail. In fact, the preliminary hearing was held after Brown had bail established. ROA, Vol. III, page 526-758. Brown concedes that Brown's time at Lakes Crossing was not prejudicial. Appellant's Brief, page 13, line 6.

Brown does not recite any interference with the preparation of his defense as a result of the denial of bail, and indeed it is unlikely that prejudice could be shown.

Second, the Teeter court held that prejudice might occur from appearing before the jury in custody, a situation which now could be independent grounds for reversal, Grooms v. State, 96 Nev 142 (1980), even in the absence of clear proof that a defendant was not prejudiced. Brown does not complain that this happened.

Third, the Teeter Court held that the wrongful denial of bail, if published in the newspaper as having occurred because the proof was evident and the presumption great that he was guilty, when as a matter of law no such showing had been made, could prejudice a defendant by "infiltrating into the mental consciousness of jurors." Brown points to no identical or equivalent holding in this case.

Brown makes no argument of actual prejudice from the initial denial of bail, except speculation that he might not have agreed to a commitment to Lakes Crossing had bail been set.

The test for determining whether reversal is warranted as a result of a federal, non-trial,

constitutional violation is whether the error is harmless beyond a reasonable doubt, Brecht v. Abrahamson, 507 U.S. __, 123 L.Ed. 2d 353, 113. S.Ct. 1710, Chapman v. California, 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1967).

Brown did not rely on an insanity or diminished capacity defense at trial. Other than his drunkenness, his mental condition did not come into play. He did, according to the affidavit of his attorney, have trouble concentrating and rationally discussing the case, in the initial stages of the prosecution. ROA, Vol. I, page 52 (Affidavit of Counsel). That claim was not repeated after his commitment to Lake's Crossing, so evidently the commitment was successful, and in that respect facilitated, rather than hampered, his defense.

Brown makes no claim that witnesses, or evidence was lost or destroyed or made inaccessible as a result of his illegal incarceration. He makes no claim that any defense became unavailable, or that communication problems with his counsel occurred. It is, of course, almost impossible to prove a negative other than by examining the file in detail in an attempt to hunt down any conceivable problem which might be attributed to the initial error. The State has been unable to find such a problem, and therefore, unless Brown points to something more than speculation about Brown not going to Lakes Crossing, the error is harmless.

It is not clear in the footnote at Page 12 of Brown's Opening Brief whether Brown is attempting to raise an ineffective assistance of counsel argument on appeal as to this issue, rather than through post-conviction relief. Such an evaluation is not

warranted, unless this court can say that counsel was ineffective as a matter of law, Jones v. State, 110 Nev 730 (1994). That is, that there could be no possible explanation for counsel's failure to move for bail. The State suggests that hypothesizing reasons is easy in this case. Brown might have been suicidal, or perhaps told counsel he could make no bail, or that the community was so outraged that Brown might be attacked. In fact, on February 28, 1994, Brown's public defender stated Brown had mental problems in his affidavit in support of the commitment to Lakes Crossing. ROA, Vol. I, page 52.

For Counsel to be ineffective as a matter of law, and have that issue considered on direct appeal without an evidentiary hearing, counsel's performance must have created a situation in which the trial result would probably have been different, but for his mistakes, Jones (supra).

The case against Brown was essentially based on DNA testing. Brown makes no claim that the denial of bail affected those test results, or prevented contrary evidence, if it existed, from being produced. As has been argued herein, for the trial result to have been different, Brown was essentially required to obviate the DNA evidence. That argument follows in a subsequent assignment of error. It is simply not possible that the denial of bail for a 21 day period at the commencement of the prosecution would have changed the trial result.

There is nothing in the record which occurred during the 21 day period which could have or did adversely affect Brown. Brown got a free mental examination at Lakes Crossing, designed both to

evaluate his competency to aid and assist counsel, and also to test his sanity at the time of the crime. ROA, Vol. I page 62 (Order committing Defendant to Lakes Crossing for Evaluation). His trial strategy appears to have had little to do with his mental condition. He called a number of witnesses. No mention of his commitment was made at trial, and no information gained by the prosecution as a result of the examination appears to have been used against him. The case against Brown essentially hinged on DNA identification, not on bail.

II. THE SENTENCING WAS NOT IMPROPER.

Next Brown claims that the trial judge improperly sentenced him more harshly because he would not admit his guilt, and because the court considered prejudicial matters.

First, the State suggests that Brown has misread the nature of the decision in Bushnell v. State, 97 Nev 591 (1981), at least as it applies to this case. In Bushnell, Doran, a co-defendant, was still exercising his right to remain silent under the 5th Amendment. Effectively, the sentencing judge told him to waive the right and acknowledge guilt or face a more severe sentence. No similar situation here exists. Here, Brown testified at trial. If there is authority for the proposition that a judge cannot sentence more harshly because a defendant continues to maintain his innocence after a jury verdict in cases where the 5th Amendment is not involved, Bushnell is not it.

In Thomas v State, 99 Nev 757 (1983), this court held that the trial court's reliance on Defendant's refusal to admit guilt after a jury verdict was an abuse

of discretion in sentencing. This court cited Bushnell, (supra) for that proposition. It is impossible to tell from the opinion whether Thomas had testified, or was still relying on his right to remain silent, but the citation to Bushnell suggest the 5th Amendment was a consideration.

Because Thomas does not directly invoke the 5th Amendment, the law in Nevada is not clear that a defendant who maintains innocence in his testimony, may not be sentenced more harshly if he is convicted and continues to claim innocence in the face of overwhelming evidence to the contrary. Such a rule would seem to take from the sentencing judge the right to consider an important aspect of the defendant's character. Sentencing requires the judge to consider the individual characteristics of the defendant, as well as the nature and impact of the crime he committed, Homick v. State, 108 Nev at page 137 (1992). Remorse, or the lack of it, is routinely referred to by this Court is of importance in the sentencing decision, Wilson v. State, 105 Nev 110 (1989), Cole v. State, 101 Nev 585 (1985). The State recognizes that a rule which allows consideration of remorse when a defendant has testified he did not commit the crime creates a potential chilling effect on a defendant's willingness to testify, but in cases where the evidence is overwhelmingly against the defendant as here, such a rule would exist solely to protect the right to testify falsely and claim immunity from suffering the consequences at sentencing.

Next, Brown argues that he was prejudiced at sentencing by the court's consideration of prejudicial matters. For that proposition he cites Costello v. State, 110 Nev Ad.Op. 68, which the State believes should be

Castillo v. State, 110 Nev 535 (1994), and Goodson v. State, 98 Nev 493 (1988). The State agrees that Brown has correctly seated the law that a trial judge cannot consider prejudicial material at sentencing, but when Brown attempts to apply the law to this case, he fails to show that any improper prejudicial matter was considered.

First, at page 14 of his brief Brown argues that:

> ". . . the court's recitation of the Brown family history, as characterized by Lakes Crossing, and its subsequent ridiculing of it, constituted prejudicial matter because the court should have been sentencing Troy for his alleged commission of crimes, not for his poor social upbringing or his continuing to maintain his innocence."

It is difficult to ascertain what the argument is in connection with consideration of prejudicial material in that instance. Certainly, Brown cannot seriously argue that the court can't consider the Lakes crossing report which was in the Court's file. See Riker v. State, 95 NCR 504. Possibly, Brown argues that the judge cannot consider the family history therein, but there is no authority for that. Moreover, it is evident that the family history was that related by Brown himself. ROA, Vol. II, page 320. Brown's argument, if successful, would place the trial judge in a position of having to ignore portions of all Lake's Crossing reports, for fear that he might subsequently rely on prejudicial material contained therein if Brown were convicted, which would then prevent the judge from properly considering a defendant's mental state at the competency hearing. The State suggests that such

evidence is clearly relevant to sentencing, is not prejudicial, and is not suspect, see Goodson, (supra).

Next, Brown claims the Court should not have considered the post trial DNA analysis. Initially, it is clear from the judge's statements that the judge thought Brown was guilty quite independent of the second DNA test. Brown himself cites the language the court used, which makes the point, at page 18 of the opening brief: "It simply is just further proof of what we already knew from the first DNA testing, that this vicious crime was committed by Troy Don Brown."

In Goodson (supra), this court observed that to establish an abuse of discretion it must be shown that the sentence was prejudiced by consideration of "impalpable or highly suspect evidence." That is not the case here. It was Brown who placed the additional DNA evidence before the court, (Defendant's Opening Brief at page 17, line 18), and that DNA evidence simply confirmed what the DNA evidence submitted at trial proved: Troy Don Brown brutally raped a 9 year old child.

Brown was fairly and impartially sentenced by the trial judge, who did not rely upon improper or prejudicial material at or before sentencing. Brown will serve more time as a result of showing no remorse, and no willingness to face up to his crime, but no constitutional question is involved to protect Brown from that consequence.

III. CHILD ABUSE REQUIRES A DIFFERENT ELEMENT THEN SEXUAL ASSAULT: DOUBLE JEOPARDY DOES NOT APPLY.

The elements of Sexual Assault On A Child Under The Age Of 14 include:

1. Sexual penetration;
2. A victim under the age of 14;
3. The penetration must be against the will of the victim; or
4. The circumstances must be such that the victim is not capable of resisting or understanding the nature of the conduct. NRS 200.366. (ROA 2) (TR 369).

The elements of child abuse, on the other hand, must include the additional element of physical pain or mental suffering. NRS 200.508. TR 372.

The Criminal Information makes that distinction. Counts I and II alleging acts of Sexual Assault do not include the elements of physical pain and mental suffering and harm because those elements are not required to sustain a conviction for Sexual Assault Of A Child Under The Age Of 14 Years. ROA 2. TR 240. However, the allegation of Abuse or Neglect in Count IV of the Information requires the additional element of mental suffering and harm.

Conceivably, a child under the age of 14 could be subjected to acts of sexual assault without physical pain or mental suffering. An act of sexual penetration or cunnilingus, fellatio or a slight intrusion into the genital or anal openings of another could be very enjoyable. NRS 200.364. Arguably, many people

engage in those acts and, but for the lack of consent, derive enjoyment rather than pain or mental suffering. Consequently, although not supported by the facts of this case, Brown could have made a "slight penetration", ever so slight, into the rectum and into the vagina of the child and neither inflicted pain nor mental suffering.

While substantial mental harm described in NRS 200.5083 (d), is an enhancer of the penalty from a gross misdemeanor to a felony as Brown argues, the mental suffering indicated in NRS 200.508(1)(a) is not such an enhancer. It is, rather, an element of the offense.

That is to say that before a person may be convicted of abuse and neglect of children, that person must cause a child to suffer physical pain or mental suffering because that is an element of the offense. Once having established that element, then the penalty enhancer of "substantial mental harm" may be considered in the determination of whether the crime is a gross misdemeanor or a felony.

We would submit that Athey v. State, 196 Nev. 520, 523, 797 P.2d 956 (1990), is not controlling in this case. Arguably an act of murder necessarily includes unjustifiable physical pain or mental suffering. An act of sexual assault on a child does not. Indeed, the definition of sexual assault includes a provision that allows for that victim who is ". . . mentally or physically incapable of resisting or understanding the nature of his conduct. . .". To repeat, in such cases, it is conceivable that a child would suffer neither physically nor mentally.

The mental suffering of the child is an additional element of the crime of child abuse not required for a conviction of sexual assault of a child. Consequently, in the case at bar, there was no double jeopardy and the tests in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), and Grady v. Corbin, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990) were met.

IV. THE DNA EVIDENCE WAS PROPERLY ADMITTED.

Brown asks the court to adopt the test in Daubert v. Merrell Dow Pharmaceticals, Inc., __ U.S. __, 113 S.Ct. 2786, 125 L.Ed.2d. 469, and reverse because a determination of the admissibility of DNA evidence was not made before trial. We would urge to the contrary, especially considering the facts of this case. For one thing there was no objection to the qualifications of the State's expert. TR 300, 12-14. Nor was there an objection to her conclusion. Indeed, Ms. Romero indicated that she had previously testified in the field of DNA in Nevada district courts on prior occasions. TR 300, 27. TR 301, 1-2. Failure to object gives rise to the argument that Brown may not now raise the issue on appeal. Canape v. State, 109 Nev. 864, 871, 859 P.2d 1023 (1993); Sterling v. State, 108 Nev. 391, 394, 834 P.2d 400 (1992), citing Emmons v. State, 107 Nev. 53, 61, 807 P.2d 718, 723 (1991). Furthermore, the admissibility of expert testimony is within the province of the trial court and unless their has been an abuse of discretion the lower court's ruling will not be disturbed on appeal. Emmons, 56-57, citing Childers v. State, 100 Nev. 280, 283, 680 P.2d 598, 600 (1984). Once the testimony and evidence was before the court it was up to the jury to weigh it. State v.

Weeks, 891 P.2d 477, 489 (Mont. 1995). The jury weighed the evidence and returned an appropriate verdict.

Brown, relying on State v. Cauthron, 846 P.2d 502 (Wash. 1993) asserts as error the statement by Ms. Romero, responding to a question by the court, that the reason hair samples were not analyzed was because the DNA evidence was so overwhelming. TR 295, 21-23. In Cauthron, however, the expert concluded that there was a "match" without discussing the probability information:

> It is apparent from the basis on which we decide the DNA testing issue that we would not permit the admission of test results showing a DNA match (a positive result) without telling the jury anything about the likelihood of that match occurring.

Cauthron, at p. 516, quoting Commonwealth v. Curnin, 565 N.E.2d 440 (1991). In the case at bar Ms. Romero discussed the probability of a match in great detail.

Brown questions the ability of Ms. Romero to conduct an RFLP test because she apparently did not conduct such a test in the first instance. Ms. Romero testified however, that she was able to do so by procuring additional material from the panties. TR 341. From that testing, Ms. Romero was able to apply the very conservative ceiling principle and establish an identification probability of one in three million. TR 321.

A number of jurisdictions have held that DNA profiling meets the relevancy standards similar to New Mexico's Rule 702 which is identical to NRS 50.275. See State v. Anderson, 881 P.2d 29, 40 (N.M. 1994). At least one jurisdiction has given judicial notice to the reliability of DNA typing. State v. Woodall, 385 S.E.2d 253, 260 (W.Va. 1989). In Taylor v. State, 889 P.2d 319, 332-33 (Okl. Cr. 1995) the court found the RFLP method of DNA profiling (the method used by Ms. Romero) reliable and the results admissible.

Brown asserts that his counsel should have been more assertive before the DNA results were admitted. (That a hearing should have been held on the admissibility before trial) Brown, however, cannot show that, but for the failure to have the material analyzed by his own expert before trial, the result of the trial would have been different. Davis v. State, 107 Nev. 600, 604, 817 P.2d 1069 (1991). In the case of Com. v. Crews, 640 A.2d 355, 403 (Pa. 1994), the court refused to reverse the lower court for not granting a continuance to the appellant so the appellant could have more time to allow his expert to study the material:

> When Dr. Acton, the defense expert, completed his testing of the samples, he was unable to obtain conclusive results due to partial degradation of the samples. But, far from excluding appellant, the tests, so far as they went corroborated the FBI results. We therefore hold that the trial court properly exercised its discretion in denying appellant's request for continuance.

Granted that Brown could not introduce his own expert's opinion at trial because the testing he requested came after trial before sentencing. He did not suffer prejudice however because his own expert confirmed the conclusion reached by Ms. Romero. ROA, V, 1393. Since under the Nevada Rules of Discovery those results would have been available to the State, the State could have moved for their admission. NRS 174.255.

Brown's argument, we would assert, is not based upon error in the record but rather on the basis of ineffective assistance of counsel. The record is fairly free of appealable error and the court generally will not entertain the issue of effectiveness on direct appeal, but rather defer to post-conviction relief. Wallach v. State, 106 Nev. 470, 474, 796 P.2d 224 (1990); Ewell v. State, 105 Nev. 897, 900, 785 P. 2d 1028 (1989); De Pasquale v. State, 104 Nev. 338, 341, 757 P. 2d 367 (1988) amd Gibbons v. State, 97 Nev. 520, 522, 523, 634 P. 2d 1214, 1216 (1981).

Because of an absence of a record it is not clear what the motives or trial tactics of Brown's attorney were in the handling of the trial. Conceivably, Brown's attorney consulted experts in the field and found no legitimate reason to challenge Ms. Romero. Indeed, if that was the case then the tactic was confirmed after the verdict. We submit therefore, that it would be proper to affirm the judgment which would allow Brown, if he so desired, to attack his attorney directly affording an opportunity for his attorney to establish a proper record.

V. THE EVIDENCE WAS SUFFICIENT FOR A CONVICTION.

The following language found in Heglemeier v. State, 110 Nev. Advance Opinion 98, 13-14 is applicable to these facts:

> This court will not reverse a criminal judgment on appeal if there is substantial evidence to support the jury's verdict. Sterling v. State, 108 Nev. 391, 398, 834 P.2d 400, 404 (1992). The standard of review on appeal is whether the jury, acting reasonably, could be convinced of the defendant's guilt beyond a reasonable doubt by the properly admissible trial evidence. As previously noted, the primary issue in this appeal concerned the propriety of admitting the testimony of accomplice Becker. As the State conceded, without Becker's testimony, the evidence would not have warranted submitting the case to the jury. Since Becker's testimony was properly admitted, an evidentiary synthesis resulted that fully satisfied the heavy burden of proof necessary to support a criminal conviction.

The evidence in the case at bar was overwhelming. In addition to the undisputed testimony that Megan was sexually assaulted and, in addition, to the undisputed testimony that Megan suffered mental harm from the assault and, in addition, to the testimony that Brown was aware that Megan was alone and, in addition, that a person dressed like Brown was seen in the vicinity and, in addition, that Brown washed his clothes immediately after the crimes and, in addition, to the fact that Brown wished he could remember what happened, their was

undisputed testimony that the probability that someone other than Brown committing the act in the little town of Carlin was one in three million using the conservative ceiling principle. Finally, Brown's analysis of the DNA evidence confirmed the State's results.

Much like Mr. Becker, and to paraphrase, since the DNA evidence was properly admitted, the heavy burden of proof was satisfied. The circumstantial evidence, along with the DNA evidence was sufficient to sustain the conviction. Deveroux v. State, 96 Nev. 388, 391, 610 P.2d 722 (1980).

CONCLUSION

For the foregoing reasons, the conviction should stand.

RESPECTFULLY SUBMITTED this 18 day of December, 1995.

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By: /s/
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Deputy District Attorney

[certificate of compliance and
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IN THE SUPREME COURT
OF THE STATE OF NEVADA

No. 27426

[Dated January 29, 1996]

TROY DON BROWN,	)
	)
Appellant,	)
	)
vs.	)
	)
STATE OF NEVADA,	)
	)
Respondent.	)
	)

APPELLANT'S REPLY BRIEF

Appealed From Judgment of Conviction
in the Fourth Judicial District Court
Elko County, Nevada Case No. 5833

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

STATEMENT OF THE ISSUES 3

I. DENIAL OF BAIL WAS PREJUDICIAL 7

II. THE SENTENCING WAS IMPROPER . 8

III. DOUBLE JEOPARDY OCCURRED WITH THE DUAL SENTENCES 13

IV. THE DNA WAS IMPROPERLY ADMITTED 14

STATEMENT OF FACTS 4

ARGUMENT 7

CERTIFICATE OF COMPLIANCE 28

CERTIFICATE OF SERVICE 29

TABLE OF AUTHORITIES

PAGE

UNITED STATES SUPREME COURT CASES:

Daubert v. Merrell Dow Pharmaceuticals, Inc. __ U.S. __, 113 S.Ct. 2786 (1993) 26

North Carolina v Pearce, 395 U.S. 711 (1969) 9

FEDERAL CASES:

Thomas v. United States, 368 F.2d 941 (5th Cir 1966) 9

U.S. Rodriguez, 498 F.2d 302 (5th Cir. 1974) 9

United States v. Gwaltney, 790 F.2d 1378, 1382-83. (9th Cir. 1986) 23

NEVADA SUPREME COURT CASES:

Bushnell v. State, 97 Nev. 591 (1981) 8

Castillo v. State, 110 Nev. 535 (1994) 13

Cole v. State, 101 Nev. 585 (1985) 8

Goodson v. State, 98 Nev. 493 (1988) 13

Grooms v. State, 96 Nev. 142 (1980) 8

Jones v. State, 110 Nev. 730 (1994) 14

State v. Teeter, 65 Nev. 584 (1948) 7

State v. Wilson, 105 Nev. 110 (1989) 8

Thomas v. State, 99 Nev. 757 (1983) 9

OTHER STATE CASES:

Commonwealth v. Crews, 640 A.2d 395 (Pa 1994) 27

In Re Lewallen, 590 P.2d. 383 (Ca. 1979) 9

People v. Collins, 438 P.2d 33, 38 (Cal. 1968) ... 23

People v. Watson, 629 NE 2d 634, 257 Ill. App 3d. 915 (1st Dist, Ill. 1994) 18

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John McGivney and Joseph Hearst. The National Law Journal, vol 6, October 10, 1993: "DNA Test Reliability Turns on Demographics" 21

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Richard Lempert, "DNA, Science and The Law: Two Cheers for the Ceiling Principle." If 34 Jurimetrics Journal, Fall 1993. pp 41-57 19

STATEMENT OF THE CASE

Appellant's Opening Brief recounts the proceedings of importance, however, the State's Responsive Brief raised matters in argument that require mention of and reference to additional proceedings:

Upon Troy's return from Lake's Crossing, his Public Defender filed a Motion to Withdraw as Counsel. (ROA 1, 124-127). At the Bail Hearing on May 2, 1994, the Public Defender was relieved and David Lockie was appointed by the Court. (ROA 3, 759-766, TR 2-4). Approximately 3 months later, Mr. Lockie filed an Ex parte Motion for Authority to Hire Witness (filed 8/5/94 ROA 2, 285-295) and the Court issued Order Granting Defendant's Motion to Employ DNA Expert (filed 8/8/94 ROA 2, 296). That DNA expert had been located previously by the Public Defender, according to Mr. Lockie's statement to the Court during sentencing. (ROA 5, 1382-1402, TR 10).

In our Opening Brief, Appellant argues the impropriety of the Court considering the post-trial DNA testing, quoting only the Court to demonstrate the material considered. Respondent argues that because the defendant sought it, he therefore "introduced it" and cannot now complain about it. The State argues it confirmed the other DNA testimony of its trial experts. However, that is not entirely accurate. Although the Court considered it, and both sides in this appeal have referenced it, it cannot be determined from the docket or Clerk's Record on Appeal if the post-trial DNA material is in the record. (Our sentencing transcript does not contain it.) Appellant therefore attaches as Exhibit A hereto, the actual letter from Forensic Science Associates, dated May 31,

1995, addressed to Mr. Lockie and copied to the Court and the DA, so this Court can appropriately review this matter.

STATEMENT OF THE ISSUES

I. DENIAL OF BAIL WAS PREJUDICIAL.

II. THE SENTENCING WAS IMPROPER.

III. DOUBLE JEOPARDY OCCURRED WITH THE DUAL SENTENCES.

IV. THE DNA WAS IMPROPERLY ADMITTED.

STATEMENT OF FACTS

The State's Responsive Brief requires mention of the following additional facts:

There is conflicting testimony about when Troy left the bar. Bartender Steve said 12:15 to 12:20 a.m. (TR 133). However, he couldn't identify Troy's clothing (TR 136) and also said Pam got Megan's call just before 1:00 a.m. (TR 133). Pam said that she got the call around 12 or 12:30 (TR 88) and admitted testifying at the Preliminary to 12:30 a.m. (TR 89). She got home, surveyed the scene, comforted Megan and called 911. Police arrived at 1:18 am.

Bartender Scarlett, who served Troy all night, and in court identified his black hat and black CG's coat with orange emblem, testified she sat at the bar after her shift ended at midnight, and drank a Sharp's non-alcoholic beer and talked with a guy who was asking her out. She saw Troy in the bar, to the right, at the

table, before she left the bar. She told police right after the crime that she thought Troy was still in the bar when she left, around or after 1:30 a.m. (TR 437-8).

Troy arrived home, with no signs of blood on him anywhere, according to both Travis and Jason New (TR 205, 409-410), around 1:30 a.m. Leah Dokes saw a man in the street at 1:05 a.m. who had a black coat with a fluorescent green skull and bandit emblem on the back. (TR 398) This was corroborated by her husband Jay who described the same thing in detail. (TR 401). The CG's windbreaker Troy had was from the bar they all frequented; it was common in town and it had an orange and yellow design on back. Troy's brother had one like it. Unlike the one which the victim said scratched her face, Troy's jacket had no zipper anywhere. (TR 208).

The State asserts that Troy's roommate testified to an apparent admission by Troy. At trial, Dave Prescott testified he spoke with Troy after Officer Terry left at 5 a.m. Prescott was staying on a couch at Troy's trailer temporarily as he couldn't find a home. (TR 213). He'd been drinking for several hours that night. He drank before dinner, left for dinner, then returned to the bar for a full night of drinking at 8:00 or 9:00 or 10:00 p.m. He was drinking vodka, tequila, kahlua. He claims to have only had 6 or 7 drinks all night long, and not to have been intoxicated (TR 215) but others described him as "looking like he'd had a rough night" (TR 205) and "looking like death warmed over" (TR 451). Later, he also remembered drinking Jim Beam and Call and others buying him drinks, too. (TR 224). He also admitted that he "used to hit it pretty heavy" and changed his drinking habits after the crime (TR 223-4).

He testified he left the bar after 2 a.m., ate breakfast and went to the trailer to sleep. He awoke with the police questioning Troy. He then asked Troy "point blank" if he did it, to which he claims Troy responded "He wasn't sure what did happen, or he would like to know" (TR 217-220) and he expanded that into "the would like to remember what did go on" and "he wished he could remember what went on" (TR 221). Under cross-examination, however, he was vague about most details including the time, talking to the bartender, partying, going to CGs, and who else was present (TR 226-229). He said that after only 2 or 3 hours of sleep, he put in 10-16 hours of work that day, went drinking and partying again the next night and then went to police the following day to give them his "accurate recollection" of what Troy said (TR 231-223). The State tries to present this as an "admission" by Troy Brown.

Troy testified that Prescott asked him "if I remembered what happened?" to which he responded "I wish I could remember what time I got home". (TR 451) Troy repeatedly told Lt. Ladd that and never told him that he couldn't remember what went on that night. (TR 462-3) . When asked if Troy ever said he did anything to that little girl, Prescott did admit: "By no means. By no means. (TR. 230). [Prescott's testimony is unreliable, at best, and added little to the evidence in this case.]

Maria Fassett, Washoe County Criminalist, testified she did not examine Troy's bedding because she was told by police that the suspect did not go back home to his bed after the crime. She said had she known that was <u>not</u> true, she would have been "very interested" in examining them for signs of blood and

hairs, and evidence transferred from the victim. (TR 289, 290-292). She also testified that she did examine Troy's cowboy boots which, being leather, would be good absorbants of blood, and she found no traces of it anywhere. (TR 290). Also, it was Fassett, not Renee Romero, who testified that the "DNA evidence was so overwhelming" that no examinations of other evidence was required. (TR 295-96). [The State erroneously attributes this statement to Romero, trying to discount its importance as merely a "discussion of match probabilities." (Responsive Brief p 16).

REPLY ARGUMENT

I. DENIAL OF BAIL WAS PREJUDICIAL

It cannot be assumed that Troy was not prejudiced by the denial of bail which the State concedes was illegal. Respondent follows the State v. Teeter, 65 Nev. 584 (1948) analysis to argue that Troy was not denied trial preparation opportunities. There is no indication any trial preparation was undertaken while Troy was in Lake's Crossing. No motions were filed. There is no motion to hire an investigator. Apparently the Public Defender had located the DNA expert who did the post-trial work long before they ever withdrew as counsel (see Mr. Lockie's statement at sentencing, TR 10), but obviously they did nothing with her as Mr. Lockie had to file a motion to hire her in August. Immediately upon Troy's return from Lake's, the Public Defender withdrew. That certainly indicates harm to Troy Brown in his trial preparation opportunities. The loss of precious time to follow-up leads on other suspects, investigate the State's witnesses and work up the case for trial must be seen as prejudicial to Troy Brown.

The record shows that the Court, after inquiring about the strength of DNA results, revoked bail and ordered Troy taken into custody at the beginning of the trial. What it does not show, however, is whether that was reported in the media. This Court can take judicial notice that this was perhaps the most notorious and heinous crime at the time in Eastern Nevada, but Defense Counsel made no motions with regard to publicity. Thus we are unable to tell if he appeared to the jury to be in custody, Grooms v. State, 96 Nev. 142 (1980), or if the revoked bail was telegraphed to potential jurors, but the inference is likely.

II. THE SENTENCING WAS IMPROPER

Respondent admits Troy Brown is serving more time for failing to show remorse, (Answering Brief p 13), but asserts that is proper "character evidence" for the Court to consider in sentencing. His citations to State v. Wilson, 105 Nev. 110 (1989) and Cole v. State, 101 Nev. 585 (1985) are inapposite. Wilson provides that when a young defendant, sentenced to death, has exhibited genuine remorse and has other mitigating evidence, it is improper for his counsel not to put that evidence forward. Cole involved a serial killer who admitted 13 murders and rape and said he'd do it again if he could, and who asked to die. Neither of those cases gives the Court any authority to punish a defendant more severely because he maintains his innocence, as was done here. The State hasn't produced any justifying legal authority because what the judge did in this case cannot be justified.

Contrary to Respondent's claim, the law in Nevada is not unclear on this issue. Bushnell v. State, 97 Nev.

591 (1981) and Thomas v. State, 99 Nev. 757 (1983) both provide that a defendant cannot be punished for maintaining his innocence. That is true whether or not he chooses to testify. The argument that allowing a judge to hammer a man at sentencing if he doesn't confess and show remorse prevents defendants from falsely testifying is specious. In a criminal trial the defendant has the right to choose to testify or not. If an accused is innocent, and maintains that stance throughout his trial, he might surely be afraid to testify knowing the judge will "max out" his sentence if he doesn't like what he says or how he says it. Face-to-face testimony, with a jury observing demeanor and determining credibility, is sometimes all a defendant has, and sometimes it is enough. Respondent says the reasoning in cases like Thomas and Bushnell, (supra) and U.S. Rodriguez, 498 F.2d 302 (5th Cir. 1974), Thomas v. United States, 368 F.2d 941 (5th Cir 1966), North Carolina v. Pearce, 395 U.S. 711 (1969) and In Re Lewallen, 590 P.2d. 383 (Ca. 1979) should not apply to Troy because he did testify but the Court didn't believe him. However, turning the right to testify into a potential "penalty enhancer" is tantamount to denying the right to defend oneself.

The very words of the court, recounted at pages 15-16 of our Opening Brief, show the invective and hatred this judge held for Troy because he would not admit guilt. He specifically said he would give him a harsher sentence if he didn't "act like a man" and confess. The facts of this case overwhelmingly support a finding of abuse of discretion and the need for a resentencing before a different judge.

This Court should also examine the text of the sentencing judge's colloquy regarding Troy's parents

and family life. While Respondent claims not to see what the problem is, the record speaks for itself. The Court clearly sentenced Troy more harshly because of his father's drinking, his mother's abuse, and the dysfunctional family he is a part of. We are all products of our upbringing but a man should be sentenced only for the crime he is convicted of, not the immorality of his parents.

The consideration of the post-trial DNA letter from Forensic Science Associates was improper and prejudicial for a number of reasons. First, contrary to Respondent's assertion, Troy Brown did not introduce it into evidence at the sentencing by virtue of the fact that his parents asked for additional DNA testing. They sought it because the Defense Counsel had failed to challenge the DNA before or during the trial, had failed to use the money the court granted for the DNA expert, stated in his own Final Argument that he could not understand it (TR 521-528) and thus they could not reconcile themselves to the jury's verdict without more exploration of this most critical issue. The Court granted their request to help give them peace of mind. The results of the post-trial DNA work were reported to the Court and the DA, as well as the Defense Counsel.

But as the sentencing transcript shows, Troy Brown was never given the chance to properly present Exhibit A, to delve into the foundation for the report or the credentials of the lab technician or to even present testimony about it. As Exhibit A shows, the new lab was not even able to do DNA testing on some of the items submitted:

"No attempt was made to conduct this analysis at this time." (See page 3, paragraph 1);

"No attempt was made to remove cells from this slide for DNA analysis." (See page 3, paragraph 2);

"No attempt was made to extract DNA from the second swab [B] due to the paucity of cells from this sample." (See page 3, paragraph 3);

"No further analysis was conducted on this specimen." (see page 4, paragraph 1).

Rather, all the new lab was able to do was identify and confirm the previously identified genes and confirm gene traits identified by the Washoe County technician Renee Romero. That is akin to confirming that a red car is indeed red. That in no way addresses the DNA issues raised in this trial (and discussed in detail in Section IV below.) There is no indication that Forensic Associates was told of the evidence collection problems cited by Maria Fassett as concerning her. (TR 280). In fact, the first paragraph of the letter indicates to the contrary. There is no indication the new lab was told that Romero at first could not find sufficient sample to do an RFLP analysis, but somehow came up with it 6 months later. (TR 172-176, 299-345). There is no indication Forensic Associates was told that Troy's brothers might be in the suspect population.[1]

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[1] The impact of brothers in the suspect population is an important consideration that bears on the Random Match Probabilities (RMP). "But the probability that the suspect and his biological

There is no indication the new lab was told that Romero was new at testifying, her lab had not yet completed proficiency testing, and that she was just learning new DNA techniques, all of which Romero testified to at trial. All of these are factors that effect the reliability of the actual testing done, and impact on the efficacy of the results achieved. The very consideration of the May 31, 1995 letter in isolation compounded the DNA evidence problems from the trial and further prejudiced Troy. It was like a second tarring with the same batch of feathers.

Nor is it accurate for the Court or Respondent to say that the post-trial DNA merely confirmed the results of the Washoe County lab. Forensic Associates said they could "not eliminate as a potential source of sperm from the Allred [Troy Brown] vaginal swab [Item 2-1A] (see page 7, numbered paragraph 4 of May 31, 1995 letter, Exhibit A hereto) which is very different from saying there is a 1 in 3 million chance the offender was someone other than Troy Brown (TR 320, 515) or "the chances that the DNA in the panties and blood is not Troy's is .000033" (TR 338). The random match probability (RMP) found by Forensic Associates (1 in 10,000 for this specific genotype) (see page 7, first line of Exhibit A) was even different that Romero's who testified at Preliminary Hearing to

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brother will share a set of alleles on each of the three probe sites is approximately (1/4)3 = 1/64." See Jonathan J. Koehler, DNA Matches and Statistics: Important Questions, Surprising Answers, 76 Judicature 222 (1993). In the present case, that factor is critically important, not only because the victim constantly referred to "Trent" instead of "Troy", but also because Renee Romero, the States's DNA "expert" quoted the odds of two brothers sharing the same alleles as **1 in 6,500!** (TR 344)

nearly double that, or 1 in 18,900. (Prelim. TR 179). The fact that both the Court and the DA assert that Forensic Associates confirmed Romero further demonstrates their lack of understanding of the whole DNA process and technology, something the Court readily admits. (Sentencing TR 11-12).

The prejudice created to Troy Brown in sentencing cannot simply be ignored nor erased. The cumulative effect was to land him in prison for more than the rest of his natural life. The magnitude of these problems requires that Troy receive a new sentencing from a different judge. Because of the consideration of prejudicial material and abuse of discretion, a new sentencing is required. Castillo v. State, 110 Nev. 535 (1994) and Goodson v. State, 98 Nev. 493 (1988).

III. DOUBLE JEOPARDY OCCURRED WITH THE DUAL SENTENCES

Respondent has produced no legal authority to support its argument that Sexual Assault of a Child Under 14 and Child Abuse by Sexual Assault are two distinct crimes. The legislative history cited in Appellant's Opening Brief demonstrates that the Legislature saw them as having the identical elements; they simply imported Sexual Assault of a Child into the child abuse statutes in toto. Rather than finding any legal authority for its position, as the Appellant has amply done, the State incredibly argues that rape of a child could theoretically be painless and enjoyable thus the "pain or mental suffering" part of a "child abuse by rape" crime differentiates it. However, the State's own expert testimony about the effect of sexual assault on a child belies this contention. (See testimony of Dr. Marion Sherman, TR 39-48).

Appellant's detailed analysis of the elements of each crime, and the factual proof that in this case, both charges derive from the exact set of circumstances, has not been successfully challenged by Respondent. Nor has the case of Yearty v. State, 805 P.2d. 987 (Alaska 1991) been even discussed, let alone distinguished or discounted. The Alaska Supreme Court has grappled with this identical issue and reached the conclusion that it is Double Jeopardy to convict and sentence a defendant for both the crimes alleged in this case. This Court should look to that ruling as it is "on all fours" with the present case.

IV. THE DNA WAS IMPROPERLY ADMITTED

Respondent urges this Court to overlook the plethora of DNA problems in this case because Troy's Defense Counsel failed to object. While that is ordinarily a post-conviction habeas corpus matter, if counsel was ineffective as a matter of law, the Court can and must consider it in this appeal. Jones v. State 110 Nev. 730 (1994). Given the current state of DNA technology and the rapidly evolving law in this area, failure of a defense attorney to challenge DNA, to challenge a DNA expert, to use money given it by the Court to meet DNA evidence and even to coherently argue the DNA at trial must be found to be "plain error" and "ineffective assistance of counsel" as a matter of law. Under the facts of this case, where the State's case turned largely on the DNA evidence, and the result is multiple life prison sentences, it is especially true.

DNA evidence first came on the judicial scene in Florida in the trial of State v. Anderson, 533 So.2d. 841 (1988). In that case the defense was basically

caught unawares and scientifically unprepared for the evidence and offered no challenge. Since that time, one of the leading commentators on DNA, D. H. Kaye, has described the history of DNA as having three phases: an initial period of enthusiastic acceptance; a damping counterreaction; and the current period of mixed outcomes and opinions expressing grave concerns over certain aspects of DNA evidence.[2] In that article, he also detailed some of the many objections raised to DNA evidence.

> "Since 1988, a fusillade of objections to the admission of DNA tests have been raised in court. These include questions about the possible effects of contaminants on forensic samples, the use of radioactive isotopes in exposing x-ray film, the addition of ethidium bromide, corrections to band-shifting, the records of laboratories on proficiency tests, the criteria and procedure for deciding that two samples of DNA 'match', the size and sources of databases used to assess the significance of matching bands, and the methods of calculating the frequency of matching DNA patterns within a reference population." (fn 3).

The chronicling of the types of problems that can and have arisen with DNA evidence has become a major pastime of the scientific and legal community.

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[2] D.H. Kaye, "The Forensic Debut of the National Research Council's DNA Report: Population Structure, Ceiling Frequencies and the Need for Numbers" 34 Jurimetrics Journal, Summer 1994 pp. 389-382

Leonard J. Deftos, M.D., writing in the Whittier Law Review in 1994 cited:

> DNA sample handling errors; stability of DNA in forensic samples; contamination by human and non-human DNA; chain-of-evidence handling errors; inadequate extraction of the DNA sample; partial digestion of the sample or altered specificity of the enzyme; bandshifting problems in the electrophoresis process; the interference of air pockets in the transfer of DNA from the gel to the paper-like sheet of material; problems caused by the number of radioactive DNA probes used and the number of pieces into which the DNA test is digested by the restriction enzymes; the effect on the X-ray pattern caused by the duration of the exposure of the film to the x-ray in producing autoradiographs (autorads); subjective interpretation errors; and even errors in the computer-assisted image analysis of the bands.[3]

Writing to the legal community in Illinois, the supervisor of the Cook County Public Defender's DNA Homicide Task Force pointed out that even though 99% of the base pairs on the DNA molecule are identical, in that remaining 1% there are over 3 ½ billion variations of the human genome, leaving much room for discrepancy.[4] With regard to Restriction

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[3] Leonard J. Deftos, M.D., "Daubert & Frye: Compounding the Controversy Over Forensic Use of DNA Testing", 15 Whittier Law Review, 1994, p 955-979

[4] citing Eric Lander, "Population Genetic Considerations in Forensic Use of DNA Typing" in Banbury Report 32: DNA

Fragment Length Polymorphism (RFLP) DNA analysis, Allan Sincox also detailed technical problems such as:

> the subjectivity of declaring that two samples match at a particular loci; the fact that a computer's placement of a band marking on the "sizing ladder" for the bands of base pairs can be over-ridden by a human without detection; and that the methods used to sort fragments by size do not possess sufficient resolution to distinguish between fragments varying by only one base pair.[5]

Even with the myriad scientific and technical errors that can occur in DNA analysis, the one thing about which most scientific and legal commentators agree is that experts disagree on the accuracy of the various methods used to determine the reference population databases used to compute the random match probabilities (RMP) once DNA evidence is found and analyzed.

The RMP is the figure which is usually quoted to the jury, by the DNA expert, the prosecutor, and often the judge, in an attempt to give some significance to the DNA findings. The findings are often couched in terms of the "frequency of the defendant's genetic traits in the reference population" and the "likelihood or probability that someone other than the defendant

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Technology and Forensic Science, Cold Spring Harbor Press, 1989.

[5] Allan Sincox and Marijane Hemza-Placek, "Challenging the Admissibility of DNA Testing", the Illinois Bar Journal vol 83, April 1995, pp170-176.

has these genetic traits". For example, in the present case, Renee Romero variously told the Court at Preliminary Hearing that the frequency of Troy Brown's PCR polymarkers was 1 in 22 in the Caucasian race; his DQ Alpha traits was 1 in 18,900 in the Caucasian population; and using the "interim ceiling method" devised by the NCR, she could place the RMP that it was someone other than Troy at 1 in 3 million.

The basic argument dividing the scientific world is that general reference populations (like "all Caucasians, Blacks and Hispanics") are homogeneous and mate randomly thus there are no racial or ethnic substructures. (Even a cursory examination of certain ethnic and population groups proves this is not true and there is often selective procreation.) This then includes the assumption that each genotype pattern produced by a DNA probe is independent from the others and can therefore be multiplied times each other to produce an estimate of rarity or frequency of that pattern in a given population. This was the first battle to divide the DNA scientists who argued that the population databases were not narrow enough to allow for such substructures. Different statistical methods of calculating the population "match" statistics evolved including the "product rule", the "fixed bin" and "floating bin" methods and use of particular databases developed by specific labs, including the FBI, Cellmark, Lifecodes and others.

The samples used to develop those databases have often been successfully challenged. In People v Watson, 629 NE 2d 634, 257 Ill. App 3d. 915 (1st Dist, Ill. 1994), the trial court found that the FBI Black database was not randomly selected and there was not

even sufficient documentation to conclude that everyone in it was Black. One private DNA tester had a Caucasian database chosen entirely from a single blood bank in Delaware. The director of that Blood Bank stated that the company misrepresented its purpose in seeking the blood samples and that those given do not constitute a random sample of the Caucasian population. One FBI database was found to contain 60 duplicate samples.[6]

To solve this problem, the NCR Report recommended that all DNA experts use very conservative measurements, labeled the "interim ceiling principle", to establish the frequency with which individuals share particular alleles (genetic traits) in the general population. (This method establishes those frequencies by taking random samples of 100 individuals from each of 15 to 20 population groups and uses the largest frequency with which any allele is found, or 5%, whichever is larger, as an estimate of that allele's frequency in the subject population group. These frequencies are then multiplied to yield an estimate of the likelihood that a randomly selected person would exhibit the same allele configuration as that found in the DNA samples associated with the defendant and the crime in question.)[7]

The problem with the "Ceiling Principle" is that it has no statistical validity; it is simply a policy

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[6] Id at fn 27.

[7] Richard Lempert "DNA, Science and The Law: Two Cheers for the Ceiling Principle," 34 Jurimetrics Journal, Fall 1993, pp 41-57.

compromise arrived at by a group of scientists to appease the legal community while the actual population database studies are undertaken to get sufficient information to make true statistical findings about given population subgroups. Recent criticism of the "ceiling principle" is that the 100-person samples used as databases are too small.[8] Another argument is that maximum frequencies in different databases should not be multiplied but rather one should use the maximum over populations of products of allele frequencies.[9] Another expert has posited that allele association within populations sampled means that applying the "product rule" to ceiling estimates can actually underestimate the frequency with which certain allele combinations occur, and there are certain ethnic groups in which certain alleles are more common than in the sampled groups.[10] Another expert suggests that we do away with "the entire enterprise of binary matching" and instead use a statistical method called Bayesian "likelihood ratios"[11]

Since the advent of DNA evidence, the scientific and legal community has often failed to set rigorous

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[8] B. Devlin et al., "Statistical Evaluation of DNA Fingerprinting: A Critique of the NRC's Report", 259 Science 748, 837 (1993).

[9] B.S. Weir, 'Population Genetics in the Forensic DNA Debate", 89 Proc. Nat'l Acad. Sci USA 11654 (1992).

[10] J. E. Cohen, 'The Ceiling Principle is Not Always Conservative in Assigning Genotype Frequencies for Forensic DNA Testing", 51 Am. J. Hum. Genet. 1165 (1992).

[11] D.H. Kaye, 'The Relevance of 'Matching' DNA: Os the Window Half Open or Half Shut?", 85 The Journal of Criminal Law and Criminology, 1995. pp 676-695.

standards for its presentation, and the result is often expert testimony based on imprecise data and unreliable statistical calculation.[12]

The "bottom line" is still that 1) procedures used to declare matches are not yet the subject of general scientific acceptance and proof, thus are not always reliable and relevant; and 2) procedures used to calculate frequencies are no better off. Not only did the NCR Report and "ceiling principle" not solve the problem, it has resulted in the NCR convening a second expert panel to re-study the entire issue. The result for criminal courts is that in a recent Forensic DNA Analysis Update for Prosecutors (as of July 21, 1995), it was reported that 72 state courts of last resort had grappled with RFLP DNA issues with 45 admitting, 17 partially admitting with or without statistical testimony, and 10 excluding the evidence entirely. With regard to PCR analysis, there were 11 state courts of last resort admitting the evidence and one excluding it entirely.[13] Often the Courts sidestep the issue by finding the "other evidence" to be overwhelming so the DNA errors are found to be harmless.

Two other problems with DNA science that should greatly concern the courts are cited in recent scientific journals. Writing in the Winter, 1995 volume of

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[12] John McGivney and Joseph Hearst. The National Law Journal, vol 6, October 10, 1993: "DNA Test Reliability Turns on Demographics".

[13] Information compiled by the Investigative Law Unit, DNA Legal Assistance Subunit (DNALAS) 10th Street and Pennsylvania Avenue, N.W., Room 7879, Washington, D.C. 20535.

Jurimetrics Journal, Jonathan J. Koehler, Audrey Chia and Samuel Lindsey describe their controlled studies of jurors given certain DNA random matching probability evidence (RMP). They conclude that jurors given RMP evidence are confused and overly impressed with RMPs given in astronomical magnitudes. They also conclude that when jurors are given that information without reference to laboratory error rates, they are several times more likely to convict a defendant. They conclude that there should be more and improved blind, external proficiency tests of labs doing DNA work and that jurors should be provided with information about lab errors, the difference between a reported match and a true source match and a perspective with which to evaluate the DNA evidence in relationship to that. They also recommend that "likelihood ratios" that convey the significance of a reported match be presented in terms more on the order of 100 or 1,000 rather than the astronomical figures given in courts today, as they find the latter to be so irrelevant as to be prejudicial.[14]

The applicability of this study and its conclusions to the case at bar is clear. When a jury is told that the "chances that the DNA in the panties and blood is not Troy's is 1 in 3 million" (TR 338) and that is 3 times the entire population of Nevada, this effectively relieves the jury of its decision-making task by replacing the jury's function of weighing all the evidence with considering instead the probability of guilt.

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[14] J. Koehler, A. Chia., S. Lindsey, "The Random Match Probability in DNA Evidence: Irrelevant and Prejudicial?" 35 Jurimetrics Journal, Winter 1995, pp 201-219

It is precisely these kinds of probability statistics that give scientists, and the courts, the most heartburn in the area of DNA evidence. Quantifying the probability of guilt has long been taboo in the area of criminal justice as it creates inherent prejudice to the accused. As the Court said nearly 30 years ago in People v. Collins, 438 P.2d 33, 38 (Cal. 1968):

> "As we shall explain, the prosecution's introduction and use of mathematical probability statistics injected two fundamental prejudicial errors into the case: (1) The testimony itself lacked an adequate foundation both in evidence and in statistical theory; and, (2) the testimony and the manner in which the prosecution used it distracted the jury from its proper and requisite function of weighing the evidence on the issue of guilt, encouraged the jurors to rely upon an engaging but logically irrelevant expert demonstration, foreclosed the possibility of an effective defense by an attorney apparently unschooled in mathematical refinements, and placed the jurors and defense counsel at a disadvantage in sifting relevant fact from inapplicable theory."

Courts still recognize the prejudice and the problems today as juries tend to equate evidentiary probabilities with probability of guilt. United States v. Gwaltney, 790 F.2d 1378, 1382-83. (9th Cir. 1986).

The second common problem that should concern the courts is described the article "Error and Exaggeration in the Presentation of DNA Evidence at

Trial" by Jonathan J. Koehler.[15] The article discusses the subtle, but common exaggerations that occur by experts, attorneys and judges at trial, defining them as "source probability errors", "ultimate issue errors" and "match" and "numerical conversion errors." A common mistake is telling jurors that technical and human errors are not possible or are so rare as to be "impossible;" that DNA analysis is "failsafe;" and that the accuracy rate is 100%. (An example in our case occurred when Maria Fassett testified that the DNA was so overwhelming" that other evidence examination was warranted. (Trial TR 295-296). The commentators note that as of 1993, when the article was written, there had been no blind external proficiency tests done in any labs. They recommend that as the only way to establish true error rates which jurors need to know. In the present case, Renee Romero testified that exclusions occur in about 30% of DNA analysis cases, (Trial TR 335) but she did not testify to the lab error rate in Washoe County, nor could she have, as they had not completed any proficiency testing yet. (Prelim TR 163) In fact, they had only been doing DQ Alpha testing for less than 9 months (Prelim. TR 162-163) and only started PCR analysis two months earlier. (Prelim TR 163). She had only testified twice, in Elko and Washoe Counties, on DNA before. (Trial TR 334).

Exaggeration of the odds of a defendant being the source of the evidence, and thus turning a comparison into an identification, are all too common and egregious because they lead jurors to conclude that

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[15] Jonathan J. Koehler, "Error and Exaggeration in the Presentation of DNA Evidence at Trial" 34 Jurimetrics Journal Fall 1993. pp 21-39.

there is no possibility that someone other than the defendant is the source of the DNA evidence, according to the authors. "Trial transcripts reveal that courtroom source probability errors are usually committed with the help of statements in the form of questions from attorneys." (at page 30) They also say that the conversation dynamics between experts and attorneys during examinations usually lead to the absolute identity claims, often in the form of "99.99 percent probability" claims. In our case, Romero told the jury that the percent of likelihood that the DNA in the panties is the same as the defendant's DNA is 99.99967%. (Trial TR 336). That is improper exaggeration and source error, according to the experts. It is also extremely prejudicial to the accused.

The worst part, however, is that in the face of all the potential challenges of DNA evidence today, Troy Brown's Defense Counsel seemed oblivious to any and all of the technical challenges to DNA, He not only raised no technical or human error issues; he failed to seek an admissibility hearing at all, even when the DA, at the Bail Hearing, suggested that one would be in order at a later date! (May 4, 1994 TR 15). He failed to examine the foundation for the "expert" status of the witnesses even knowing that Romero had just begun to do DNA analysis and testimony, and he merely allowed into evidence a written resume of Romero and others. When one criminalist Maria Fassett, expressed concern over the inexperience in evidence collection methods of the Carlin police, Defense counsel failed to delve into that, and its potential effect on the ultimate lab results. Even when Ms. Fassett testified she was mislead about bedding and other evidence and would have investigated and examined it further had she not been, Defense Counsel failed to stress that or

capitalize on it in argument or cross-examination of others. When the other circumstantial evidence was almost exculpatory of Troy--different hair, shirt, coat, smell, no zipper or watch, repeated naming of "Trent" by the victim, no fingerprint of Troy on the lamp, no blood on his clothing--the abject failure of his Defense Counsel to vigorously attack the only, but most fatal, evidence--the DNA--must be found to be "plain error" and ineffective assistance as a matter of law. Jones v. State 110 Nev. 730 (1994).

Respondent argues that because some jurisdictions have accepted DNA analysis, and the statistical probabilities that make it meaningful, this Court should too, and without requiring a Daubert v. Merrell Dow Pharmaceuticals, Inc. __ U.S. __, 113 S. Ct. 2786 (1993) pretrial admissibility hearing to assess relevance and reliability. The very infancy of this process in Nevada dictates otherwise. The very need to eliminate this basis for "ineffective counsel as a matter of law" findings dictates otherwise. Until the scientific community itself settles some of its disputes over DNA methods and statistical reporting of the results for population databases,[16] the only way this Court has to assure that the prejudice of "statistical probability of guilt" does not infect a criminal trial is to require the maximum pretrial scrutiny of the evidence, and the experts, and to demand that Defense Counsel demonstrate knowledge and expertise in the field of

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[16] A recent examination by counsel of the National Judicial College computer listings for resource material on DNA revealed over 600 current articles and evidence that population databases have now been constructed for German, Danish, Swedish, Chinese, Arab, Korean, Chinese-Malay-Indonesian populations so far, indicating great progress in this fast moving field.

DNA science.[17] The consequences--a dead certainty of conviction despite exculpatory and even contradictory or unreliable evidence--demand that this Court raise the standards of the Criminal Defense Bar in this area of law-science by requiring Daubert pretrial hearings or excluding DNA evidence in their absence. In the absence of the same, this Court should reverse his conviction and remand Troy Brown for a new trial, because unlike Commonwealth v. Crews, 640 A.2d 395 (Pa 1994), the other evidence was far from overwhelming so the DNA errors cannot be harmless errors.

Respectfully submitted this 29th day of January, 1996.

/s/_____
DOROTHY NASH HOLMES
Counsel for Appellant

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[17] Appellant urges this Court to impose a rule similar to SCR 250, requiring demonstrated DNA expertise before one can handle a criminal trial in which a defendant faces life sentences in prison.

EXHIBIT "A"

Forensic Science Associates
3053 Research Drive, Richmond, CA 94806
FAX (510) 222-8887
(510) 222-8883

May 31, 1995

David Lockie
Attorney at Law
1053 Idaho Street
Elko, NV 89801

Re: State of Nevada v. Troy Brown
Megan Allred [Victim]
Our File Number 94-743

Report

Background

The following information was communicated to us by David Lockie, counsel for Troy brown: The Brown case involves an alleged sexual assault in which the victim is Megan Allred, a young child, and a potential suspect is Troy Brown. Pursuant to the investigation of this case a sexual assault kit and clothing were collected from the victim. This evidence was examined by Renee Romero of the Washoe County Criminalistics Laboratory [see report dated June 6, 1994 and September 15, 1994]. Romero conducted an RFLP based DNA genetic analysis on sperm recovered from the Allred panties which failed to exclude Brown as a potential sperm source. It was requested that PCR based DNA typing be conducted on the Allred vaginal

swabs to determine whether or not Brown can be eliminated as potential sperm source from these items.

Items of Physical Evidence

The following items of physical evidence were received from Renee Romero of the Washoe County Criminalistics Laboratory on February 27, 1995 via US Registered Mail:

1. Tape sealed envelope labeled "Motile sperm slide and vaginal smear slides from sexual assault kit RO3692 removed from envelope number 5 received from Carlin P.D. 2-21-95" containing the following two slide holders:

1-1. Slide holder labeled "RO3692 motile sperm slide 0277-94 02Feb94 MF" containing an unlabeled broken microscope slide.

1-2. Slide holder labeled "RO3692 vaginal smears 0277-94 02 Feb 94 MF" containing two slides.

1-2A. Unlabeled and unmounted slide.

1-2B. Slide labeled "0277-94 RO3692 02 Feb 94 MF V".

The following items of physical evidence were received from Renee Romero of the Washoe County Criminalistics Laboratory on March 6, 1995 via US Registered Mail:

2. Tape sealed envelope labeled "Remainder of vaginal swab RO3692 collected from Megan Allred" containing tape sealed envelope labeled

"0277-94; RO3692; vag swab (2) 02 Feb 94 MF, EX#27, case #5833" containing two bindles.

2-1. Bindle labeled "0277-94 02 Feb 94 MF RO03692 Vag swabs (2)" containing two partial swabs.

2-2. Bindle labeled "swab 2 cutting" containing small amount of debris.

Examination of the Allred Motile Sperm Slide [Item 1-1] and Vaginal Smear Slides [Item 1-21]

Three slides were submitted for examination. The motile sperm slide [Item 1-1] is illustrated in figure 1. This unstained slide contains a coverslip over the cellular debris. Microscopic examination of this specimen could not be adequately conducted without removal of the coverslip and staining the specimen. No attempt was made to conduct this analysis at this time.

The vaginal smear slides [Items 1-2A and 1-2B] are illustrated in figure 2. One of these slides [Item 1-2A] is unlabeled and unmounted. Microscopic examination of this slide revealed spermatozoa and blood cells. No further analyses were conducted on this specimen. The second vaginal smear slide [Item 1-2B] has been histochemically stained and contains a mounted coverslip. Microscopic examination of this slide revealed several intact spermatozoa [sperm with tails] and many white blood cells. The cellular debris from this slide is illustrated in figure 3. No attempt was made to remove the cells from this slide for DNA analysis.

Examination of Allred Vaginal Swabs [Item 2]

Two partial swabs [Item 2-1A and 2-1B] and a bindle containing swab debris [Item 2-2] were submitted for examination. The packets containing these items are illustrated in figure 4. The two partial vaginal swabs [2-1A and 2-1B] are illustrated in figure 5. One of these swabs [A] contains a small amount of red stained material resembling blood. Most of the swab tip has been removed from the other swab [B]. Blood was detected on both swabs using a sensitive presumptive test [o-tolidine and hydrogen peroxide]. All of the remaining swab material from both swabs was removed and extracted. Microscopic examination of the cellular debris revealed scattered sperm heads and many white blood cells from swab A; and only a small amount of cellular debris from swab B. The cellular debris from swab A containing sperm heads is illustrated in figure 6. DNA was extracted from this sample as described below. No attempt was made to extract DNA from the second swab [B] due to the paucity of cells from this sample.

The vaginal swab debris packet [Item 2-2] is virtually empty. This sample is illustrated in figure 7. Microscopic examination of the small amount of debris from this sample revealed a few white blood cells and no sperm. No further analysis was conducted on this specimen.

Genetic Analysis

Several genes were amplified using the polymerase chain reaction [PCR] and subsequently typed. These genes include DQ-, the Polymarker genes LDLR, GypA, HBGG, D7S8 and GC.

The DQα DNA region is a genetic marker system in its own right in a similar manner to the ABO genetic marker system. Within the DQα marker system there are 6 alleles (or traits) designated 1.1, 1.2, 1.3, 2, 3, and 4. Since each individual has two alleles, this genetic marker gives rise to 21 possible types as follows: [1.1, 1.1], [1.1, 1.2], [1.1, 1.3], etc. Each allele is associated with the specific and known DNA sequence. The DNA associated with the conventional HLA genetic markers (A, B, and C loci) is in the Class I group. All of these genetic markers are associated with the short arm of chromosome 6.

The Polymarker gene system consists of five genetic markers [DQα is included but is not typed with the other five genes] each located on a different chromosome region. These PCR amplifiable genes include the low density lipoprotein receptor [LDLR] located on chromosome 19, glycophorin A [GypA] located on chromosome 4, hemoglobin gamma globin [HBGG] located on chromosome 11, D7S8 located on chromosome 7, and group specific component [GC] located on chromosome 4 and distantly removed from GypA. The Polymarker genes are amplified simultaneously and typed using sequence specific probes immobilized on typing strips in a similar fashion to DQα typing. Each of these genes possessed two or three alleles. Two of the gene systems described above have been widely employed in forensic practice where typing was conducted on at the protein level. Glycophorin A [Gyp A] is responsible for the MN blood group system, commonly used in paternity testing; and group specific component [CG] is a blood serum protein responsible for vitamin D transport.

Genetic analysis of the specimens in this case involved the following essential steps:

1. Epithelial cells were digested with SDS and proteinase K followed by the digestion of sperm with SDS, proteinase K, and DTT [dithiothreitol]. Blood was digested with SDS and proteinase K.

2. DNA was extracted from sample digests with chloroform/phenol and concentrated using Centricon molecular filters.

3. The DQα and the polymarker genes described above were amplified using the Polymerase Chain Reaction [PCR].

4. DQα and the polymarker genes were typed by hybridizing the amplified sample DNA with Allele Specific Oligonucleotides (ASO's) using a Dot Blot Assay.

The results of this analysis are summarized in Table 1. These findings revealed the following observed facts:

1. The sperm DNA from the Allred vaginal swab [Item 2-1A] was not completely separated from the female's DNA. This is due to the relative small number of sperm in this sample and the relatively large amount of white blood cells from the female. Most of the DNA in the sperm fraction is derived from sperm; and a lesser proportion is derived from the female's cells.

2. The non-sperm DNA fraction from the Allred vaginal swab [Item 2-1A] corresponds to the types

obtained for Megan Allred by Renee Romero [report dated June 6, 1994]. This sample was determined to be DQα type 3,4; LDLR type A,B; Gyp A type B,B; HBGG type A,B; D7S8 type A,A; and GC type C,C.

3. The sperm fraction from the Allred vaginal swab [Item 2-1A] was determined to contain the DQα 3 allele in excess of the DQα 4 allele. This result indicates that the sperm source possesses DQα type 3,3.

The LDLR type was determined to be type A,B. Since this type is possessed by the female and since both the A and B traits are present at equal levels, it is unclear whether the female's traits mask those of the sperm source. Thus, no inference concerning the LDLR type of the sperm source is drawn from this result.

GYPA typing contained the A trait in significant excess of the B trait. Since the A trait can not originate from the female, this result indicates that the GYPA type of the sperm source is type A,A. This result also demonstrates that more DNA from the sperm source is present in this fraction than from the female.

The HBGG typing contained the B trait in significant excess of the A trait. Since the female is HBGG type A,B, this result indicates that the sperm source is HBGG type B,B.

The D7S8 typing contained the A trait is slight excess of the B trait. Since the female is D7S8 type A,A; this result indicates that the sperm source is either D7S8 type A,B or B,B. It is more likely that the

type of the sperm source is type A,B since it is clear from the GYPA, HBGG and GC typing that more DNA from the sperm source is present in this fraction than from the female.

Th GC typing contained the A trait in significant excess of the C trait. Since the female is GC type C,C; this result indicates that the sperm source is GC type A,A.

Thus, despite some DNA from the female in the sperm fraction from the vaginal swab [Item 2-1A], the sperm source can be determined to be DQα type 3,3; GYPA type A,A; HBGG type B,B; D7S8 type A,B or B,B; and GC type A,A. The LDLR type of the sperm source can not be clearly determined. This array of genotypes occurs in approximately 0.01% [one out of 10,000] of the Caucasian population and less frequently in the Black population. Frequencies associated with individual genotypes are contained in Appendix 1 below.

4. Troy Brown was determined by Renee Romero [report dated June 6, 1994] to be DQα type 3,3; LDLR type A,B; GypA type A,A; HBGG type B,B; D7S8 type A,B and GC type A,A. Therefore, he can not be eliminated as a potential source of sperm from the Allred vaginal swab [Item 2-1A].

Should you have any questions concerning this work, please contact us.

Sincerely,

/s/

Edward T. Blake, D. Crim.

/s/
Jennifer S. Mihalovich,
Criminalist

cc: Thomas L. Stingfield,
District Judge, Department 1
Fourth Judicial Court
Elko, Nevada, 89801
FAX: [702] 753-4611

Marshall S. Smith
Elko County District Attorney
Elko County District Attorney's Office
Elko County Courthouse
Elko, Nevada, 89801

[certificate of compliance and
certificate of mailing omitted in printing]

Appendix 1:
Cumulative Frequency Data for the Polymarker and DQ~ Genotypes

[See chart next page]

Item 2-1A. Sperm Fraction from Vaginal Swab [A].

Marker	E Cell Fraction Type	Sperm Fraction Traits	Possible Sperm Source Type	Frequency in Caucasians	Frequency in Blacks
DQα	3,4	3>4	3,3	0.03	0.01
LDLR	A,B	A,B	All	-	-
GYPA	B,B	A>>B	A,A	0.29	0.26
HBGG	A,B	A<<B	B,B	0.24	0.05
D7S8	A,A	A>B	A,B B,B	0.62	0.60
GC	C,C	A>>C	A,A	0.08	0.01
Cumulative Frequency				0.0001	0.000001
Cumulative %				0.01%	0.0001%
Reciprocal Frequency				1/10,000	1/one million

1. DQ$_\alpha$ frequency estimates are based on a compilation of seven studies involving 2390 Caucasians and eight studies involving 2004 Blacks. Polymarker frequency estimates are based on genotype counts provided by Roche Molecular Systems, Forensic Science Associates, the FBI, and the Serological Research Institute [SERI]. These frequencies are based on a random survey 337 Caucasians, 245 Blacks, and 268 Mexican-Americans. The frequencies for GYPA and GC are similar to those frequencies in the serology literature.

PCR AMPLIFIED DNA AND TYPING: 94-743
TABLE 1

ITEM NO.	DESCRIPTION	DQ-α Type	Polymarker Genes: LDLR Type	GYPA Type	HBGG Type	D7S8 Type	GC Type
2-1A	Vaginal Swab A, E Cell Fraction	3,4	A,B	B,B	A,B	A,A	C,C
2-1A	Vaginal Swab A, Sperm Fraction	3>4	A,B	A>>B	A<<B	A>B	A>>C
	Extraction Blank	NA	NA	NA	NA	NA	NA
	Megan Allred [From Renee Romero]	3,4	A,B	B,B	A,B	A,A	C,C
	Troy Brown, [From Renee Romero]	3,3	A,B	A,A	B,B	A,B	A,A

NA: No Activity
NAI: No Activity Due to Inhibition
D: Degraded

H: High
M: Medium
L: Low

[Fold-out Exhibits, see next 9 pages]

Immobilized ASO Probe DQ$_{\alpha}$ Typing

Immobilized ASO Probe Polymarker Typing [LDLR, GYPA, HBGG, D7S8, GC]

Figure 1: Item 1-1 Motile Sperm Slide [Broken]

Figure 2: Item 1-2 Vaginal Smear Slides [2] A & B

Figure 3: Item 1-2B: Cell Debris From Vaginal Smear Slide B Showing Spermatozoa →

Figure 4: Item 2 Vaginal Swabs [Item 2-1] And Debris [Item 2-2]

Figure 5: Item 2-1 Two Partial Vaginal Swabs A & B

Figure 6: Item 2-1A Cell Debris From Vaginal Swab [A] Showing Spermatozoa →

Figure 7: Item 2-2 Debris From Vaginal Swab Cuttings

IMMOBILIZED ASO PROBE DQα TYPING

(1)

Sample	DQα Type
(2-1A) Vaginal Buccal Cell	3,4
(2-1B) Vaginal Buccal Sperm	2 > 4
Extraction Blank	NA
1.3,4 DNA STD	1.3,4
2,3 DNA STD	2,3
PC2 Blank	NA
PC2 Blank	NA

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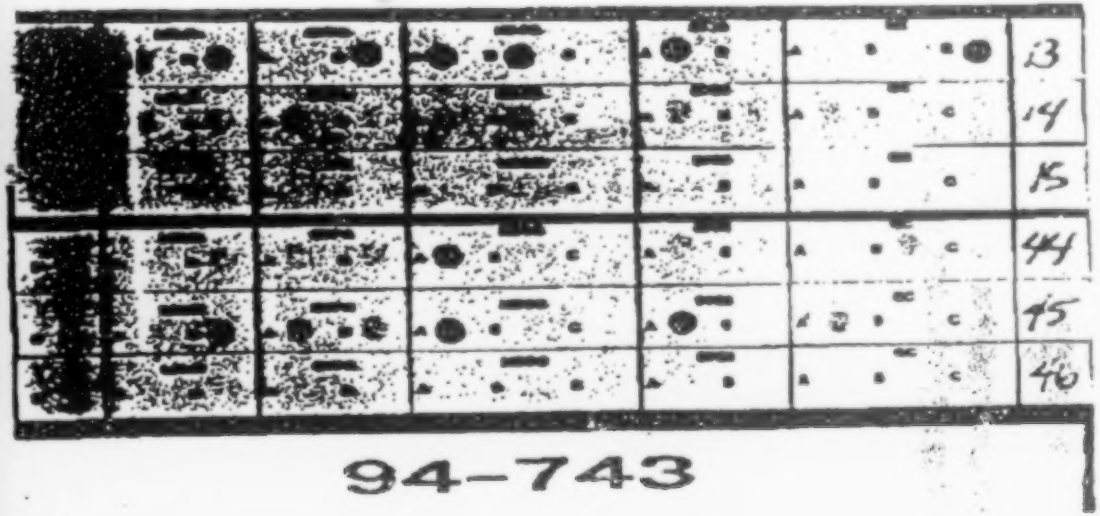
IMMOBILIZED ASO PROBE POLYMARKER TYPING
[LDLR, GYPA, HBGG, D7S8, GC]

(2)



94-743

	LDLR	GYPA	HBGG	D7S8	GC	Sample
13	A,B	B,B	A,B	A,A	C,C	(2-1A) UAG sweat, EC
14	A,B	A>>B	A=B	A>B	A>>C	(2-1A) UAG sweaty sperm
15	———		NA	———		Extraction Blank
44	B,B	A,B	A,A	A,B	B,B	Lit DNA STD
45	B,B	A,B	A,A	A,A	A,C	ISM DNA STD
46	———		NA	———		PCR Blank

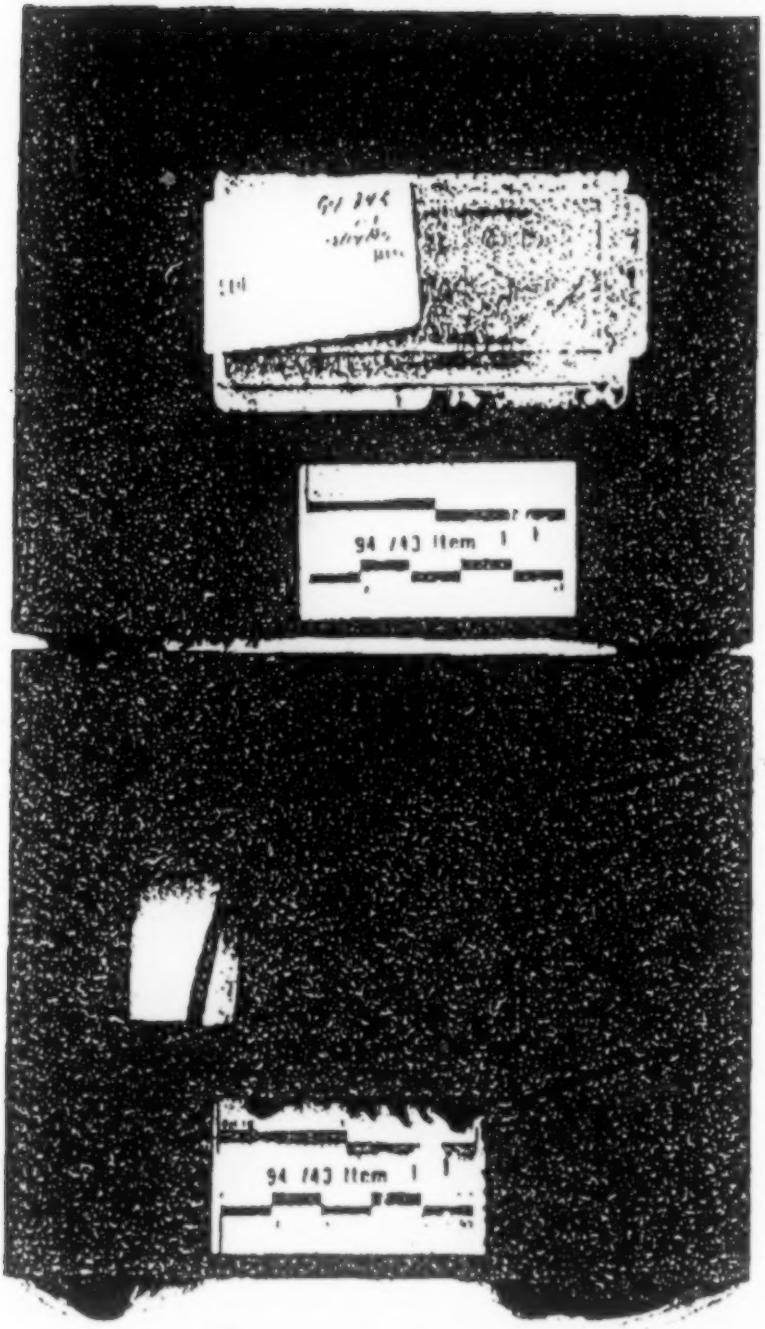


FIGURE 1
ITEM 1-1
MOTILE SPERM SLIDE
[BROKEN]

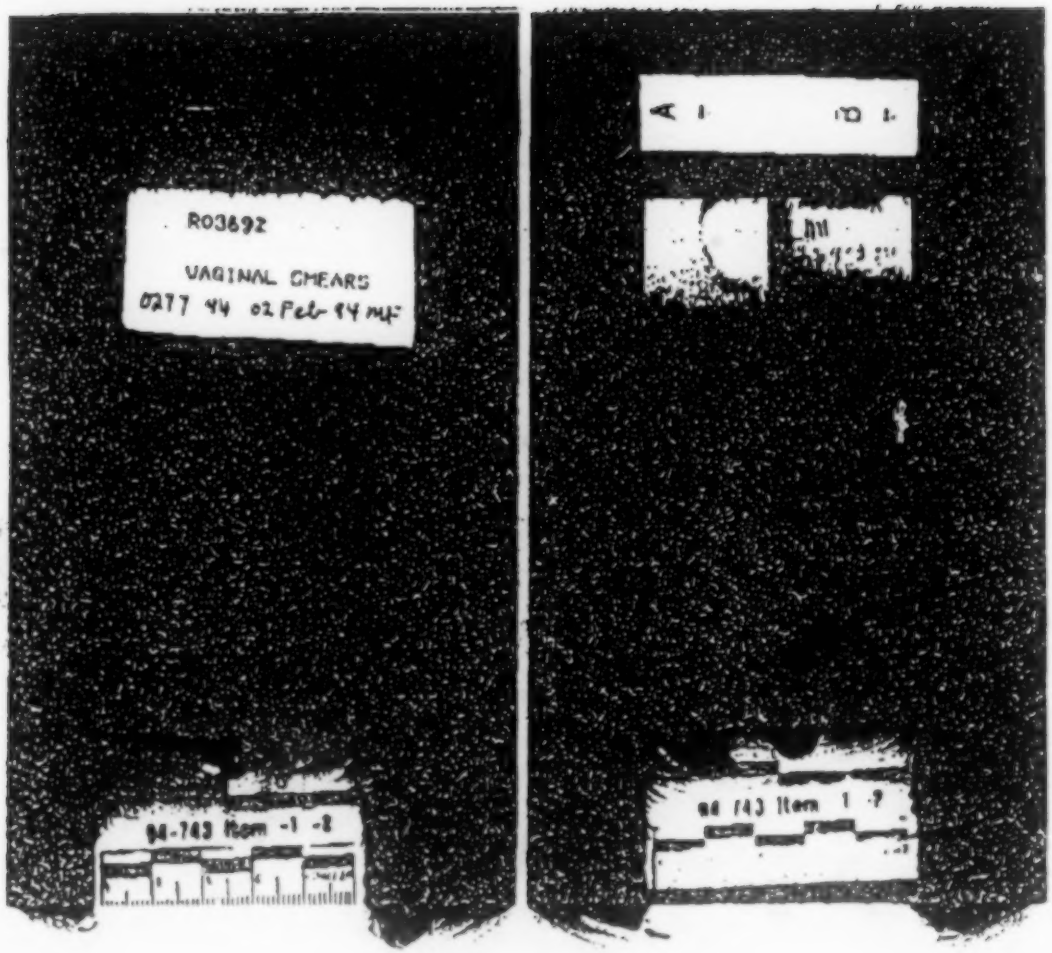


FIGURE 2
ITEM 1-2
VAGINAL SMEAR SLIDES (2)
A & B

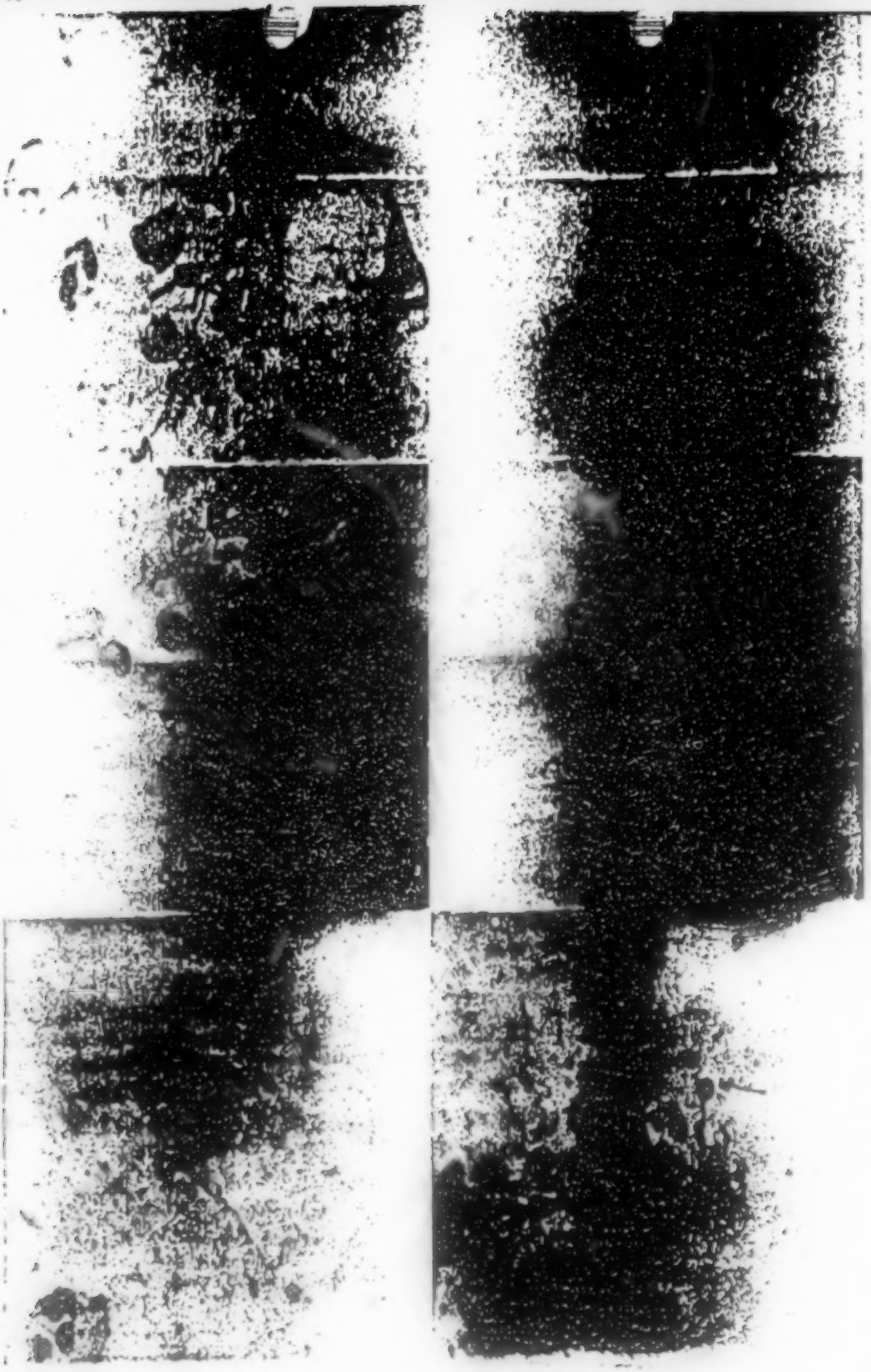


FIGURE 3
ITEM 1-2B
CELL DEBRIS FROM VAGINAL SMEAR SLIDE B SHOWING SPERMATOZOA ⟶

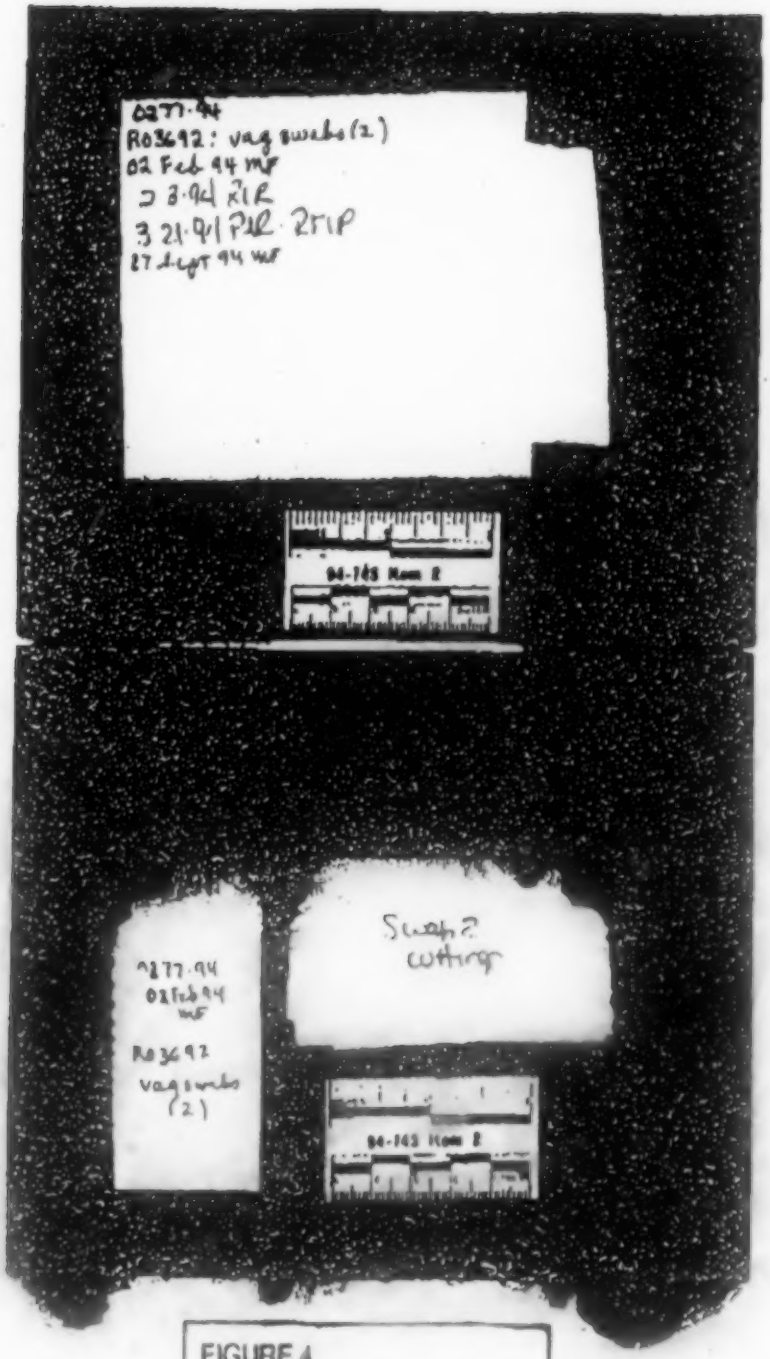


FIGURE 4
ITEM 2
VAGINAL SWABS [ITEM 2-1]
AND DEBRIS [ITEM 2-2]

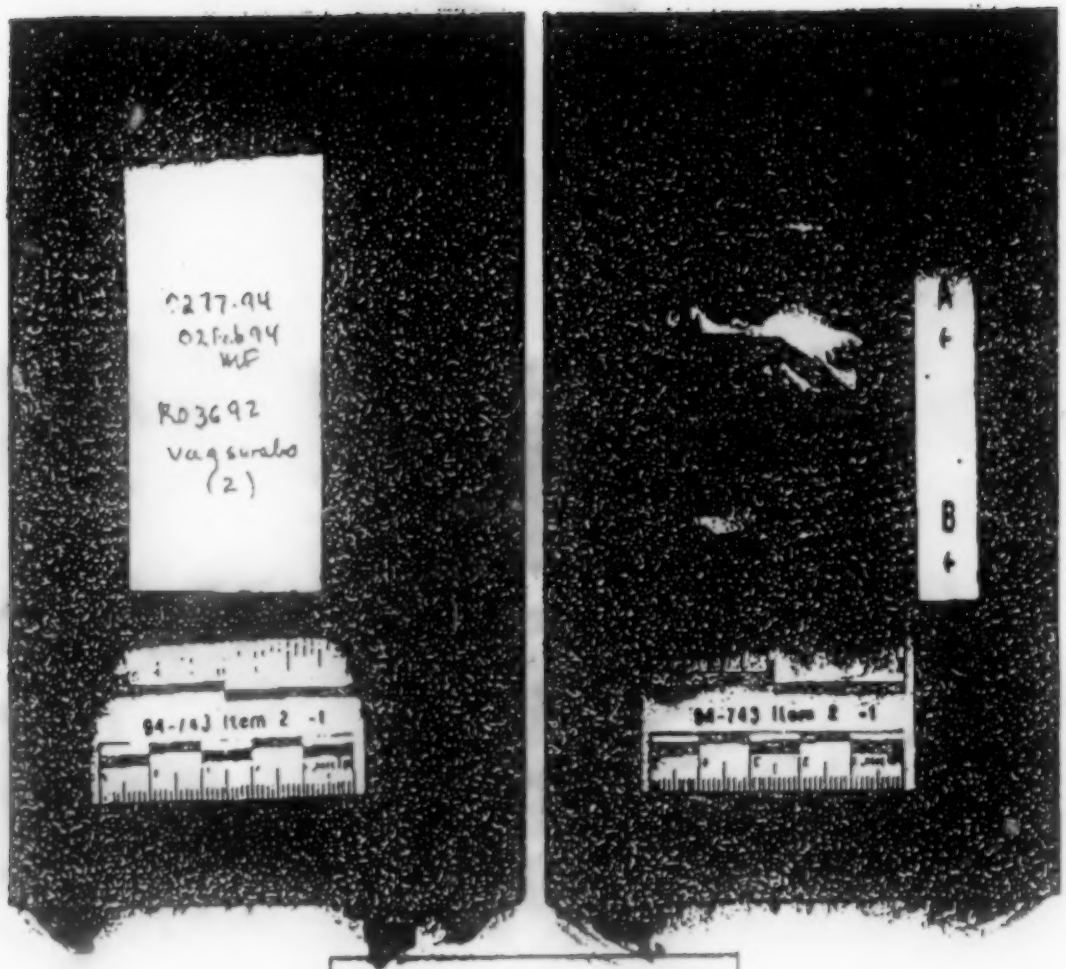


FIGURE 5
ITEM 2-1
TWO PARTIAL VAGINAL SWABS
A & B

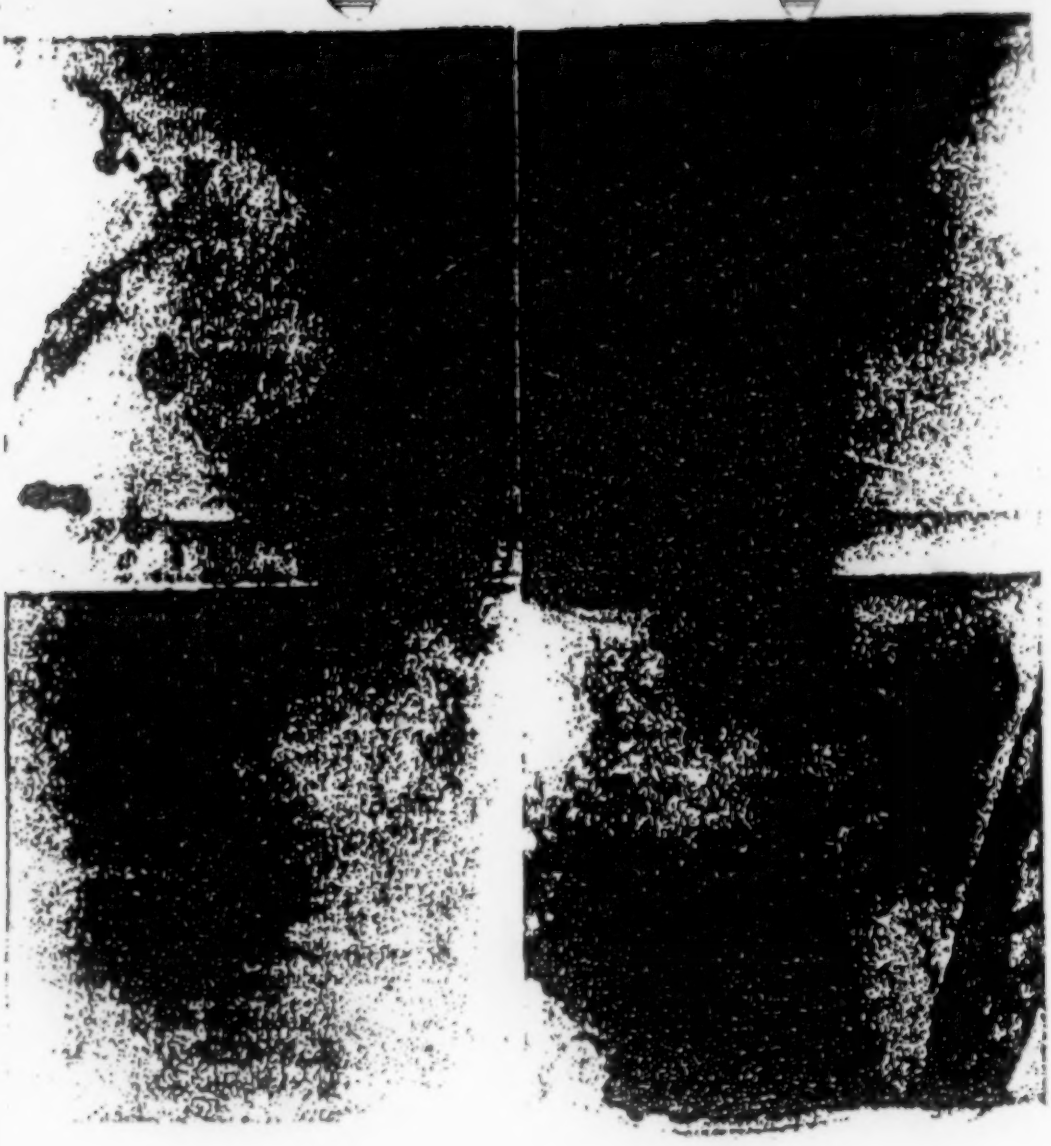


FIGURE 6
ITEM 2-1A
CELL DEBRIS FHOM VAGINAL
SWAB [A] SHOWING SPERMATOZOA

FIGURE 7
ITEM 2-2
DEBRIS FROM VAGINAL
SWAB CUTTINGS

IN THE FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

[caption omitted in printing]

SENTENCING
ROUGH DRAFT TRANSCRIPT OF
TRIAL PROCEEDINGS

BE IT REMEMBERED that he above-entitled matter came on for hearing on March 13, 1998, at the hour of 1:30 p.m. of said day, before the **Honorable J. Michael Memeo**, District Judge.

The plaintiff was represented in Court by Gary D. Woodbury, Elko County District Attorney.

The defendant was present in Court and represented by Dennis Widdes.

[p.2] INDEX

	Dir	X	Rd	Rx	Vd
State's Witnesses					
Pamela Sue Allred	5	21	42		42
Defendant's Witnesses					
Neal A. Brown	48		53		
Ron Don Edwards	56				
Tiffany Marie Brown	62				

[p.3] THE COURT: Okay. This is criminal action number 5833, the State of Nevada verses Troy Don Brown. The defendant is present in Court and he is in custody. He is represented by Mr. Widdes and we have Mr. Woodbury from the District Attorney's office. We have Mr. Tjaden from Parole and Probation.

The defendant is being sentenced today pursuant to an Order of Remand from the Supreme Court of the State of Nevada. As a result of the order issued by the Supreme Court Mr. Brown will be sentenced on one count of sexual assault on a child under the age of fourteen, that is count two. Is that correct counsel?

MR. WOODBURY: Yes, sir.

MR. WIDDES: Yes, Your Honor.

THE COURT: This is the time set for the imposition of sentence. Are the parties ready to proceed?

MR. WOODBURY: The State's prepared, Your Honor.

MR. WIDDES: Ready on the behalf of Mr. Brown, Your Honor.

THE COURT: I guess a Supplemental Pre-Sentenced Report was ordered, it has been received. Mr. Brown, have you had an opportunity to review the Pre-Sentence Report?

MR. BROWN: Yeah.

THE COURT: Excuse me.

MR. BROWN: Yes, I have.

[p.4] THE COURT: On page ten Parole and Probation recommends that you pay the $25.00 administrative assessment, and for count one that you be sentenced to a term of life in prison with the possibility of parole after ten years in the Nevada Department of Prisons. That was the sentence imposed by the Jury. So, we will not be dealing with count one today.

For count two, Parole and Probation recommends that you be sentenced to a term of life in prison with a possibility of parole after ten years in the Nevada Department of Prisons and that this sentence be concurrent to the sentence for count one. Did you understand that recommendation?

MR. BROWN: Yes, sir.

THE COURT: On the prior nine pages Parole and Probation informed me about your past. Mr. Widdes, did you see any errors or admissions in the Pre-Sentence Report?

MR. WIDDES: With regards to his past or --

THE COURT: In the pre-sentence investigation, Pre-Sentence Report.

MR. WIDDES: Yes. We do not have any factual corrections to make at this time.

THE COURT: Okay. Mr. Brown, did you see any errors or admissions in the Pre-Sentence Report?

MR. BROWN: No, I didn't.

THE COURT: Mr. Woodbury, did you see any errors or [p.5] admissions in the Pre-Sentence Report.

MR. WOODBURY: No, Your Honor.

THE COURT: Mr. Tjaden, do anything to add?

MR. Jayden: No, Your Honor.

THE COURT: All right. The Court does understand that both parties have witnesses in this proceeding and we will proceed with the State's witnesses first. Mr. Woodbury.

MR. WOODBURY: Thank you, Your Honor. Pam Henley, please.

THE COURT: Miss Henley if you would step forward please. Right about there, face the Court Clerk, raise your right hand and be sworn.

(WHEREUPON the witness was sworn.)

PAMELA SUE ALLRED

called for examination by the State, being first duly sworn on oath, testified as follows:

THE COURT: All right. If you would take the stand and when you're seated, if you would state your full name and spell your last name for the record.

THE WITNESS: Pamela Sue Allred. A-L-L-R-E-D.

THE COURT: Mr. Woodbury.

MR. WOODBURY: Thank you, Your Honor.

DIRECT EXAMINATION

Q. (BY MR. WOODBURY): Ms. Allred, in what community do you live?

[p.6] A. In Huntington, Utah.

Q. Okay. Do you know a person by the name of Megan Allred?

A. Yes.

Q. And who is that person?

A. She's my daughter.

Q. Okay. And how old is she presently?

A. Thirteen.

Q. Is it your understanding that she was the victim in the rape case that we're here about today?

A. Yes.

Q. Okay. After the conclusion of the events of that day, the rape, when was the next time that you saw your daughter?

A. When I came home that night I saw her.

Q. Can you describe her condition when you saw her that night?

A. She was covered in blood. She had blood in her hair on her face, on her arms, all down legs. Standing in a puddle of blood.

Q. How old was she at that time?

A. Nine.

Q. After seeing her in that condition what happened?

A. I was in shock. I wrapped her in her towel and she was holding her towel between her legs to sop up the blood so [p.7] she wouldn't make a mess of the floor.

Q. Was she subsequently then taken to the hospital?

A. Yes. I walked her over and we sat down on the floor and I called 911 and they took her to the hospital.

Q. As a result of -- how long did she then stay in the hospital?

A. She was there Saturday, Sunday, and released on Monday or Tuesday, I believe.

Q. Was she released into your custody?

A. No, she was not.

Q. In who's custody was she released?

A. The State of Nevada put her in a foster home.

Q. How long did she then remain in a foster home?

A. I got custody of Megan back two and a half months later.

MR. WIDDES: I am sorry I missed that last -- how many months?

THE WITNESS: Two and a half.

Q. (BY MR. WOODBURY) And then when she returned to your custody did you continue to reside in Carlin or did you go somewhere else?

A. No, I moved back to where we were born in Utah -- where my kids were born.

Q. Give us a month and year when you moved back to Utah, can you do that?

[p.8] A. In April of '94.

Q. What grade was Megan in at that time?

A. Third grade.

Q. Can you describe for the Court what Megan's emotional condition was at the time that you moved back to Utah?

A. She was a totally different child.

Q. From what? From previously, prior to the rape?

A. Yes.

Q. Can you tell the Court please how was she different?

A. Prior to the rape she was on the honor roll.

MR. WIDDES: Objection, Your Honor, hearsay. She's testifying to school records and whatnot. And I just think she's not a competent witness to be testifying to that. Lack of personal knowledge, also hearsay. Thank you.

THE COURT: Mr. Woodbury.

MR. WOODBURY: I can't imagine how a mother would not have personal knowledge of whether her child was on the honor roll or not, Your Honor.

THE COURT: It would seem to me that would be an opinion that would be within the ability of the lay witness to testify to. I'll overrule the objection. Go ahead.

Q. (BY MR. WOODBURY): Was she a happy child or sad child?

A. Yeah, she was happy. She didn't worry about too [p.9] many things.

Q. And after the rape how was she, at the time you moved back to Utah?

A. If there would be piece of gum laying on the floor, or on the ground, and kids would be walking by it she would become hysterical trying to make sure

nobody stepped in the gum. She could not do school work.

Q. And what grade was she in when she went back to Utah?

A. Third.

Q. Did she do better in the third, as time passed then?

A. No. She was put in therapy.

Q. With a psychologist or psychiatrist?

A. A therapist.

Q. Okay. And where was that at?

A. In Price, Utah.

Q. Did she continue receiving therapy?

A. Yes. She still is.

Q. How often does she go, even today?

A. They have just cut her back to twice a month.

Q. Okay. Does she take medication?

A. Yes, she does.

Q. What medication does she presently take?

A. She's on DDAVP and that's for bed wetting. When she found out --

[p.10] Q. Lets stop and talk about the bed wetting. Did she wet the bed before she was raped?

A. Every once in awhile.

Q. Did she wet the bed after she was raped?

A. Continually.

Q. And then did there come a time when she stopped doing that?

A. Yeah, she had stopped probably a year and a half ago. And then it would only happen maybe once every four or five months.

Q. And did it pick up again recently?

A. Yes. After I told her we had to come back here, it was every night again.

Q. And that's what the medication is for?

A. Yeah.

Q. What other medications does she take?

A. She's on Paxxel.

Q. Do you know --

A. It's an anti-depressant.

Q. Has she been on a anti-depressant since the rape?

MR. WIDDES: Your Honor, I object to this witness's testimony with regards to the specific properties of these medications unless she's qualified as a person capable of doing so. Objection.

THE COURT: Mr. Woodbury.

[p.11] MR. WOODBURY: Yes, Your Honor. I assume that -- I could lay a foundation for it, but it seems something that seems axiomatic and not necessary for the foundation. And that is that a mother would know when she takes her daughter to a therapist or to a physician, what the nature of the problem is and what the discussion is and what the medication is for. And when to administer the medication as all of those other things that typically occur in the family setting.

THE COURT: I'll overrule the objection. Mr. Widdes can explore that on cross-examination. Go ahead, Mr. Woodbury.

THE WITNESS: She is also on another pill. I don't remember what the name of it is, but it's like a Valium that is for children is what the doctor told me.

Q. (BY MR. WOODBURY) Now, with respects to those medications, the Valium type medications, is that something that she has been on all along? Since the rape or before the rape, or can you explain to the Court?

A. She wasn't on anything before the rape.

Q. And this Valium stuff was it recently or was it --

A. Recently, when we found out we had to come back to Court. And at one time she was Ridalin.

Q. How does the child sleep?

A. She has nightmares every night.

Q. How do you know she has nightmares every night?

[p.12] A. Well, I can here her crashing around in the room cause I don't go to sleep until three or four. I'll hear her crashing around in her room trying to get out. And I got out of bed and get out in the hall before she finds her door, because at the end of the hallway is flight of stairs that she'll go down.

Q. Now, has that occurred consistently since the rape?

A. After we got back home to Utah, it was quite often. And then it just really slacked off to where, you know, she would have a bad dream about it and wake up and go up and get a drink of water and go back to bed. And now, since she found out that she had to come out here, because she wanted to come and testify, and its gotten worse again.

Q. What if any determination have you made with respects to her testifying in the proceedings today?

A. Well --

Q. Just state what -- not why, just state what determination you've made.

A. That she's not going to.

Q. With respect to her social life in Utah -- she's thirteen now?

A. Uh-huh.

Q. And is she entering into puberty, or not?

A. Yes.

Q. And have there been discussions between you and her [p.13] about, I guess for lack of a better term, the birds and the bees, and those kinds of issues?

A. Yes.

Q. With respect to the question of sodomy, what if any discussions have you had with her about that? And how did they come out?

A. There's this little girl in Price, Utah, that was sodomized. And her and her family went public with it because they wanted people to know this man was doing these things to little kids. And my daughter told the little girl she says, well, that part didn't happen to me --

Q. We're probably not going to be allowed to talk about the conversation that didn't take place in your presence and that kind of --.

A. Okay.

Q. What did your daughter talk to you about?

A. Oh, well, on our way home from the house she said that they had been talking about what happened and --

MR. WIDDES: Objection to hearsay, Your Honor.

MR. WOODBURY: We're not offering it for the truth of the matter asserted, Your Honor. We're offering for the purpose of establishing a predicate for the what the conversation was between Ms. Allred and her daughter. We don't know whether it's true or not, what the other child said.

[p.14] THE COURT: Possibly also state of mind. I'll overrule the objection. Go ahead.

THE WITNESS: She told me that they had been talking about what had happened to each other and she says, and mom, that sodomy never happened to me. And I said, well, honey, do you what sodomy is? And she said no. So I explained to her the best way I could figure out how to explain to a thirteen year old.

Q. (BY MR. WOODBURY) What was her reaction when she found out what sodomy was and that she had been sodomized?

A. Well, she still, after I explained it to her, she didn't realize that she had been sodomized. And I told her that honey, yes it did happen to you And we were driving down the road I had to stop the car and pull over and just hold her while she cried.

Q. Did you have any discussions with your daughter about whether or not she continues to be a virgin?

A. Yeah.

Q. Let me ask you first. When did this discussion about sodomy take place, how long ago?

A. It was about a month ago, maybe. Not even that far.

Q. With respects to any discussions about whether or not she continues to be a virgin. Have you had discussions with her about that?

MR. WIDDES: Objection, relevance, Your Honor. [p.15] We're not here on the vaginal intercourse, that's count one. We're here on a count two and the virgin, vaginal issues are all relevant only to count one which is not before Your Honor.

THE COURT: Mr. Woodbury.

MR. WOODBURY: We've had the argument, Your Honor, prior to this time. The fact is that this Court is entitled to consider, not only the crime he committed in count one of the information, we're entitled to consider, you're entitled to consider every crime the guy ever committed. This isn't a trial. This is a sentencing. You are entitled to look at his background and his past to know, and you are entitled to know what the total effect of what he did to this child was on this child.

MR. WIDDES: Well, Your Honor, that would be true except that count one's already been sentenced. And count one was sentenced by the jury. And Mr. Brown is already paid the price and is paying the price, as we speak, for count one. And that -- I just absolutely disagree with Mr. Woodbury that count one and issues related to count one are not properly considered by Your Honor in sentencing on count two. Simply because the jury has already sentenced on that and that would violate double jeopardy. It's two whacks for Mr. Brown for the same conduct.

THE COURT: Mr. Woodbury.

MR. WOODBURY: That same argument could be made [p.16] with the fact that the Court has, in the Pre-Sentenced Report, prior evidence of a DUI. Can we not then consider the DUI?

MR. WIDDES: Well --

THE COURT: Well, hold on. Wait til he finishes.

MR. WOODBURY: Is that the argument that he is making. This man is being sentenced for everything he ever did in his past. The Court can think and considered all of those things. There is no rule of law either in the statutes nor in the case law that says a prior crime cannot be considered. And this fellow did the actions to the child. When did the jury ever get to consider what the impact to this victim would be? Never. That's in the statutory predicate. When the jury sentences, they don't know what the impact is gonna be. Now we know, four years after the fact, what the impact was. And the Court's entitled to considered

what happened to this child in determining what should happen to him.

MR. WIDDES: Your Honor, page seven of my sentencing memorandum, Mr. Brown's sentencing memorandum, I cite to Denson, D-E-N-S-O-N, v. State. And in Denson it reverses a sentencing, the middle paragraph lines 12 through 18, the Court has to be very careful, Your Honor, not to punish Mr. Brown on count two for what you feel should be or shoulda, woulda, coulda, been the sentence on count one. It's very -- the Court needs to be very careful that when you [p.17] consider other offences by a defendant or an accused at a sentencing, that you are not re-punishing or additionally punishing for these other offences.

As I set forth in my pleading from our Supreme Court, you only can use these other offenses to gain some better knowledge of the defendant's life and characteristics. Now, whether or not Mr. -- we're not here on anything on count one. And I would respectfully suggest, Your Honor, that a person who, and we're maintaining our innocence here, but we are here on a re-sentencing. So, it's assumed that Mr. Brown did it. So, if he vaginally penetrated this young girl, and then he anally penetrated this girl, it doesn't add. In fact, it would be opposite. If we were here on a vaginal, maybe the anal penetration, -- which use to be a separate felony crime, against nature, in the State of Nevada and it's a perversion in a lot of peoples mind and all. and I would suggest, Your Honor, that if you were here on sentencing for vaginal that perhaps the anal penetration might add some further insight to the Court in terms of the perpetrator and that they're a freak, or kinky or what ever. But it's the opposite way.

We are here on a count two, anal penetration. And now they want to bring in all of the prejudicial and inflammatory, and perhaps understandably so, information and evidence concerning that vaginal penetration. If it doesn't add to your appreciation of Mr. Brown, in terms of his [p.18] characteristics, not in terms of victim impact, but only in terms of Mr. Brown's character, then it is absolutely improper, Your Honor, for you to consider those things and that is why I object. And especially in a case where we're back here when your predecessor in office, basically made some significant sentencing errors. And so I just ask the Court to exclude and limit the questioning on this area.

THE COURT: All right. Mr. Widdes, the Court understands we're here on count two, not on count one. Count one was sentenced by the jury. The Court is going to sentence on count two.

Now, with respects to the victim impact testimony on the differentiation between the virgin or not virgin, the Court is going to find that this type of testimony, victim impact testimony, can not be so neatly categorized as to count one or count two. And on that basis the Court will hear the testimony.

So, the objection is overruled. Mr. Woodbury, you may proceed.

MR. WOODBURY: Thank you, Your Honor.

Q. (BY MR. WOODBURY) With respect to the conversation you had with the child about whether or not she continued to be a virgin, when did this conversation take place?

A. It was about a month and a half ago.

Q. And who was present for the conversation?

[p.19] A. Me and her.

Q. And where was the conversation at?

A. Upstairs in my bedroom.

Q. Okay. Can you tell the Court what was the conversation was please?

MR. WIDDES: Objection, hearsay. No opportunity to cross-examine the child, the declarant.

THE COURT: Mr. Woodbury.

MR. WOODBURY: We're offering the testimony to show the state of mind of the child. That is what the impact is, to show what the child is saying, not to prove what she said is true. It is simply a conversation.

THE COURT: The Court will overrule the objection. The statements of the declarant will be considered not for the truth of the matter asserted, but simply to illuminate the state mind of the victim in this case. Objection is overruled. Mr. Woodbury, go ahead.

Q. (BY MR. WOODBURY) What was your conversation please?

A. She was upset when she walked, when she come in.

Q. How did you know she was upset?

A. Well, she just -- her head was down and I know when my daughter is upset or when she comes in happy or she's upset. Her head's down and she just goes right upstairs. Says hello to everybody half way up the stairs so she doesn't [p.20] have to look at them.

Q. Okay.

A. And so I knew there was something wrong and I went upstairs in my bedroom and hollered at her and told her to come here. And, and I asked her what was the problem. And she said, oh nothing. And I told her look, you know we can do this the hard way where I keep asking you, or just tell me what the problem is and I can help you fix it. And she started to cry and asked me if she was still a virgin. She said some kids at school were talking about it, and one of them asked Megan are you a virgin. And she said yes. And the other little girl says, well yeah, but I thought you were, oh never mind.

Q. What was Megan's state of mind? How did she react to finding out that she was no longer a virgin?

MR. WIDDES: Your Honor, may my objections be continuing to all the hearsay? I don't want to interrupt to take any longer than possible. May my hearsay objections to what the child is said, what other children have said, and all of that, just be a continuing one so I don't interrupt?

THE COURT: The Court will recognize a continuing exception based on the grounds of hearsay. The Court still believes that the state of mind of the

victim is important and any prejudicial effect is out weighed by it's probative value as far as this sentencing hearing is going to go. So, Mr. [p.21] Woodbury, please proceed.

MR. WOODBURY: Thank you, Your Honor.

Q. (BY MR. WOODBURY) How did Megan appear to you to react of the news that she was no longer a virgin?

A. She was devastated. She just couldn't believe it. She hadn't done anything.

Q. With respect to Megan's -- the security in the home, where you and Megan live, what if any demands has Megan made regarding the security in the home?

A. We have had to buy security doors. The four doors in the house and we need two more. She was terrified that somebody could come in through them. And with the doors we have now, they have special locks on them, no one can get through them even if they break the glass out. You can not get through the doors.

We have had a security system installed that has a laser beams and then it is hooked up directly to the sheriff's department. And still, she goes and checks the doors every night and windows.

MR. WOODBURY: I think that is all we have.

THE COURT: Cross-examination.

CROSS-EXAMINATION

Q. (BY MR. WIDDES) With whom do you and Megan live?

A. My mother and my younger daughter.

Q. Okay. And that's it in the house in which you [p.22] reside?

A. Yes.

Q. Okay. Is the security that you used also because one of your ex-husbands has threatened to hurt you and your children?

A. No.

Q. They never did?

A. No.

Q. What was one of the first things that you said to the police when you found out that Megan had been attacked over at your home in Carlin?

A. Well, I know what you are speaking of and I do not honestly do not remember telling them what they said I did. I remembering saying, that my ex-husband might do something like this to hurt me. To get even with me.

Q. And what was your ex-husband's name?

A. Maynard Allred.

Q. Okay. You just cannot remember whether or not you told the police that Mr. Allred previously threatened to do something like this?

MR. WOODBURY: I am going to object to the characterization. She testified that she did not think she said such a thing. She did not say she didn't remember.

MR. WIDDES: Couldn't remember.

THE COURT: Rephrase your question please.

[p.23] Q. (BY MR. WIDDES) Do you remember one way or the other telling the police what they said you said?

A. I do not remember the exact words that were used.

Q. Okay.

A. I do not think I said what they have written down. That I used the f word and all this. I remember speaking to them about my ex-husband. And it was them that asked me about him. I did not bring him up.

Q. How long after the attack on Megan was it before you moved to Utah?

A. Lets see, she went into the hospital in Salt Lake in March, I think. And after she got out of the hospital we had to come back here for one more custody hearing. And then we left for good.

Q. How many months did, this State of Nevada have Megan in foster care?

A. About two and a half months.

Q. Okay. And they have taken custody away from you?

A. Yes.

Q. And you had to cooperate with them?

A. Yes.

Q. Did you sign a service agreement with them to participate in what ever counsel ng and other things they wanted you to do?

A. I did they everything they wanted me to do. [p.24] Sometimes before they asked me to do it.

Q. Okay. Did that include counseling?

A. Yes.

Q. Parenting classes?

A. Yes.

Q. Okay. You went through those correct?

A. Yes.

Q. All right. And do you have any reason to believe that you were suspected of committing this assault on Megan?

A. I had no reason to suspect that.

Q. Okay. And so prior to Megan being attacked in 1994 had there been investigations by the welfare authorities concerning your children and you?

A. No.

Q. Okay. And --

MR. WOODBURY: Your Honor, that question is in, but the line of questioning seems to us irrelevant to the question of the victim impact.

THE COURT: Relevancy objection, Mr. Widdes.

MR. WIDDES: Yes, Your Honor. She is testified here with regards to -- number one, it goes to her credibility, and therefor the weight you should give. You've let it in, but still you have weight considerations here. Our position is that she is not a creditable witness and we want to develop reasons for that. Number two, they've opened the [p.25] wide as a barn door with regards to Megan's mental health and, the Pre-Sentence Report makes references as well to that. And quite frankly as long as they have opened the door I get to explain or I get to explore why she might be in therapy and why she might be in counseling. And if it is not all traceable to Mr. Brown, well then it shouldn't be considered in an aggravation of his sentence.

THE COURT: I will overrule the objection. Go ahead.

MR. WIDDES: Thank you very much.

Q. (BY MR. WIDDES) Now, did Megan receive any counseling prior to January, 1994?

A. No.

Q. Okay. What grade was she in at that time?

A. Third grade.

Q. And she was nine years old?

A. Yes.

Q. Has she been held back a grade?

A. No.

Q. Isn't she being in third grade at that time, a year behind? Being nine years old?

A. It depends on when the deadline is for the birth date. In Utah the deadline is September -- August 31st. And she missed the deadline by eight days.

Q. Okay. In all honesty you can't remember her grades, [p.26] specific grades prior to the attack can you?

A. A's and B's.

Q. You remember all A's and B's?

A. She may have gotten one C one time but we worked hard on it to get it back up to an A or a B.

Q. Did you happen to bring her report cards or copies of them with you to court today?

A. No, I did not.

Q. Okay. Now, after the assault, did Megan receive some counseling here in Nevada of course?

A. Yes.

Q. For the ten weeks or so that the State had custody of her?

A. I was not allowed to know when she had therapy. I went with her to therapy twice. But I assume she had more therapy than that.

Q. Okay. And you were concerned right after the assault of course, with obtaining custody of Megan back from the State?

A. Yes.

Q. And did you do everything that you could to cooperate with the State at that time?

A. Everything I could.

Q. Okay. And how long was it after the assault that you broke up with Mr. Henley, your other ex-husband?

[p.27] A. In June of '94.

Q. Okay. And did that occur in that occur in Utah?

A. Yes.

Q. Okay. And prior to court today, did you review a copy of the Dushang County Sheriff's Department arrest report?

A. Yes.

Q. Okay. And did that have to do with a sexual assault committed by your ex-husband, Mr. Henley, in Utah?

A. Yes.

Q. Okay. And Mr. Henley previously in fact, in your own words there in the statement, done the same thing before, hadn't he?

A. Yes.

Q. Okay. How many times?

A. Once that I knew of.

Q. And who was that with?

A. Our next door neighbor. Her name was Debbie and I don't remember what their last name was.

Q. Okay. How old was Debbie?

A. In her late thirties.

Q. Okay. The girl in Dushang County in June of 1994, she was but 18 years old, wasn't she?

A. No, she was about thirty-five years old.

Q. Okay. After the attempted sexual assault by your ex-husband, Mr. Henley, in Utah, five months after the assault [p.28] on Megan, is that when you finally left Mr. Henley?

A. Yes, he never came back home after he assaulted the one in Dushang.

Q. Okay. Isn't it true that Megan -- well, let me just ask this. Strike that, I apologize. When did you marry Mr. Henley?

A. July of '93.

Q. And how long had you and he been living together?

A. Since October of '91.

Q. Okay. And had he previously threatened to hurt Megan?

A. No.

Q. Okay. He was angry with you in January of 1994, because he thought that you were having an affair with Mr. Brown. Is that true?

A. I haven't heard that one, no.

Q. Did he accuse of that?

A. No.

Q. Did he accuse you of having affairs with other men?

A. No.

Q. Okay. How many times have you been married?

A. Twice.

Q. Okay. Well, who is Megan's therapist? That you referred to earlier in your testimony?

A. She has been to three or four different ones.

[p.29] Q. What is the latest one?

A. Lisa. I would have to look at her last name.

Q. How many times --

A. Hubbard, Lisa Hubbard.

Q. Would that the H-U-B-B-A-R-D?

A. I think so.

Q. Okay. Do you know what the qualifications of Miss Hubbard are?

A. No, I don't.

Q. Okay. The mental health professional before Miss Hubbard, that Megan saw, do you remember the name of that mental health professional?

A. Mike -- Mike. I do not know right off hand.

Q. Do you know the qualifications of that mental health professional?

A. No, I don't.

Q. The mental health professional before Mike somebody, who was that, mental health professional?

A. Chris Rumel.

Q. And how do you spell that last name please?

A. R-U-M-E-L.

Q. Okay. And was that in Utah as well?

A. Yes.

Q. Okay. And what are the qualifications of Chris?

A. A therapist, I don't know what the qualifications [p.30] are.

Q. Now how did Megan see Chris?

A. I am not sure. It is all written down in the estimated, cost of all the therapy she has received.

Q. Okay. Did you bring some documents to town with you with regards to those costs?

A. Yes, I did.

Q. Okay. When did you give those to the District Attorney?

A. This morning.

Q. About what time?

A. We were supposed to be at his office at 9:00 o'clock and we were there about fifteens early.

Q. Okay. And that's when you gave him that documentation?

A. Yes.

Q. Okay. Now the three -- are there other counselors, and therapists, and mental health professionals that you recall Megan having seen?

A. Yes.

Q. And tell us who they were? Before the last one you just described.

A. Before Chris is was Brenda Bishop Benton.

Q. Is that in Utah?

A. Yes.

[p.31] Q. What was her qualifications?

A. I am not sure.

Q. And before that?

A. Dr. Sherman out of Salt Lake at the Mental Psychiatric Institute, and her qualifications are all in the, -- she testified in court.

Q. Okay. As part of the service agreement that you entered into with the State of Nevada authorities in

order to get your child back for those ten weeks or so, did you have to go through any therapy?

A. Yes.

Q. And with whom did you counsel or receive therapy?

A. Frank Hall.

Q. How do you spell that last name?

A. H-A-L-L.

Q. Okay. And was that here in --

A. In Elko.

Q. -- in Elko?

A. Yes.

Q. Did you know Mr. Hall's qualifications?

A. No, I didn't.

Q. Okay. How long, or how many times did you see Mr. Hall?

A. I don't recall exactly.

Q. How about your best guess?

[p.32] A. Seven or eight times.

Q. Okay. And did you cover in those sessions, Ma'am, your problems in your family?

A. Yes.

MR. WOODBURY: Object, Your Honor. I think there is probably a privilege, between the therapist and a patient, and I do not know of course whether it was reported to the Court or not. And if it was that would take away from the privilege, but she should be advised she may have the privilege and would not have to disclose what went on in those sessions.

THE COURT: Mr. Widdes.

MR. WIDDES: Well, the door on all the mental health has been opened here. And in fact if they had a severely dysfunctional family, which is by all indications what we had on our hands seeing as there was the State of Nevada had a child for ten weeks, then the aggravation that the State would ask you to consider is attributable to Mr. Brown truly isn't. And that's what I am exploring here is her counseling, what problems she had, and the, -- I would preferred not get into any of this. But now the State has I am obligated, on behalf of Mr. Brown to confront this. And to find out what other problems were going on in that home.

MR. WOODBURY: The door I keeping opening so wide I don't even usually see. I don't think I ask a question about [p.33] the lady's mental health. It is a matter a fact I know I didn't. Because I did not do it deliberately. I don't care if he explores about her dysfunctional family or anybody else's dysfunctional family. He can do that until he is blue. The case that I have raised, the issue that I have raised is this lady

has, at least potentially, a privilege to not discuss or disclose what she said to her therapist or what her therapist said to her. That's the only issue. She may not want to invoke it, but all I am suggesting is she should be advise that she has such a privilege potentially. And if she does not want to discuss it with us, she doesn't have to.

THE COURT: Mr. Widdes. Do you agree that she was privilege with her therapist?

MR. WIDDES: No, Your Honor. I would be surprised that she hadn't waived that. There was a 432B action in this Court, not before Your Honor of course, but, there was a collateral 432B action in which all of these things would have come out and would have been part of the proceedings. All of those proceedings would relevant and there is not a privilege for her to sit here and not talk about her prior mental health problems.

The privilege surely does reach to the therapist and the attempts to get the therapist to divulge what this woman said. It's, quite frankly, Your Honor, she is on the stand her mental health is now an issue, and there is no patient [p.34] therapist privilege under these circumstances. That's our position, Your Honor.

THE COURT: I will overrule the objection. Go ahead, if you keep this brief. I am wondering about relevancy, tell you the truth. But go ahead.

Q. (BY MR. WIDDES) And you counseled with Mr. Hall here in Elko County correct?

A. Yes.

Q. And, did issues surround the possibly that you are an alcoholic?

A. Yes, it did.

Q. And how about a poly-substance abuser, a controlled substance abuser?

A. No.

Q. Okay. How about being a victim of domestic abuse?

A. No.

Q. None of those issues were discussed at all?

A. No.

MR. WOODBURY: Question has been asked and answered. Your Honor, we object. And we also suggest that relevancy is becoming an issue and we object to anything further. We didn't ask anything about her mental health. Not making any claims of victim, that she's a victim, or she's entitled to a victim impact.

THE COURT: All right. Tell me the relevancy of [p.35] this, Mr. Widdes.

MR. WIDDES: It has to do with -- the basic core of relevancy the logical relevancy would be, Your Honor, that we are looking at therapy of Megan that occurred after this assault. And if it involved other issues in addition to simply her victimization as of a result this assault, well then it's just inappropriate to use it as aggravation against Mr. Brown. And that's all I am

trying to do is to sort out what might be applicable to the conduct at issue in this case, and what might be applicable to a long term dysfunctional family. The counseling that being, Megan's counseling. Maybe I can move on to some other questions.

THE COURT: Let's do that. I'm having a real hard time with this one. So, go ahead.

MR. WIDDES: All right. Let me, move --

THE WITNESS: Is there anyway I can get something to drink?

MR. WOODBURY: I can get it.

Q. (BY MR. WIDDES) I'll ask it this way, Megan's counseling involved more than simply her victimization from what occur in January, 1994, isn't that true?

A. It had to did with her whole life.

Q. Okay. Thank you. And had Megan developed a healthy on going relationship with her father, Mr. Allred --

A. No.

[p.36] Q. As of January 1994?

A. No.

Q. Okay. Had she developed --

MR. WOODBURY: I am going to object. I think that he is asking a funny question. With, your father, Mr. Allred, I don't think that her father is Mr. Allred.

MR. WIDDES: The child's father --

MR. WOODBURY: Oh, Okay. All right. I heard it come out as her father.

Q. (BY MR. WIDDES) With regards to her father, Mr. Allred, you have answered the question no she didn't have a healthy relationship with --

A. She didn't have any relationship with him. It was not unhealthy, and it was not healthy. There wasn't a relationship.

Q. Okay. And did she a develop a healthy relation with Mr. Henley.

A. Yes, she was starting to.

Q. Okay. Other than the one incident that you described before, did you have any information with regards to Mr. Henley committing sexual crimes against other people in the Carlin area?

A. Except for the one that I told you about when he went to my neighbor's home?

Q. Yes.

[p.37] A. No.

Q. Okay. And after the Dushang County incident on June 12th, 1994, that's when you decided to divorce Mr. Henley.

A. Yes.

MR. WOODBURY: The question has been asked and answered, I object.

Q. (BY MR. WIDDES) Okay. And seeing as you been asked some things here, in your opinion was Mr. Henley a sex offender? Did he have a mental health problem, perversion, sexual perversion?

A. In my opinion, anyone that forces any person to do anything, especially a child, is a sex offender.

Q. Okay. The Court's indulgence. Do you know if Mr. Henley is out of custody or still in custody?

A. He is out.

Q. Okay. He followed you when you moved to Utah after you regained custody of Megan. Isn't that true?

A. We all moved together.

Q. You did not break here, and then he followed you?

A. No.

Q. And the security in the home, the security doors and all of that --

A. Uh-huh.

Q. -- isn't impart to protect against Mr. Henley.

A. No, I wouldn't say so. He lives in Gillette, [p.38] Wyoming.

Q. Okay. And has Megan developed a relationship with a subsequence father figure? Somebody in your life?

A. She -- no. I have no one in my life right now. The only man she is close to is my older brother and she has been close to him from the day she was born.

Q. Okay. And what school did she attend here in Elko County before January or at the time of January, 1994?

A. In Carlin.

Q. Oh, Carlin, I apologize.

A. Carlin Elementary.

Q. Is that the only elementary school there?

A. Yes. She was suppose to of attend school in Elko. I do not know what the name of the school was, for the time she was in foster care. But she spent very little time at school. She would not go. She was either sick, or something was wrong and she wouldn't go.

Q. Is she also receiving some counseling and therapy that has to do with her behavior at school?

A. No.

Q. Nothing?

A. She gets, she has satisfactory grades or honor grades in class.

Q. Now?

A. Yes.

[p.39] Q. Okay. And so she's not receiving this ongoing therapy for a being a rebel without a cause or one of these unruly adolescents?

A. No. She has never been that way.

Q. Okay.

A. When she has problems she'll bring them home and be a little rebel without a cause at home. Where we have had a few problems.

Q. And what would those be?

A. Her being angry, lashing out. She'll yell at her little sister when there is no reason. But she never did it before.

Q. Just one before I move on. The ten weeks of foster care here in Nevada, Ms. Allred, did that also involve Dallas the little sister.

A. No.

Q. Take Dallas away too?

A. No. Dallas was sent home with my parents to Utah.

Q. Right after this occurred?

A. Uh-huh.

Q. Is that a yes?

A. Yes.

Q. Okay. With a day or two?

A. I think it happened Saturday morning and I think Sunday afternoon they left with her.

[p.40] Q. Okay. Courts indulgence, I maybe about through. What's your educational background Ma'am?

A. I ha[redacted] two years of college.

Q. Where did you attend?

A. College of Eastern Utah.

Q. And when did you attend?

A. What?

Q. When did you attend?

A. Oh, -- it was '86 through '88.

Q. Okay. And did you get a diploma an AA degree?

A. No, I ended up getting a certificate of completion for heavy equipment and truck driving.

Q. Okay. And that's the course that you were enrolled in at that time?

A. That I -- yeah, I finally decided that's what a I wanted to go into after taking English, Algebra, History classes.

Q. The general education?

A. Yes.

Q. Did you have a high school diploma? Or did you get a GED?

A. A high school diploma.

Q. Okay. From where?

A. Emery County High School.

Q. What's -- Utah?

|p.41| A. Yes, in Utah.

Q. What year did you graduate?

A. '83.

MR. WIDDES: Court's indulgence. I have nothing further.

THE COURT: Re-direct.

MR. WOODBURY: Yes, Your Honor.

RE-DIRECT EXAMINATION

Q. (BY MR. WOODBURY) Showing you now has been marked as State's Exhibits 1 and 2 for identification in the sentencing hearing, have you seen these documents before?

A. Yes.

Q. Without reading from those documents, what are those documents?

A. They are mid-term and end of term report cards that Megan has received in seventh grade.

Q. All right. What grade is Megan presently in?

A. Seventh.

Q. All right. And what is the period covered by each of those report cards?

A. The first one is for the third term and the second one is for the second term.

Q. Okay. And what period of time does the second term cover, roughly?

A. It's like from November 1st to January 10th or [p.42] something around there.

Q. And what does the third term cover?

A. From January to -- well, I'll be getting her report card this Wednesday.

Q. All right. Lets go back. One of those report cards is for the first term, or for the second term, or the third term?

A. This one is for the third term and this one --

Q. How could it be for the third term, if the third term hasn't ended yet?

A. It is the -- half through the quarter, mid-term, mid-term grades.

Q. Okay, mid-term for the --

A. I am sorry, my mind is kind of gone today.

Q. Okay. Now tell exactly what it is.

A. It's the mid-term report card that they sent home with the students to let parents know how they are doing.

Q. Halfway through the term?

A. Halfway through the term.

Q. And what period of time did that come?

A. Well, I received it February 13th. So, from the beginning part of January to the 13th.

Q. And the other report card, what period or time does that cover?

A. It would be the second term.

[p.43] Q. And that second term would be for, -- it's not a mid-term report it's for the second term?

A. Yes, it's a full second term.

Q. Now, what do those documents purport to be? Are they report cards from the school district?

A. Yes, they're report cards.

MR. WOODBURY: We would ask to have State's Exhibits Number 1 and 2 be entered into evidence, Your Honor.

THE COURT: Objection?

MR. WIDDES: May I just take another quick look at them for a minute?

THE COURT: Yes.

MR. WIDDES: Thank you, Your Honor. May I voir dire, a couple of questions.

THE COURT: Certainly, go ahead.

MR. WIDDES: For foundation.

THE COURT: Yes, go ahead.

MR. WIDDES: Thank you.

VOIR DIRE

Q. (BY MR. WIDDES) Did obtain those from -- did you bring those to the District Attorney?

A. Yes.

Q. And when did you give those to Mr. Woodbury?

A. This morning.

Q. Okay. About the same time, 9:00 o'clock?

[p.44] A. Yes.

Q. Okay. And from where did you obtain them?

A. The school mailed them home to me because they wouldn't send them home with my daughter. If you fail so many grades, so many classes, they will mail them to the parent.

MR. WIDDES: I have no further questions on voir dire.

THE COURT: Objection?

MR. WIDDES: Yes. Objection, relevance. They're remote in time to the incident at hand here. Their meaning is lost. There is just a myriad of causes why a child might get certain grades. And these grades here do not reflect one iota on Mr. Brown. And therefor, we'd object on relevance.

THE COURT: Mr. Woodbury --

MR. WIDDES: Also, if I could, I apologize. I indicated that I spoke with Mr. Woodbury this

morning and at least once provided him with copies of the documents that I intended to use today. And he neither volunteered nor gave me, nor do I have now, copies of these documents that he's using today, and we just believe that also is inappropriate not to provide those with discovery prior to the hearing at sometime for me to look at those. So, our objections are multi. And those are them.

THE COURT: Relevance, and not being provided a document from today. Mr. Woodbury.

[p.45] MR. WOODBURY: With respect to not being provided the document today. I suppose that is a short coming on the part of the District Attorney's Office. It did not dawn on me at the time. I suppose I did have them in my hands and it never dawned me to provide them to him. I gave Mr. Widdes an opportunity to see these documents prior to the time that we -- before court today, which I believe is satisfactory. And if he needs a continuance for a couple days I would be glad to give him a continuance so he could look at them. That would be find with us. If he finds them prejudicial.

To address the second issue with respect to relevance. The lady was asked on cross-examination, well, what kind of behavior problems does she have. And the answer was she doesn't have behavior problems and those report cards demonstrate that she does not have behavior problems at the school. She was asked questions about the effect on Megan or the relevance is, beyond that, with respect to the grades, she will testify that for the second quarter Megan's grades are indicated in that document, her academics grades, not her behavior grades. She will then say that

when she told Megan that she was going to come back and there was going to be re-sentencing. And we will show you what the effect is on that child with respect to the grades we think, and whether or not there are other factors that go into the lowering of the grades and it goes to the weight of the evidence not the [p.46] admissibility of the evidence.

We think that we can establish that Megan, finding that she had to come out here, had a extreme drop in her grades and those are relevant to show this Court what kind of impact this crime still has that child.

THE COURT: Relevancy objection is overruled. Mr. Widdes, do you want a continuance to further explore these documents? You certainly entitled to cross-examine her fully on them.

MR. WIDDES: Yes, Your Honor. With regards to Megan's condition totally and this is only one part of this, when we are done with the done the testimony I have a motion to the Court, and at this time I'm not going to request a continuance simply on these documents alone because they were not provided to me a few hours before court this morning, rather than a few minutes.

THE COURT: All right. The objections are overruled. State's 1 and 2 will be admitted into evidence. The Court feels, that's going to help the Court at least understand the victim impact. The Court will give it what weight it deserves after cross-examination and argument of counsel. Go ahead.

MR. WOODBURY: I will just hand them to the Court. The Court can review them without any

additional questions. I don't think we have any further presentation, Your Honor. [p.47] Well, I guess I got to ask one question.

Q. (BY MR. WOODBURY) When did you tell Megan that she was that there was going to be a re-sentencing in this case?

A. Last summer. It was after she had gotten out of school. My father died in March of '94, no, March of '97 and everybody was upset. We watched him die. He died at home with us. And I thought it would be better for her if I gave her time to deal with that before I laid this other on her, that we had to come back out to Nevada again.

Q. Do the grades for the second quarter reflect --

A. No.

Q. That period of time?

A. She stayed on the honor roll.

Q. And then subsequently, the mid-term grades for the third quarter reflect after she was told. That she was going to come out here and testify?

A. Yes.

MR. WOODBURY: I have nothing further, Your Honor.

THE COURT: Mr. Widdes. I think we're on re-cross.

MR. WIDDES: Yes, on simply State's 1 and 2, I believe. May I approach to take a look at those?

THE COURT: Yes, please.

RE-CROSS-EXAMINATION

Q. (BY MR. WIDDES) Who's handwriting is this on State's Exhibit I, received January 21, 1998?

[p.48] A. That's mine.

Q. Okay. And on State's Exhibit 2, received February 13th --

A. That's mine. That's the day they came in the mail.

Q. And so, you're saying in the three weeks between State's Exhibit 1 and State's Exhibit 2, in that three week period of time, you told Megan that she was going to have to come back for a re-sentencing?

A. No.

Q. Okay.

A. She was told in the summer after she got of sixth grade. I let her finish sixth grade before I told my kids.

Q. And so, her A's and B pluses and all on these report cards are all after you told her about --

A. Along with the D's and C's and F's. Yes.

Q. And again you didn't happen to bring any report

cards of how she was doing before you told her did you?

A. No, I did not. She didn't have a problem with it. I didn't see that it was necessary.

MR. WIDDES: Just with the request that I might be able to get copies of these after Court, Your Honor. Would that be alright?

THE COURT: Yeah, that's fine.

MR. WIDDES: I have no further questions.

THE COURT: All right. You may step down.

[p.49] MR. WOODBURY: The State has no further evidence to offer, Your Honor.

THE COURT: All right, Mr. Widdes.

MR. WIDDES: Thank you very much, Your Honor. May I have a moment. Your Honor, we would call Mr. Neal Brown.

THE COURT: Mr. Neal Brown. Right about there. Face the Court Clerk, raise your right hand and be sworn in, if you would.

(WHEREUPON the witness was sworn.)

NEAL A. BROWN

called for examination by the Defendant, being first duly sworn on oath, testified as follows:

THE COURT: All right. If you would take the witness stand and that door just pulls out towards you. There you go. When you are seated if you would state your full name and spell your last name for the record.

THE WITNESS: Neal A. Brown, B-R-O-W-N.

THE COURT: Mr. Widdes.

MR. WIDDES: Thank you.

DIRECT EXAMINATION

Q. (BY MR. WIDDES) Sir, what's your business profession or occupation?

A. I own a trucking outfit. A long-haul trucking,

Q. And how long have been in that business?

A. Well, I've owned my own business for 11 years. And [p.50] I been trucking for 28.

Q. Okay. And how old are you?

A. I'm 51.

Q. And, where do you live?

A. Orem, Utah.

Q. Are you familiar with Mr. Troy Don Brown? My client?

A. Yes, I am. I'm his uncle.

Q. Okay. And how long have you known Troy Don Brown?

A. All of his life.

Q. Okay. And now, have you been close to Mr. Brown as he grew up?

A. Yes, I have. Like I said, I've -- since he was a kid, whatever and everything. And he has lived with me for a period of six months, you know.

Q. And when was it that he lived with you and your family?

A. About a month before he come out here. I don't know the date.

Q. Okay. But it would've been in around 1993 then?

A. Yeah.

Q. And, do you have a daughter?

A. Yes, I do.

Q. And what's her name.

A. Stephanie Marie Brown.

[p.51] Q. And how old is she today?

A. Today, I think she is 13, 12 or 13.

Q. All right. And in the Brown family have there been children, little girls and little boys over the years?

A. Yes.

Q. Okay. And have you had an opportunity to see Mr. Brown conduct himself around the children in your family and in others, but in your life seen him conduct himself around the children?

A. Yes, I have.

Q. And how's he conducted himself?

A. Very well mannered. He loves kids. I mean, he'd do anything for them, help them, whatever.

Q. Have you ever seen act in any violent way what so ever towards to a child?

A. No, I haven't.

Q. Okay. Do you have an opinion with regards to whether or not he has any character traits or propensities for -- let me ask it this way. Well, yeah, I'll ask him. Do you have an opinion with regards to whether or not he has any character traits or propensities to act in a sexually deviant way?

A. No, I don't.

Q. Okay. You ever known him to act in a any kind of sexually perverted way?

[p.52] A. No, I have never seen it or that around him.

Q. Okay. Do you feel that you are close to Mr. Brown?

A. Oh, yeah. I am just like his -- just he is one my kids.

Q. Okay. And over the years you've developed an opinion with regards to whether or not he's an honest, truthful, young man?

A. Yes, he is. He's very honest and truthful. Like I said, I had him before he came out here to Carlin, Nevada. He did work for me. Help me work on the trucks, went with we me, whatever.

Q. Did he do you an honorable job for you?

A. He done me a very excellent job, I'd hire him in a minute.

Q. Now, just to maybe perhaps to get to the obvious, do you love Mr. Brown?

A. I guess. Whatever.

Q. What I mean is as an uncle, not --

A. Oh, yeah.

Q. -- in some kind of a weird way.

A. Yes.

Q. I didn't --

A. You know.

Q. Like a son?

A. Oh, yeah.

[p.53] Q. Do you know that you are under oath here today?

A. Yes, I do.

Q. And you know that it is a felony to get on a stand and tell a lie?

A. Yes, I do.

Q. Okay. Do you love him so much that you would come in here to lie to Judge Memeo about anything to do with Troy Don Brown?

A. No, I wouldn't lie to him.

Q. Okay. And do you believe that he's innocent of this offense?

A. Yes, I do --

MR. WOODBURY: I object. The question is irrelevant, Your Honor.

MR. WIDDES: Well, obviously it goes to his bias. Just getting it out of the way.

THE COURT: I'll overrule the objection. Go ahead.

Q. (BY MR. WIDDES) Okay. And so, do you have any doubt in your mind, whatsoever, sir, as a father with a daughter, as a citizen, that Mr. Brown does not pose a threat to do anything like this in the future?

A. I know not only did he never do anything like this in future or in the past.

Q. Okay. Are you asking Judge Memeo to sentence Mr. Brown to concurrent sentences?

[p.54] A. I don't know. You'll have to explain that one to me.

Q. Okay. I'll withdraw the question.

MR. WIDDES: I have no further questions. Thank you, Your Honor.

THE COURT: Cross-examination.

MR. WOODBURY: Thank you, Your Honor.

CROSS-EXAMINATION

Q. (BY MR. WOODBURY) Troy Don Brown does a little drinking doesn't he? When he was with you?

A. No, not when he was working. On weekends yeah, we would have a couple of ,beers but that would not buzz Troy anyway.

Q. But you knew he'd been convicted of driving under the influence of alcohol?

A. Yes, I did.

Q. Okay. And you knew he had been treated in an in-patient program for alcohol?

A. Yes, I do.

Q. And in your judgement did that take so that he stop drinking?

A. What's that?

Q. Did he stop drinking as a result of that?

A. Well, like I said he had a beer or two on the weekends and that was it.

[p.55] Q. Your testimony is you don't think he's a threat to anybody.

A. No, I don't.

Q. Do you think that driving under the influence of alcohol on the highway or a premise where public has access is not a threat to somebody?

A. If he was driving under the influence of alcohol he shouldn't of been. You know what I saying?

Q. The reason you're not suppose to do that is because it is a threat, right?

A. Right.

Q. So, he must be that kind of theat, right? Do you how much he had to drink on the night of this incident?

A. I have no idea, I wasn't here.

Q. Nobody ever told you?

A. I had no idea. He was drinking or what he was doing, or what. So, I wasn't here.

Q. What if I told that Supreme Court of this State found that had least 20 drinks of alcohol that night? Would that change your opinion about whether or not he might of done something like this?

A. If he had 20 drinks or that much alcohol he should have been dead.

Q. Yeah. Well, that is what the Supreme Court of our State found he had, and that is what he said he had.

[p.56] MR. WIDDES: Objection, argumentative, Your Honor.

Q. (BY MR. WOODBURY) Now going back. Do you think you can take his word for what he said he didn't do?

A. Yeah, I can take his word.

Q. Twenty drinks?

A. Twenty drinks. You're not even going to walk. Let alone do what they said he did.

Q. All right. So now, if he said he had 20 drinks, he must of been lying about it?

A. Well, everyone sat there and told me he had 20 drinks --

Q. I am telling up what the testimony before this Court is, sir. If he said he had 20 drinks, he must of been lying about it, because he would be dead. Couldn't be sitting here right now, right?

A. I not, I mean, telling you how much alcohol that the body can hold or this or that, you know.

MR. WOODBURY: I have further questions.

THE COURT: Re-direct.

MR. WIDDES: Nothing, Your Honor.

THE COURT: You may step down. Thank you for coming. All right. Mr. Widdes.

MR. WIDDES: Thank you, Your Honor. We would call Roy Don Edwards.

THE COURT: Roy Don Edwards. Right about there. [p.57] Be sworn by the Court Clerk, if you would.

(WHEREUPON the witness was sworn.)

ROY DON EDWARDS

called for examination by the Defense, being first duly sworn on oath, testified as follows:

THE COURT: Go ahead, Mr. Widdes. I think we can hear him. There you go. Okay.

DIRECT EXAMINATION

Q. (BY MR. WIDDES): Sir, would you state your name and spell your last name for the record please.

A. Roy Don Edwards. E-D-W-A-R-D-S.

Q. And sir what's your business profession or occupation.

A. I am production manger for the F-16 aircraft at Ale Air-Force Base.

Q. And how long have so employed in that line of work?

A. Fifteen years.

Q. How old are you sir?

A. I am 44 years old.

Q. Where do you live?

A. I live in Roy, Utah.

Q. How long have you lived up there?

A. I lived in currently in my home for about ten years.

Q. Okay. Married?

A. Yes, I am.

[p.58] Q. TO whom to you are married?

A. I am married to Julie Edwards. She's in the stands right here.

Q. Okay. And her relationship to -- well, let me ask you this. What's your relationship to Mr. Troy Don Brown?

A. Troy is my nephew. I'm his uncle.

Q. Okay. And would it be safe to say that you have known Mr. Brown his entire life?

A. Yes, I have.

Q. Do you love him like an uncle loves a nephew?

A. Yes, I do.

Q. Okay. Do you have children sir?

A. Yes, I do.

Q. And how many?

A. One.

Q. Age?

A. 16

Q. And a boy or girl?

A. Boy.

Q. What's his name?

A. Brandon.

Q. Okay. And over the years that you've known Mr. Brown, would you say that you had a good opportunity to get to know him and to form an onion with regards to his character?

A. Yes, I have.

[p.59] Q. Okay. And is that from have known him since he was a little baby?

A. Yes, it was.

Q. How long have been married sir?

A. Eighteen years.

Q. Okay. And so, about how -- let me just ask you, have you had an opportunity to see Mr. Brown around children?

A. We are a very close family. Yes, we have quite a few family get to togethers and yes, I've seen him around all types of children.

Q. Okay. Have you ever seen him act in any inappropriate way whatsoever with any child?

A. No, I haven't.

Q. Okay. Have you seen him around animals?

A. Yes, I have.

Q. And how is he with animals?

A. He is probably one of the better people that I know to work with animals, horses, anything, any type of animals that he works with. He is very gifted in that area.

Q. Have you ever seen him mistreat an animal?

A. No, I haven't.

Q. Okay. Do you have an opinion with regards to whether or not he's an honest person?

A. Yes, I do.

Q. And what is that opinion?

[p.60] A. I think that Troy would probably be a pretty honest person.

Q. Okay. Have you had an opportunity to form an opinion with regards to whether or not Mr. Brown has any propensities or character traits in the nature of some kind of sexual deviance?

A. Yes, I have.

Q. And what's your opinion?

A. That he does not have any sexual deviance that I know of.

Q. Okay. And have you known him to have girlfriends in his life?

A. Yes, I have.

Q. Okay. Have you ever known him to once mistreat any of them?

A. Not that I know of.

Q. Do you feel that you know him and his life pretty well?

A. I do.

Q. Now, as much as you care for Troy Don, are you here trying to influence Judge Memeo with phony, false information for the Court?

A. It's against the law and it's against my religion to be that way, yes.

Q. Okay. So, you're here telling the truth?

[p.61] A. I'm here telling the truth.

Q. Okay. Have you had something -- if this wasn't the truth you just wouldn't be here, would that be the --

A. I wouldn't be here if this wasn't the truth.

Q. All right. And now, it's true isn't, that this whole incident and affair over the last few years has had a pretty strong impact upon your entire family? Would that be accurate?

A. Very strong impact.

Q. Okay. And have you thought about possibility that he might be guilty?

A. Yes, I have. I think you all think about that possibility.

Q. Okay. And have you gone over in your mind and come to any conclusions as to whether or not you think he is or isn't?

A. I have.

MR. WOODBURY: Irrelevance, Your Honor. We object.

THE COURT: Mr. Widdes.

MR. WIDDES: This goes to his credibility, Your Honor.

THE COURT: How so?

Q. (BY MR. WIDDES) Maybe I will ask it a different way and it'll give him a chance to -- before you answer sir, let Mr. Woodbury make his objection. I'll try to make it a [p.62] better question. If you thought that there was one chance in million that he was guilty of this offence would you be here testifying for him?

A. No, I wouldn't.

MR. WIDDES: I apologize. Did you want to make an objection, motion to strike?

MR. WOODBURY: I'm of the opinion that you can't unring a bell.

Q. (BY MR. WIDDES) I apologize. Anyway, are you familiar with Mr. Brown's reputation, that is what other people think of Mr. Brown?

A. As far as I know everybody from my family thinks very well of him.

Q. Okay. Do you know people that aren't in your family and what they think of him?

A. There's quite a difference in Troy and I's age and so I didn't, you know, I don't know that his close, the people he grew up close to.

Q. Okay. Very well.

A. So, I can't answer that question.

Q. I understand.

MR. WIDDES: I have no further questions. Thank you, Your Honor.

THE COURT: Cross-examination.

MR. WOODBURY: We have nothing of this one, sir.

[p.63] THE COURT: All right. You may step down. Thank you for coming. Bailiff. Mr. Widdes, your next witness.

MR. WIDDES: Thank you, Your Honor. We would call Ms. Tiffany Brown.

THE COURT: Tiffany Brown. Right about there. Face the Court Clerk, raise your right hand and be sworn.

(WHEREUPON the witness was sworn.)

TIFFANY MARIE BROWN

called for examination by the Defense, being first duly sworn on oath, testified as follows:

THE COURT: All right. If you would take the witness stand if you would, and when you're there if you would state your full name and spell your last name for the record.

THE WITNESS: Tiffany Marie Brown. B-R-O-W-N.

THE COURT: Mr. Widdes.

MR. WIDDES: Thank you.

DIRECT EXAMINATION

Q. (BY MR. WIDDES) Tiffany, how old are you?

A. Thirteen.

Q. Okay. Do you know Troy Don Brown here in Court, my client?

A. Yes.

Q. And how is it that you know him?

A. By, he is my cousin.

Q. Okay. And did your Dad testify here the first up, a [p.64] few minutes ago?

A. Yeah.

Q. Okay. Have you lived with Troy Don Brown previously?

A. Yes.

Q. And about how long ago was that?

A. About like four years ago.

Q. Okay. And do you remember, if you do, how long Troy Don had lived with you?

A. About six months.

Q. Okay. And in the time that he lived with you and your Mom and Dad, did he ever act inappropriately around you? Did he ever touch you?

A. No.

Q. Other than a friendly cousin older cousin way?

A. No.

Q. Did you see him at times when he had been drinking?

A. Not that I can remember.

Q. Okay. Did you ever see him around other children?

A. Yeah.

Q. Okay. And did you ever see him act bad or in a mean way to kids?

A. No.

[p.65] Q. Or animals?

A. No.

Q. Okay. Do you love your cousin Troy?

A. Yeah.

Q. Okay. Do you know what it means to the truth?

A. Yeah.

Q. And what is the truth?

A. That, what really happened.

Q. Okay. And then what's not the truth is everything else, can that be true?

A. Yeah.

Q. Okay. Now, you've got family here in Court?

A. Yeah.

Q. Are you saying these things and testifying this way for Judge Memeo because your family's here?

A. No.

Q. Okay. If what you're saying wasn't the truth would you just not get up on the stand? Do you feel like you can say that to your Mom and Dad, I just do not want to testify Mom?

A. Yeah.

Q. Okay. Has anybody forced you to get here and testify?

A. No.

Q. Okay. I nothing further, Tiffany, thank you. Mr. [p.66] Woodbury will ask a couple of questions perhaps though.

THE COURT: Cross-examination.

MR. WOODBURY: Nothing, Your Honor.

THE COURT: You may step down. Thank you for coming. Mr. Widdes.

MR. WIDDES: Court's indulgence. May I have moment?

THE COURT: How long of a moment?

MR. WIDDES: Pardon?

THE COURT: How long of a moment?

MR. WIDDES: Two minutes, one minute.

THE COURT: Fine. One, ten, twenty.

MR. WIDDES: Two minutes is great, Your Honor.

THE COURT: Okay.

MR. WIDDES: Thank you, Your Honor. I don't anymore witnesses to present. Although, I do have some documentary evidence to have mark and be offered.

THE COURT: All right. First, before we get to your documentary evidence, Mr. Woodbury, to have any further evidence in a documentary sense that you wish to offer at this time?

MR. WOODBURY: No, Your Honor. Except to the extent that we have provided for the Court the photographs that were admitted during the time of the trial. I had originally planned on having the Court review those [p.67] photographs, but after consideration it seem to -- review the photographs in conjunction with the testimony of Ms. Allred. But after consideration, they're still here and I have no objection, I think it would appropriate for the Court to review the photographs.

One of them shows the rectum and the vaginal area of the child. And we think that the Court could better appreciate the damage that the defendant did to the child if the Court reviewed the photograph. But, if the Court finds that it does not work to review photograph, or feels better or more appropriate to not review the photograph, we have no objection. We've made those available, they are marked in evidence, they are part of the record in the case. And other than that we have nothing.

THE COURT: All right. Mr. Widdes, your evidence please.

MR. WIDDES: Yes, thank you. Initially with regards to the photographs, we would object on behalf of Mr. Brown to the Court's reviewing of those, or the selective review of evidence in this particular case. From trial neither Mr. Woodbury nor I, nor the Court, were personally here at the prior sentencing. We requested that the Court review all the evidence in the case and make it's independent evaluation under Busher in the thirteenth jury. You found that was untimely and are not going to go through that process [p.68] at this time. I think however, that it's inappropriate to hunt and peck through the record in this case. I'll be quiet if the Court indicates that it won't be looking at the photographs.

THE COURT: Well, the Court hasn't and I guess I won't have time. So, the Court has not looked at the photographs. Okay. Your documentary evidence please.

MR. WIDDES: Thank you, Your Honor. I think that based upon our discussions pre-trial I'd indicate that almost after immediately after coming to town I let Mr. Woodbury have copies of these and provided copies to the Court previously. And if I could use the Courts stapler I would have these -- super, thanks, Judge -- marked collectively as the defendant's first in order.

THE COURT: Defendant's 1. Mr. Woodbury, any objection?

MR. WOODBURY: No, Your Honor.

THE COURT: Hearing no objection, Defendant's 1 will be admit into evidence for purpose of this sentencing hearing.

MR. WIDDES: These are seven handwritten, I believe notarize most of them, statements from character witnesses and family of Mr. Brown.

THE COURT: Thank you. Mr. Widdes.

MR. WIDDES: And, Your Honor, with regards to the [p.69] information and the statements and all, attached to the defendant's sentencing memorandum, they're already made a part of the record and I would formally offer those for the court's considerations as well at this time.

THE COURT: All right. Any other documentary evidence?

MR. WIDDES: Yes. Perhaps I should've made this a part of the group, it's the fax that the Court received from Mr. Dexter Baker. And if I could have this marked as the defendant's next in order as well, you were be kind enough, Your Honor --

THE COURT: Now, did Mr. Woodbury have a chance to look at this?

MR. WOODBURY: Yeah, I saw it, Judge. We don't have any objection to it.

THE COURT: All right. The Court Clerk will mark it as the defendant's 2. Hearing no objection, defendant's 2 will be admitted into evidence. Why don't we do that right now.

MR. WIDDES: Okay. Did -- I have the one copy that you provided me. Do you want me to use this one as the Court's?

THE COURT: We'll just use that one as the Court's, or as the exhibit, sure.

MR. WIDDES: With regards to further evidence, Your [p.70] Honor, what I would request the Court to do at this time, is to, and only because of the information elicited from Miss Henley-Allred by the District Attorney, we'd move under State verses Lickey, L-I-C-K-E-Y, for an independent psychological and psychiatric evaluation of Megan.

It appears that we have Ms. Allred's testimony regarding some medications and with regards to changes of moods and with regards to different mental health aspects of the case for the purpose of aggravating this particular sentence. And as long as it's has been brought up, not only would I be requesting under the Washington-Ballard line of cases and then State verses Lickey, L-I-C-K-E-Y, it's approximately four years old, I believe it's either 108 or 110 Nevada, Your Honor. It has to do with mental health issues in a criminal context.

Also we would be moving to strike, and this ties right together, information in the Pre-Sentence Report, under a line of cases called Goodson Silks. Under those two cases and those are about '95, '96 Nevada, we would moving to strike from the Pre-Sentence Report the quote quote victim information, beginning at page five and moving over to page six, having to do with counseling and therapy and all.

We believe that Mr. Brown, as long as it's brought in aggravation, has a opportunity under the Sixth Amendment to confront these things. The only way we can confront these is {p.71} with independent psychological examination of Megan and that's what we'd request.

Other than that I have no other documentary evidence or documentary issues I believe to address. Thank you.

THE COURT: Mr. Woodbury.

MR. WOODBURY: Yes, Your Honor. State v. Lickey directly deals with the question of whether or not the Court can order independent -- can or should order an independent psychological investigation of a victim in addition to the State or by a defendant in addition to the State having had the opportunity. And the answer to that is yes. But it's in the criminal trial context not in the sentencing context.

As far as we're concerned, there is no line of cases anywhere that suggest that we have to have -- aren't these guys done hurting this little girl yet. Can't they just finish it up? Why do they have to do this to her anymore? Why would they make the request? That's the first question.

The second is. Lickey doesn't apply to a sentencing. It applies to the trial. It does not have a thing in the world to do with the Sixth Amendment. It has only to do with the crime that -- the right of the defendant to have access and an opportunity to prepare evidence at trial, nothing to do with sentencing whatsoever. And until and unless they can cite a case that says they

have an independent right at a victim impact to have a child re- [p.72] examined at this late date in the proceedings, wee not only resist it because there is no authority to it, we resist it because it's just plain not fair to this victim. They have done enough to her and they shouldn't be allowed to do anymore.

THE COURT: Mr. Widdes.

MR. WIDDES: I wish the subject hadn't been brought up. I objected to it. I was overruled. Now that it's been brought, I think we should have an opportunity to find out if in fact, Your Honor, her mental condition is traceable to Mr. Brown. And if it's not, then it's not fair and inappropriate to aggravate a sentence against him based upon that.

And that's the only reason I -- I didn't want to open the door. I didn't want to go through this. But yet now that it over my objection occurred, it seems like now, how she's doing in school and how she is doing in home and sleeplessness, and her condition, and whether or not this is in some way traceable to the conduct of her underlining count two. It seems so tenuous to me that I'd be remised not ask for professional help in helping to sort it out. I just don't think it's appropriate that it was presented to you as if Mr. Brown is to blame for all of this. It seems incredible that he would be. And that's why we make the request. That's quite frankly why we made the objection.

THE COURT: Okay. We've been at this for awhile. [p.73] The Court is going to take a break until quarter to 4:00. Counsel, if I could see in chambers please.

(WHEREUPON a recess was taken)

All right. Let the record reflect that we are back on the record. We have the defendant present in Court along with his attorney Mr. Widdes. We have Mr. Tjaden, and we have Mr. Woodbury from the District Attorney's office. Mr. Widdes, do you want to add anything to your arguments considering your motions?

MR. WIDDES: No, Your Honor. I have articulated his basic Constitutional Sixth Amendment right to confront request. Case law supports this, if not specifically in the sentencing context, then I would simply add to the Court that sentencing continues to critical phase of the proceedings. Mr. Brown does have the Constitutional right to confront the State's case at sentencing, not just at trial, not just at pre-trial probable cause level, but also at sentencing here. And in light of the State's voluntary use of, over my objection, of this psychiatric information and mental health information regarding Megan Allred, then I believe that it's incumbent upon us to go forward and confront that. And the only way that I can think to do that, is the way that it occurred in may times and that is with a independent psychiatric mental health type examination of Megan.

And I would just point, Your Honor, that because -- [p.74] and only addition new argument that I would make, because that was basically re-treading, is that what we had here, was Megan's mother testifying as, not as an expert, okay. But relaying what she has allegedly been told by a series of experts. And this child apparently has gone through a series of expert mental health therapists and professionals in her life. At least for the last four years or so. And in order for us to meet that hearsay, double hearsay at times, information that's been presented to you. In order for

us to meet that the only way we can do it is with our own independent. And then with, quiet frankly, it's going also require a request for production of the psychiatric records of Megan.

I wouldn't have opened the door myself because that's a psychiatric private thing apparently between Megan and her therapist. And because we brought out into public hear at this forum, in this Court, Your Honor, I believe that it's privacy has lost it's private nature, and now we need to delve into that.

And so, those are simply the basis of for our request. Because of the vehicle that was used to present this to the Court, it makes it especially important that we have our own expert. Thank you.

THE COURT: Mr. Woodbury.

MR. WOODBURY: Thank you, Your Honor. The case [p.75] that was originally sighted for this proposition is Lickey. That appears in 108 Nevada and principle -- I was going to say the principle portions of it appear on page 196. But in order to fully appreciate the case, you have to understand that in the Lickey Case, the child had alleged sexual assault and that sometime later it got turned in. So, there wasn't any physical evidence. And as the Court observed the principle evidence against the defendant was the testimony of this, I believe it was an eight year old girl.

The case goes on to say, the District Court permitted the prosecution to call a clinical psychologist specializing in child sexual abuse, who reiterated what the minor victim had told her during the interviews. And that the child -- that the psychologist stated her

expert conclusion that the victim had been sexually molested and that she'd pined that the victim was truthful. Well, we know that in -- that that victim being truthful wasn't going to fly under Townsend.

The prosecution had two evidentiary advantages over the defense. First, it was able to provide expert testimony that the victim was assaulted sexually and had post traumatic stress disorder as a result of the assault. A conclusion which the defense was not given the opportunity to controvert with its own experts, Second, the prosecution's expert was permitted testify as to veracity of the victim witnesses.

[p.76] We obviously don't have that problem. What we have is a case -- first of all, I must say, that except for the fact that there's a question psychological testimony, this case in its present posture, and the Lickey case, simply are not related. I mean they are so unrelated it is almost pervious to any kind of analysis. In Washington in 96 Nevada, which I've previously discussed with the case, our Supreme Court has held, the appointment of the psychiatrists or psychologist expert in the sexual abuse cases is the matter of the discretion for the Court. So, no matter what happens, the Court has the discretion to appoint the expert.

An expert hasn't testified here. Not only hasn't he or she testified, we didn't open any doors. All we did was say is Megan seeing a therapist? Does she still see a therapist? And to the extent that counsel has gone on and suggested we asked what the therapist was telling them and all this other things. We didn't ask those questions. Counsel asked those questions. The only the thing that could be fairly attributed to the issue of what psychiatrist or the psychologist were saying, was

the prescription medicine that the child is receiving. That's all.

Mr. Widdes, very competently got into the issues of all the other traumatic experiences a child might of experienced in her life. All the bad things that ever happened to her, and is attributed parts of those things or [p.77] attempted through questioning, to attribute to part of those things to Megan's present psychiatric health. And we cannot deny it. We didn't put on an expert to say that wasn't so.

We're simply suggesting that the way to the evidence is such that one could reasonablely conclude that Megan still bares effects. And to that end we've talked about Megan and her concern with getting sodomized and her concern with her virginity.

So, in the final analysis, the appointment of a psychiatrist or a psychologist is at the Court's' discretion. Washington clearly says if a expert does not testify you don't have to give them one. The Supreme Court in Lickey re-affirmed that. In determining that Lickey had no right to have a psychiatrist to examine the victim and testify a trial, The District Court relied upon Washington.

In Washington, the defendant requested a psychiatric examination of the victim after trial. To support his motion for a new trial based on a his contention that the victim was lying. This Court concluded that the prosecution's case was not so void of corroboration that an examine was warranted and that in any event the decision to appoint a psychiatrist for the defense, post-trial, was within the discretion of the trial court. I would suggest to you that a pre-trial

motion post trial is every bit as much a critical phase as is a sentencing.

[p.78] In Washington however, the prosecution had no expert of it's own. We don't have an expert of our own. Moreover, we did not address issue presented in this case, to wit, whether the same standard applies if the trial court permits the prosecution expert to testify at trial, but denies the defendant the same opportunity. We didn't have an expert testify at this hearing and you can't possibly deny the defendant the same opportunity because it didn't happen.

There are two instances. There's been more psychiatric or psychologist appointed and no psychiatrist or psychologist had been appointed. Both tests under Washington, which they is still controlling the law, except in the case where psychiatrists has been appointed or been allowed to testify for the prosecution, both of those instances don't exist here, even if the sentencing were anything like a trial. Which it's not.

If counsel wanted a psychiatrist to examine Megan, theoretically he had an opportunity to make the motion to do that. What he is suggesting would end victim impact statements. What he's suggesting would force us to put Megan on the witness stand so she could be cross-examined and hurt even more. And I don't think our Supreme Court would ever in the world require that to happen. Mothers ought to be able to come testify about what happened to their children without having to subject the children to a second or third [p.79] psychiatric examination.

I believe, based on the information I know have, that I state categorically, that Megan was examined by a psychiatrist under Court order and that examination that was report of that examination has been presented to the defendant during, or previous to the trial phase in this Court.

. . . . . .

So, for all those reasons Lickey doesn't apply. There has been no expert testimony. Counsel has amply demonstrated that there may be other problems with Megan psychologically. All of those reasons we would suggest that there is no issue at all.

THE COURT: You wish the last word on this one, Mr. Widdes?

MR. WIDDES: Thank you. Just as Mr. Brown and I would stand before you and say that we do not have, nor or have I personally ever seen this shrink, excuse me, this psychiatric report of Megan in this particular case. And I would -- so just on that particular issue.

And then at page six of the Pre-Sentence Report and it's just maybe about 12 or 14 words. Quote, emotionally the victim is beginning to physically act out and both the mother and therapist believe that this behavior is do to the sexual assault. The victim has shaved part of her hair and on one occasion cut up her clothes in scissors, close quote. That's paragraph three at page six on the 1998 Pre-Sentence Report [p.80] herein. I move to strike all of that previously. But when we say that the State hasn't presented a psychiatrist or mental health professional, it's worse. It would've better if they did, because then we could cross-examine. We can't cross-examine a fifteen word paragraph in a pre-sentence report. And we can't

cross-examine, effectively, the mother who was the vehicle for bringing in that a doctor has prescribed psychiatric medications, Paxxel and anti-depressants and whatnot, and that this is all linked up to the sexual assault.

You know it's before the Court and I wish it wasn't. Because I don't have any burning desire to go through this personally. But I would I tell you that now that it's before Your Honor, that there is the one remedy, and the remedy is for independent psychiatric examination of Megan so that we can rebut this and confront it. But I would say that even though they didn't bring in a witness today it was worse than if they had. Because at page six they tried to get in the back door what they didn't want to bring in the front. Thank you very much.

THE COURT: All right. The Court would note that there was no prosecution expert that testified. And we simply had the testimony of the victim's mother has to Megan's continuing emotional difficulties. The Court believes that an independent mental evaluation would not be appropriate. The Court has balanced the potential harm to the victim, what she [p.81] has been through already, against the perceived need for the mental evaluation which is to show that somehow the victim's continue psychological difficulties are not traceable to the defendant's actions. Counsel, I am sure, was fully aware that the victim impact statement by the mother would be offered today. And the substance of that testimony was contained in the Pre-Sentence Report. Certainly no surprise. So, any notions of the continuance are denied.

With respects to the hearsay, I would also double hearsay, statements attributable to the doctors and therapists contain within the Pre-Sentence Report, they are stricken and they will not be considered by the Court in pronouncing sentence.

Mr. Widdes, where were we in the sentencing in process?

MR. WOODBURY: Mr. Widdes was still offering his motions, I believe, Your Honor.

THE COURT: All right. Go ahead. Anything else?

MR. WIDDES: Your Honor, there are before argument on the sentence itself. I believe there are a couple of final motions to consider and that is set forth in page one, Roman Numeral One, of my sentencing memorandum. And that is our motion to have count two set aside on the basis of double jeopardy. Discussing Townsend v. State, 103 Nevada 113. Court's indulgence.

[p.82] THE COURT: Count two set aside?

MR. WIDDES: Yes.

THE COURT: That's the one we are sentencing him here on today.

MR. WIDDES: Yes. I'm not doing anything to do with count one.

THE COURT: All right.

MR. WIDDES: It's just related to all related to count two. And also there was a motion to strike from the record, and from consideration herein, the prior quote quote independent post trial DNA testing by order allowing DNA testifying by defendant filed December 9, 1994. At page six of our sentence memorandum in this case, request that the Court strike from any consideration that DNA testing. Those are the two final motions that I have, Your Honor. And that is set aside count two based upon double jeopardy, and that is to move to exclude the strike from consideration the post-trial DNA testing. Thank you.

THE COURT: Mr. Woodbury. Before we get to Mr. Woodbury, what did this Supreme Court say about the post-trial DNA testing on the first appeal?

MR. WIDDES: In first appeal, Your Honor, they said that Mr. Brown could not complain on appeal because in the trial court he, through his attorney at the time, court appointed, offered the information or sought it or obtained [p.83] and all of that. And Mr. Brown's position is that counsel at the time in -- did you want me to give Brown v. State? Court's indulgence.

THE COURT: Tell me what the DNA testing has to do with the guilty verdict of the jury? And I'm not supposed to consider it in the sentencing. That's what I don't understand. The jury found this man guilty.

MR. WIDDES: I'm raising the issue. The Supreme Court in Brown v. State, that remanded this, talked about Mr. Brown in the trial court did not object to the post-trial DNA. And therefore, the failure to hold a hearing and go through the things associated with

additional DNA evidence would not be considered on appeal.

We are now back in the District Court and just call it an abundance of caution, or whatever. We're back in the District Court and Mr. Brown wants to make it clear that he believes that second DNA test was the result of ineffective assistance at counsel, shouldn't have presented to the Court and for the reason set forth in page six and seven in my sentencing memorandum, should be stricken, Your Honor. So while we're here, we're asking that it be stricken and we'd ask for your ruling on that as well as the setting aside of count two.

THE COURT: Mr. Woodbury.

MR. WOODBURY: Yeah. I wouldn't call it an [p.84] abundance of caution, Judge. I would call it a neuter on the part of the defendant to avoid what has already been litigated and to try to re-litigate it.

The fact the matter is the Supreme Court is quite definite in what we are doing. We are sentencing on count two today. He had an opportunity back quite awhile ago to raise the issue of double jeopardy. As a matter of fact I think in his appeal he did raise the issue of double jeopardy, and the Supreme Court discussed that and said that you can't convict him of the child abuse charge as a result of double jeopardy.

Now, he has come back to the trial court and is taking another run at his double jeopardy argument. I don't think the Court has to consider it. I know of no reason why you would have to consider it. I don't even know if you've got jurisdiction to consider it and would

suggest you in fact that you don't have jurisdiction to consider it. Because it's not part of the sentencing.

The case is over. The time for appeal has passed. There is no appellate issue left except for sentencing. So, we don't have any additional argument to that, other than in an abundance of caution the Court might want to look at it. But I can't fathom why. Because the Supreme Court has already -- he's raised that issue with the Supreme Court. The matter's already been litigated and there is no sense in you doing it again. What they are trying to do is avoid that -- [p.85] to raise a new applet issue at the time of sentencing. And you are to deny that.

Second, with respect to the DNA testing. That's already been litigated too. That isn't a part of the sentencing. That hasn't anything to do with the sentencing at all. This Court has no jurisdiction to do that. The jurisdiction, the time periods have already past. He can't raise his post conviction relief motion, writ I guess actually it is, through this proceeding. There's all kinks of ways to raise his post conviction stuff. You do it through a writ of habeas corpus filed under the chapter thirty four of the Nevada Revised Statues and can raise all these issues. My counsel was to dumb and didn't do anything right. All of these issues can be handled at that time. He hasn't waived a one of them. But it's not appropriate to be had at sentencing here particularly where we got -- you know what we got. We got a sentencing memorandum, which I've had in my handy little hand for about three days and we are trying to do a motion without following the Court rules on motions.

So, I don't think so. I don't see any reason to do it. I don't think you got the jurisdiction to do it. You're not cutting off his remedy. He can still go through all of this through his post conviction.

THE COURT: I guess my question is, what does the DNA evidence have to do with this? Mr. Brown here's been [p.86] found guilty by a jury. We have the Pre-Sentence Report. I don't even think it mentions the DNA evidence, does it? I don't think I saw it in there. Counsel? So, I guess my question is where is this coming from, Mr. Widdes?

MR. WIDDES: I'd only be re-treading, Your Honor. The opinion indicated that Mr. Brown -- if you're not going to consider it in the sentencing here, then that ends the hunt. All you have to do is make that ruling and grant the motion. If doesn't matter then grant the request. But if it does, then, and you do want to consider it, then that's why I made the motion. I don't think you ought to.

THE COURT: Mr. Woodbury.

MR. WOODBURY: Yes, sir. If you start granting motions just because they are not very important I am going to whined litigating in the Supreme Court a half a dozen extraneous things. The Court has no jurisdiction to make and no reason to decide at all. They are trying to raise a separate issue in an improper way. If they are allowed ro raise this DNA issue, if they do that, the next thing you are going to see is you are going to it in a writ of habeas corpus for post conviction relief.

Well look, the District Court found that Mr. Lockie didn't do that right. And you're going do it on the basis of a sentencing memorandum that did not come in the form of the motion and did not give us time to reply. You are going being [p.87] to shooting from the hip. There's no reason -- I don't think the Court can decide the issue. And for that reason I don't think the Court ought to decide the issue.

These procedures are set out very nicely so we all know where we're going. And if the Court makes decisions on motions that aren't really motions, about which jurisdiction is very questionable and which have no relevance at all to this proceeding, all that's going to happen is it's get twisted around and ultimately it's going to be a Court decision about Mr. Lockie's competence at the time of sentencing. And I don't think the Court ought make that decisions at this point on the scarce evidence.

THE COURT: All right. I tend to agree with the District Attorney. The motion with the respect to the DNA evidence is denied.

With respects to the double jeopardy, that motion is denied.

To recap on the other motions, we aren't going to subject the victim to another mental or psychological evaluation for the reasons set forth. And the Court has stricken the statements attributable to the doctors and therapists from the Pre-Sentence Report. They will not be considered. All right. Mr. Widdes, anything else?

MR. WIDDES: Not by way of motion, Your Honor, Did you want some argument on --

[p.88] THE COURT: Well, we're going to get to that. Do you have any --

MR. WIDDES: Okay. No, I have nothing further, Your Honor. I apologize. Didn't know what you wanted me to move into.

THE COURT: All right. Are we ready for final arguments on this?

MR. WOODBURY: The State's prepared, Your Honor.

MR. WIDDES: Yes, Your Honor. I would just say that Mr. Brown, whether or not you hear him at his time for allocution, the Court -- he has some things that he wants to present to the Court in terms of requests and alll. And I don't know if you want those now or --

THE COURT: Well, here's what normally happens. And that is, I am going to ask Mr. Woodbury for the position of the State. Then I am going to ask you if you have anything on behalf of the defendant. Then Mr. Brown gets his chance at allocution. Then I enter judgement and the sentence and then that's that.

MR. WIDDES: Okay.

THE COURT: Now, so how that fit into your scheme of things, I don't know. But that's what the Court's intent is.

MR. WIDDES: I think that would work for everybody.

THE COURT: All right. Why don't we go ahead. Mr. [p.89] Tjaden do you have anything to add at this time?

MR. TJADEN: No, Your Honor.

THE COURT: Mr. Woodbury, what is the position of the State on sentencing?

MR. WOODBURY: The position of the State is that we think that the Division has been to lenient. That consecutive time, consecutive life sentence is the appropriate sentence. And the reason we, think is quite independent really of the harm that happened to Megan. It's axiomatic that if someone sodomizes and rapes a nine year old child the consequence to that child are horrendous. That can't be anything else but that. It justifies by itself without anything more, the most draconian possible sentence that could be imposed.

You may not recall, Judge, being somewhat young than I am, but there was a time when rape was a capital crime. He would've had the death penalty. He would be facing the electric chair right now. And that wasn't too long in Nevada and I don't know what exactly liberalized it. And I used to wonder, well how in the world could just raping another person ever justify the death penalty. This is the case. This is the one that would've justified it.

What we think the important consideration of this case it that guy. The defendant. He's telling you a lot about himself. A whole bunch. One of the things, and I'll grant you, there's a little bit a trepidation in saying this, [p.90] but I am going to say it anyway. I will bet,

I can assure you almost, that when Troy Don Brown makes his allocution statement to you, he is going to say something so outrageous that only a crazy person could believe it. They see, these folks in the audience and Mr. Brown, see his ability to have a number of people present statements in his behalf as a plus and as an advantage. You know how the State views that? The State views that as the ability of Mr. Brown to make preposterous claims. He actually has those folks believing he is innocent. You heard them testify. You know that proves, Judge? That proves, not that this are bad folks, that proves he's a good con man. That's all. But the fact is all that's really happened is that got himself jacked into a position now where could never admit his guilt. There's to many people out there that think he is innocent.

In the face if incontrovertible DNA evidence at trial, that twelve citizens of our county thought constituted prove beyond a reasonable doubt, he continues to assert his innocence. In the face of his own statement -- and I was kindly, I guess, to the first witness up here, the trucker guy, saying that Troy Don Brown has said that he had ten drinks and ten beer chasers. Because I think Mr. Brown actually said he had thirteen Kamikazes. That's a double drink and beer chasers. Which would be 26 drinks. He expects people to believe that. He doesn't find it at all incredible [p.91] that he would be asking people to believe it. And that's Troy Don Brown. Thirteen Kamikazes. Thirteen beer chasers.

He has had a inpatient program on alcohol abuse. He's had two DUI's. And you what he said in his Pre-Sentence Report, Judge? I don't think I got an alcohol problem. That's what he said. I don't think I'm

an alcoholic. He expects you to believe that. He expects us people to believe it and worse, they do believe it. That's how good he is at what he does. He's a con man. They believe it.

Let me tell you about this guy. May each of us -- each of us have base desires, I expect. We have an inhibitor. Something that stops us from doing it. Sometimes we commit little wrongs, a little theft, maybe even a murder, murder for kill your wife's boyfriend or something like that. But there are always reasons. There are always motives that are understandable to just us guys out in society. We could understand, we may not approve of them and we would not be in a position to condone them, but we can see what their point was.

Now, you might look at Mr. Brown and say well what your point, Mr. Brown, in raping this nine year old child. It couldn't been sex. There are whore houses all over Elko County, if you wanted sex. And there's one in Carlin. And wanted sex you could of gone in and got sex. So, he didn't go to this child's house for sex. Oh, no. He went for something [p.92] else.

Where is the inhibitor in this guy? As he walks step by step to that house? He heard at the Peacock Lounge, according to the testimony and evidence, that the child was home alone and the mother was in a bar. When did it first dawn on him he was going to go up and have that child? He was going ravage that child. When did that happen? And as he progressed from the lounge, step by step the four of five blocks to where that child was. Every time he took a step he could've stopped himself. This is the most reprehensible thing a person could do. I have got to stop. I can' t do it.

And if the thought occurred to him at the time of the telephone call and he found the child was there alone. His response was not to say, God I got some awful thoughts, I got to do something about them. I can't do this. He response was to pour another Kamikaze down his throat to take away whatever inhibitions he did have. There are no inhibitors in him. There are zero inhibitors in him. He's a con man. Worse, he's a depraved con man.

We're not bad people over at the DA's office. We actually -- it's tough to look at a twenty-two year old kid and say, you are going to spend the rest of your life in prison. And if anybody out there thinks we enjoy that they're crazy. We don't. And if I could find one spark of decency, one indication that he had done anything to stop this. That [p.93] at some point he had stopped and delayed and tried to deal with it, in someway, we would take it into consideration and I would tell what it was.

He never, not once, not no how, not no way, no place in trial, no place in any statement he's ever given, no way I ever heard, has he ever said anything that showed one spark of human decency. One spark of pity. One spark of mercy for that child.

He took her, he put his penis in her rectum. He put his penis in her vagina. He ripped her from stem to stern in the vagina. He sodomized her and he left her for dead. He didn't quite because he was satisfied or that he had ejaculated. He quite because he thought she was dead. That's how the child got rid of him. She pretended to be dead. And he has the audacity to walk in hear and ask for something less the maximum sentence.

Judge, you can't put this guy back on the street. He has no inhibitors. As long as he is within an age when the testosterone is flowing freely, and that's in his twenties and thirties and forties and fifties, he shouldn't be back on the street. It's clear. There is nothing, he has no control. He is willing to pour the alcohol down his throat until he does these kinds of things and when he done drinking the alcohol he will do it again. And he had the DUI and he done that again. He has the alcohol in patient program that telling him, they [p.94] don't give inpatients programs to people who are not alcoholics. And he's drinking again. He was drinking again In Carlin. It's clear, he has no control and there's no way in the world this Court should put that man back out on the street for as long as it possibly keep he off the street.

THE COURT: Mr. Widdes, do you have anything on behalf of the defendant?

MR. WIDDES : Just a few words, Your Honor. And wow do we have a little bit to talk about here. Initially I'd indicate that what the State is argued is precisely the type of error that caused this to come back for re-sentencing. There were two errors.

Number one. The initial Court's use of constitutionally forbidden psychiatric information concerning Mr. Brown, which we need not go into. And number two, the trial court previously sentenced Mr. Brown to precisely the sentence that the State is asking you to do today, a consecutive sentence. And the Court did it for precisely the same reasons that this District Attorney is asking you to do it today. And he is saying Mr. Brown didn't show remorse. He didn't show any spark on decency. He didn't come forward

and cry and say he was sorry for the act. He maintained his innocence. And Mr. Brown if you're going to maintain your innocence, just like it was argued by Mr. Woodbury a second ago, if you're going to maintain your innocence and if you're [p.95] going to continue in this, then you going to give what the DA's asking you to give him again. And that's consecutive sentences.

Well, Your Honor, he maintains his innocence. And if you could imagine the catch 22 that a persons finds themselves in. If you could imagine a person being innocent of a crime -- and now he argued, a second ago, about how twelve people heard all this evidence and twelve people did all of this, and how the trial -- and now Mr. Brown is before you absolutely guilty of this, without any, you know, question about it.

Well, Your Honor, whoa Nelly. I'll tell you that when -- if you look at this case without the DNA evidence the most you can say is it's possible that Mr. Brown could of done it. If you read the Supreme Court's opinion, all they say is, well he could of done it. I mean there was the time frames. And if you believe the evidences and like most favorable to the State, well it's conceivable that he could do it. And so therefor, under Jackson verses Virginia, it's not reversible error violation of due process to leave him convicted under the sentence. And so we are going to reverse under sufficiency of the evidence because he could of done it.

But boy, you take out the DNA evidence in this case, Your Honor, and it is absolutely reasonable doubt all over this case. And we've got DNA evidence in this case. Where I [p.96] saw that December '94 order from Judge Stringfield that referenced I believe, that

referenced that Mr. Lockie spent $500.00 of $5,000.00 prior to trial, investigating DNA. Excuse me. He didn't retain a forensic investigator to go check and to make sure the collection of evidence was appropriate. He didn't go through and check to see that the procedures at the time with Rene Ramiro were appropriate and a whole host, a laundry list, of derelictions which we're not going into today. Again except only because Mr. Woodbury's says that twelve people found him guilty and he's guilty as sin. And therefor, he sits here unquestionably guilty and how anybody can before Court unquestionably guilty and still maintain his innocence. Well he does, because he is innocent.

We're here to re-sentence, however, and so we are not getting into that. We have asked you to do that and you have declined our invitation. Okay. But in terms of the argument right now to move you to give a consecutive sentence, the State's asking you to commit the exact same error that's brought it back here for re-sentencing. And that is look at him, he's got no character he's got no heart. He's an animal. He's got no spark of decency and he'll go out and do it again and all of this.

Well, Your Honor, that's simply not true. And the only thing they have to say is the verdict of the jury and boy I'll tell you, what a tough spot Mr. Brown finds himself in [p.97] today, because we are not re-litigating guilty or innocence. So, you are here with somebody who's been guilty, but the question concerning the strength of that conviction and the strength of the truth of the charges and all, is not something that you've said you will allow us. But yet Mr. Woodbury says that the evidence was so overwhelming. It wasn't.

But moving on. When we look at what are appropriate sentencing considerations, we talk about the nature of the offence and the nature of the offender. Those are the two prongs that are Supreme Court and the U.S. Supreme Court have said are appropriate sentencing considerations. Nature of the offence, nature of the offender.

And in this particular case, Your Honor, what is what I suggested under the double jeopardy argument is that -- in our sentencing memorandum, is that all of the ripping stem to stern was all vaginal. We're not here on vaginal. We're here on the anal penetration, the rectum. The count two. Count one, the vaginal causing substantial bodily harm has already been considered by a sentencing body, that being the jury. And the jury had said, it's sentence -- and it's a heck of a sentence. People talk about life, ten years before you're even eligible for parole.

I do, just in my own practice, I have done over the years a bit of work before the parole board. And I can tell you that Mr. Brown -- the bad news for Mr. Brown is that [p.98] after ten years that doesn't mean your paroled. You're going to looking what they call dumps. Three dumps, minimum. And as long as he maintains his innocence, the parole board really isn't a sentencing body, so they will hold it against him that he maintains his innocence. They will say either you admit it and go get some help and jump through the hoops and be a good little rehabilitated person and show us all how you're rehabilitated and all, or you don't get paroled.

A life, ten to the board, for Mr. Brown is virtually a life without. Unless he says has some epiphany and

says okay, okay, I did it give me help and let me jump through the hoops and play the game and go through the parole and all of this, that, the other. Or whatever. But I'm just telling you that the sentence that he is on now, for the misconduct that the State's trying to use a second time here to aggravate, and that is count one. Vaginal penetration causing substantial bodily harm. He's already been punished for that. The State went to the jury requesting life without. Okay. The jury came back and said life with.

Now because they couldn't get it there they are trying to use the same information, and that is the medical and psychological -- and of course indicated that you're going to consider the report that if information. But Mr. Woodbury argues it to you now, that this girl was ripped stem to stern, excuse me. She wasn't ripped rectally. The [p.99] evidence before the Court does not show the substantial bodily harm resulting from that. You don't have information before you regarding substantial mental psychiatric harm resulting from that.

You cannot help but think that the jury who had all this information before it, took into consideration and imposed a sentence, or entered it's verdict of a sentence of life with ten to the board. That's an enormous, an enormous sentence. For an enormous incident and enormous crime.

We of course continued to believe that and assert that Mr. Brown didn't do it. But we're not here to litigate that right now. We are not here litigate Mr. Lockie's derelictions or things that he over looked and all. Not saying he's a bad guy, I don't even know the man personally. But we're not for that.

What we're here is to impose an appropriate sentence for count two. Sexual assault in a situation where in the context of a discreet incident, call it a crime. A criminal incident that occurred, as I recall Megan's testimony reading over it, it didn't take to long. So, we are talking a matter of minutes. And with a child it doesn't take to long to do to much damage. But again damage and all was done and he's paid for that. And he is continuing to pay for that. And with a count two even concurrent. A life, ten to the board, concurrent. This is going to be further weight this going to [p.100] prevent him from obtaining any kind of parole relief. In this case, truly this a life without that Mr. Brown has, that he's suffering under.

And I will tell you that use, to reuse and to force jeopardy upon Mr. Brown, in terms of real life with a the consecutive sentence, for information and factors that of all already been considered and used and for which Mr. Brown has already been punished, would violate the double jeopardy clause.

And I am not talking about the Townsend argument. As far as setting aside the conviction. I am talking about the imposition of consecutive sentences. And the same principles and considerations apply, Your Honor.

Now beyond those -- and I appreciate the Court's patients here. Beyond that I would indicate that -- you know, a lot of times we can tell, you know, which one of the dogs did the bitting based upon their history of bitting other people. And Mr. Brown has absolutely no record of any misconduct of any kind similar to this at all. He had some DUIs and he had some drinking problems. Okay. Traffic problems. Misdemeanors. No

prior felony record at all. And drinking -- excuse me I do not live in Elko County but I in the course of this case had I opportunity to meet a number people who are familiar with Elko County and folks that work in the mines and all. And unfortunately it appears that [p.101] whether it be the work that the miners do or whatnot. But it appears that perhaps alcoholism is a problem in that sector of the community, people that work the mines. Maybe not. But that's my sense.

And so to say to Mr. Brown, gees you are just mad dog because you had an alcohol problem. My God, we've gotta give you consecutive sentences because you had a alcohol problem, is totally inappropriate. He's got, Your Honor, no record of similar misconduct. There is nothing before the Court to show that he's got that twisted character. That he's a pervert. That he's a danger to the future health and safety of the community.

And, Your Honor, what we're asking you today I believe is the only relief left for the Court's consideration is the exact sentence to be imposed. We've suggested that under the statue that you could give it a sentence of -- I believe it is twenty five years. Court's indulgence, I apologize. I apologize. The -- available to you at page four at the top, in Roman numeral two, section two. A sentence of 20 years with eligibility beginning in five years. We've suggested and I haven't heard the State object to it, that is an available sentence for the Court. We ask the Court to impose the sentence of 20 years, five to the board under the new statue of being N.R.S. 200.3663(b)(2) as being an option for this offense.

[p.102] Remembering that this is offense does not involved substantial bodily harm. If they could of proved substantial bodily harm they would of charged it and attempted to prove it. They couldn't because it wasn't there. Though it is a terrible enough offense as it is. Again he has paid for the substantial harm that the child endured. Okay. That's not here to re-litigated. And to punish him again for that, Your Honor, is simply inappropriate.

He has shown absolutely no indication on his life that he is a pervert. And you know what, he's not a con man and he's not all that good -- what we've got is a courtroom full of family and friends and people who have known him since he was a child. And have grown up with him. And of course love him. And of course want the best for him. And of course want Your Honor to give him concurrent sentences today. But not so much that they would come in and lie.

Utah is not that far removed or out in some universe from Elko County, Nevada. That there pro-child abuser over there. Good night. They're basically a community of similar beliefs and values and all. And there's no way that they're pro-child abuse. They came in here. They stood up and they told you the truth. And the truth of the matter that Troy Don Brown has been around kids, been around folks, as been trusted and is a good young man and has been all of his entire life.

And it is unfortunately a tragedy that Megan Allred [p.103] was subjected to what she was. But, I'm going to suggest it's been a tragedy that Mr. Brown has as well. Without the DNA evidence -- again we gonna get into that, perhaps down the road in other

proceedings. But for today, Your Honor, you're not here with a man who is undeniably guilty. Who is psychiatrically predisposed. Who you have to fear. Who you have to fear for some re-offense down the road, Your Honor.

No, he's guy proven himself over the years. And this thing sticks out like some kind of giant volcano out of the ground or something. It's a weird. It's an aberration. For a whole life of this young man of honorable conduct. To then all of a sudden do this. Your Honor, there's not the tract record to say that protection of the community requires a consecutive sentence.

Your Honor, I would ask you open your heart in this case. I would ask you to realize that Megan's suffering and the tragedy that she endured has already been punished. And I would ask you, Your Honor, to join with the Division of Parole and Probation who sits here in Court with a recommendation for concurrent sentences, to join with the Division of Parole and Probation and me, in imposing -- we're recommending it together, concurrent sentences here. Whether is be the life ten to the board, or I would suggest the 20 year, five to the board. I'd just ask you, Your Honor, to run that concurrent.

Again, there is a idea -- and then I'll be through [p.104] -- that where separate and distinctive offences, technically for which somebody is convicted, nevertheless, occur within in a short period of time involving the same victim, involving the same circumstances and so it really is part of one criminal transaction, that it at least, my experience is, that

often times a concurrent sentences found to be appropriate in those circumstances. And I think that perhaps that is what motivated, as well as the lack of a prior criminal record and all, the Division to be recommending concurrent sentences as well.

So again, Your Honor, we thank you very much for your patience. We would ask you to please, on behalf of the family, on behalf of Mr. Brown and on behalf of myself a join with the Division of Parole and Probation and me and impose a concurrent sentence in this case. Thank you very much.

THE COURT: All right. Mr. Brown you have an opportunity at this time to make a further statement on your on behalf, keeping in mind that you are not required to make a statement, but you entitled to. Is there anything further you would like to state?

MR. BROWN: Yes, sir. I have couple of things. First, I would like -- I had some stuff prepared to have you look at and review, but they did not roll me up in the bus so I put it in the mail yesterday, to you and to the D.A. What it is, is basically a pre-sentencing motion. And I would like [p.105] to have you submit this to the Court.

MR. WIDDES: I don't have a copy of it, Your Honor.

THE COURT: Have you seen this, Mr. Woodbury?

MR. WOODBURY: I do not think so.

THE COURT: All right. Show it to Mr. Woodbury first.

MR. WOODBURY: No, we haven't seen it, Your Honor.

MR. WIDDES: We would ask that it be filed, Your Honor.

THE COURT: All right. The Court is reviewing a pre-sentencing motion for a new trial. The court will file it in open Court.

MR. BROWN: And a to allocution in this Court, Your Honor, I know I did not commit this crime. And due to the serious mistakes made in the justice procedure of trying me for this crime, I have be found guilty.

The allocation to this Court is the simple facts that are in this case, is the State's failure to prove the chain of custody on all the evidence that they collected. Counsel failed to call me an alibi witness. Officials failed to preserve the DNA evidences in bad faith, which has been ruled in Young Blood case. Romero's inconsistent statements made in Court. The prosecution used evidence and testimony it knew, or should of known, what perjured or changed.

And the stipulation by both parties that was ordered [p.106] in this case, was broken by the State. Not by me. There was a stipulation ordered in this case that all DNA testings at a critical stages I had an independent there, of all critical stages of the DNA. The RFLP test which mysteriously appeared in this case when it wasn't there when it was first examined. But five months later it automatically appeared. DNA does not grow. It can magically appear. So, how do you

get a one three million in 90 days, in 70 days that she says takes 90 days.

The victims contradicting statements, Your Honor, unreliable. The lab was not even certified at the time of testing. The failure to even check for other suspects. I have an affidavit of alibi statement, but my trial counsel is ineffective. The blood vial -- there was a signed statement that was entered the day before the preliminary hearing, that this vial was signed and labeled by the lady that drew it. But the next day she wants to change her testimony because the blood vial shows up unsigned or labeled. There's been serious errors in this case. All I can do is say I know did not commit this crime and if it wasn't for the bad faith and the prosecutorial misconduct in this case, we would not be standing here today.

I realize that what happened to Megan was extremely perverse and disgusting. But I know I didn't commit the crime. I am sorry that it happened to her. And I never [p.107] committed the crime. But there is nothing that I can do about it but try to prove my innocence, Your Honor. I refuse to take a plea of a crime I did not commit. Although my life if I committed crime I admitted to it. There one in my Pre-Sentence Report, they mentioned Yellowstone National Park. If you'd have bothered to get the records you'd see on all those charges when I went into a courtroom, in a federal courtroom, I stood up and admitted my guilt, because I committed the crimes they charged me with. I have always told the truth in every matter.

But the D.A. they say are not bad guys. Prosecutorial misconduct from this D.A.'s office is

what put us here in the first place. And that's all I have to say, Your Honor.

THE COURT: All right. The Court's procedure is, the Court will enter a supplemental judgement of conviction against Mr. Brown finding him guilty of count two sexual assault on a child under 14. The restitution issue was on the table today. It was open for discussion. The Court will reaffirm the prior judgement of conviction that ordered restitution in the amount of $29,547.22. The defendant will pay the $25.00 administrative assessment fee.

The Court notes that the defendant was previously sentenced by the jury for count one. That was the defendant was sentenced to a term of life in prison with the possibility [p.108] of parole after ten years in the Nevada Department of Prisons. Credit for time served, where are we on that Mr. Tjaden?

MR. TJADEN: The Pre-Sentence Report indicates 1,352 days.

THE COURT: Okay. Is that on count one or count two.

MR. WIDDES: I think it should be credited for count one.

THE COURT: All right. That will be credited for count one, 1,352 days time previously served. For count two, the defendant is sentenced to a term of life in prison with the possibility of parole after 10 years in the Nevada Department of Prisons. This sentence will be consecutive to the sentence in count one. Thank you for coming.

MR. WIDDES: Your Honor, there is just couple more things now pertaining to this case. I appreciate your patients. Initially, Your Honor, I believe that Mr. Brown is going to be requesting Court appointed counsel for appeal. I understand my responsibilities under the case law is to file a notice of appeal within 30 days of today for Mr. Brown. And I will. However not, as far as my responsibilities, a fast tract appeal case, because from my responsibilities it made be for other reasons administratively down the road. But at this point I would move to be relieved as Mr. Brown's counselor. And he would like to make the motion for appointment of [p.109] counsel on appeal at public expense.

MR. WOODBURY: Mr. Widdes had indicated to me earlier that he might be moving to withdraw, but I was under the oppression that wasn't going to happen today. So long as Mr. Brown doesn't get caught in a crack, where the notice of appeal does not get filed, we don't have any objection to Mr. Widdes withdrawing. And I think Mr. Brown probably has one or two, maybe more, affidavits of indigency before the Court. I would suppose he's entitled to counsel on appeal if Mr. Widdes wants to withdraw and it's alright with Mr. Brown, it's okay with us.

THE COURT: Is that alright with you Mr. Brown?

MR. BROWN: Yes. But I have one thing I would like to request. I knew I was suppose to have this court date. But the way it is now, I am requesting that you somehow have them take me back to the prison instead of down to the county jail because it is going to be a two week wait for the bus to come back. And by the time that happens then I loose my housing in the

prison. So I have to go back into administrative segregation which is 30 days. That's 45 days where I can not get any legal work material done or any research which severely hinders me. And I can't do anything in the jail because of the new phone system. For some reason their phone system will not dial Utah numbers. So I am now incommunicative with everybody.

[p.110] THE COURT: All right. We'll have to take you back to prison, I guess. Mr. Woodbury.

MR. WOODBURY: The note I got from the Sheriff's office said, Troy Brown told me he was having his attorney make a motion for Elko County Sheriff's office to return him tonight. His argument is that he needs to file a direct appeal and cannot wait until pick up next Thursday. Which I gather is a week not two weeks --

MR. BROWN: They told me 11 days.

MR. WOODBURY: -- By NSP.

MR. COSGROVE: They will come through next Wednesday or Thursday.

MR. WOODBURY: So, it's less than a week. Would request -- the problem is that it's very difficult for the Sheriffs Office to arrange that transportation. It probably means an overtime deputy. His appeal has to be filed from this within 30 days. And I assume that Mr. Widdes will file a notice of appeal in this?

MR. WIDDES: I can do that on behalf of Mr. Brown, Your Honor. I believe the order is, is that I'm relieved, today. But my responsibilities --

THE COURT: Well, I haven't made an order yet have I?

MR. WIDDES: I didn't know if you orally ruled. The motion to be relieved and then for appointment of counsel [p.111] on appeal at public expense. And I will go forward if Mr. Brown wants me to file his notice of appeal here.

THE COURT: What would be the problem with you filing the notice of appeal and then you can withdraw?

MR. WIDDES: Whatever the Court's pleasures is.

THE COURT: Mr. Woodbury, is there anything wrong with that?

MR. WOODBURY: No, there's nothing wrong with that. Now, that takes care of that problem. Is there something else that is going to be filed that I don't know about that needs to be filed by someone other than Mr. Widdes within the next week?

THE COURT: I have no idea

MR. WIDDES: Perhaps some motion with a seven day limit. We've had those motions --

THE COURT: Well anyway, until that notice of appeal is filed I guess, Mr. Widdes, you're still on the case.

MR. BROWN: Your Honor, also I realize you denied my motion for transcripts by saying that I don't have a right to these transcripts. Where the D.A. argued that it's a post conviction matter -- the State has failed to prove chain of handling a chain of evidence which is a federal rule that they do --

THE COURT: We'll take this up, whatever it is, at a later date. Court is in recess.

[p.112]

STATE OF NEVADA)
) ss.
COUNTY OF ELKO)

I, CHRISTIAN M. KNOX, electronic Court Reporter of the Fourth Judicial District Court of the State of Nevada, in and for the County of Elko, was presented in Department 1 of the above-entitled Court on March 13, 1998.

The foregoing transcript is an UNCERTIFIED ROUGH DRAFT TRANSCRIPT of the electronic tape recording of said proceedings. THIS TRANSCRIPT HAS NOT BEEN EDITED, PROOFREAD, FINALIZED, INDEXED OR CERTIFIED.

DATED: At Elko, Nevada, this 4th day of May, 1998.

DAVID M. SCHIECK, ESQ.
NEVADA BAR NO. 0824
302 EAST CARSON AVE., STE. 600
LAS VEGAS NV 89101
702-382-1844
ATTORNEY FOR BROWN

IN THE FOURTH JUDICIAL DISTRICT COURT OF NEVADA IN AND FOR ELKO COUNTY

CASE NO. 5833
DEPARTMENT NO. I

[Filed August 30, 2001]

TROY DON BROWN,	)
	)
Petitioner,	)
	)
vs.	)
	)
WARDEN OF LOVELOCK CORRECTIONAL CENTER, and THE STATE OF NEVADA,	)
	)
Respondent.	)
	)

PETITION FOR WRIT OF HABEAS CORPUS
(POST-CONVICTION)
DATE: _____
TIME: _____

1. Name of institution and county in which you are presently imprisoned or where and how you are

presently restrained of your liberty: LOVELOCK CORRECTIONAL CENTER, PERSHING COUNTY

2. Name and location of court which entered the judgment of conviction under attack: FOURTH JUDICIAL DISTRICT COURT, ELKO, NEVADA

3. Date of judgement of conviction: 9-30-94

4. Case number: C 5833

5. (a) Length of sentence: LIFE WITH THE POSSIBILITY OF PAROLE AFTER 10 YEARS, PLUS A CONSECUTIVE LIFE WITH THE POSSIBILITY OF PAROLE AFTER 10 YEARS

(b) If sentence is death, state any date upon which execution is scheduled: N/A

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? NO

If "yes", list crime, case number and sentence being served at this time: N/A

7. Nature of offense involved in conviction being challenged: SEXUAL ASSAULT ON CHILD UNDER AGE 14

8. What was your plea? (Check one)

(a) Not guilty XX

(b) Guilty _____

(c) Guilty but mentally ill _____

(d) Nolo contendere _____

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details: N/A

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)

(a) Jury XX

(b) Judge without a jury _____

11. Did you testify at the trial? Yes XX No ___

12. Did you appeal from the judgement of conviction? YES

13. If you did appeal, answer the following:

(a) Name of court: NEVADA SUPREME COURT

(b) Case number or citation: 27426

(c) Result: CONVICTION AFFIRMED; REMANDED FOR NEW SENTENCING

(d) Date of result: 2-26-97

(e) Other: SECOND DIRECT APPEAL FROM REMANDED SENTENCING AND DENIAL OF

MOTION FOR NEW TRIAL FILED 3-20-98; NEVADA SUPREME COURT CASE NOS. 32025 AND 33325; ORDER DISMISSING APPEAL; 9-8-2000

14. If you did not appeal, explain briefly why you did not: N/A

15. Other than a direct appeal from the judgement of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgement in any court, state or federal? YES

16. If your answer to No. 15 was "yes," give the following information:

(a)(1) Name of court: FOURTH JUDICIAL DISTRICT COURT

(2) Nature of proceeding: MOTION FOR NEW TRIAL

(3) Grounds raised: NEWLY DISCOVERED/ CONCEALED EVIDENCE

(4) Did you receive an evidentiary hearing on your petition, application or motion? NO

(5) Result: DENIED

(6) Date of result: 3-9-98

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: 3-9-98 AND 3-19-98

(b) as to any second petition, application or motion, give the same information:

(1) Name of court: _____

(2) Nature of proceeding: _____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application or motion? _____

(5) Result: _____

(6) Date of result: _____

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: _____

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion?

Yes XX No ____

Citation or date of decision: CASE NO. 32025; 9-8-00

(2) Second petition, application or motion?

Yes ____ No ____

Citation or date of decision: _____

(3) Third or subsequent petitions, applications or motions? Yes ___ No ___

Citation or date of decision: _____

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) N/A

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other post-conviction proceeding? NO; SIMILAR FACTUAL ALLEGATIONS HAVE BEEN RAISED BUT NOT SEEKING RELIEF ON THE GROUNDS SET FORTH HEREIN

18. If any of the grounds listed in Nos. 23 (a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) VIOLATION OF SIXTH AND FOURTEENTH AMENDMENTS DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL;

RE-SENTENCING; AND ON DIRECT APPEAL. THESE MATTERS ARE NOT PROPERLY RAISED ON DIRECT APPEAL.

19. Are you filing this petition more than 1 year following the filing of the judgement of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) NO

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgement under attack? Yes ____ No XX

If yes, state what court and the case number: _____

21.Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: TRIAL ATTORNEY: DAVID LOCKIE; DIRECT APPEAL: DOROTHY NASH HOLMES AND DENNIS WIDDIS; RE-SENTENCING/NEW TRIAL MOTION: DENNIS WIDDIS; SECOND DIRECT APPEAL: DONALD EVANS

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgement under attack?

Yes ____ No XX

If yes, specify where and when it is to be served, if you know: N/A

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

(a) Ground one: Petitioner BROWN'S conviction and sentence are invalid and must be set aside because he was deprived of his constitutional right to effective assistance of counsel, due process of law, equal protection of the law, cross-examination and confrontation due to the failure of trial counsel and appellate counsel to provide reasonably effective assistance. U.S. Constitutional Amendments V, VI, VIII, and XIV; Nevada Constitution Article I, Section 3, 6, 8 and 9; and Article IV, Section 21.

Supporting FACTS (Tell your story briefly without citing cases or law.): PETITIONER SETS FORTH HEREIN A SUMMARY OF THE ERRORS AND OMISSIONS OF COUNSEL. FILED HEREWITH ARE POINTS AND AUTHORITIES IN SUPPORT OF THIS PETITION WHICH CONTAINS THE DETAILED FACTUAL BASIS FOR EACH ALLEGATION. ALSO FILED HEREWITH IS AN APPENDIX CONTAINING DOCUMENTARY EVIDENCE IN SUPPORT OF THE PETITION. THE CONTENTS OF THESE PLEADINGS ARE INCORPORATED HEREIN BY THIS REFERENCE.

1. Trial counsel failed to file a Motion or otherwise object to exclude all DNA evidence.

2. Trial counsel failed to obtain testing by an independent DNA expert, instead utilizing an expert that had a conflict of interest and failed to be present during the testing.

3. Trial counsel failed to prevent testing of DNA by the State in the absence of a defense expert in violation of a stipulation and order resulting in test results that were not reliable.

4. Trial counsel failed to investigate and present evidence at trial to show that Megan's step-father was the assailant.

5. Trial counsel failed to investigate, interview, and call witnesses provided by Petitioner to establish his innocence.

6. Counsel failed to discuss defense strategies with Petitioner and never informed Petitioner that he intended to argue that Petitioner's brother Trent could have committed the crime.

7. Counsel failed to object to Petitioner being brought to court in shackles and taken into the court room in said condition within the eyesight of the members of the jury.

8. Counsel failed to file a Motion to Dismiss or in the Alternative Suppress Evidence based on the loss of exculpatory evidence, specifically relating to the teeth scraping taken from the victim as part of the sexual assault kit.

9. Counsel failed to timely file a Motion for New Trial thereby resulting in the Motion filed by

Petitioner being denied by the Court as being untimely.

10. Trial counsel failed to object to the lack of pre-trial evidentiary hearing or to qualifying Renee Romero as an expert witness thereby precluding appellate review of the DNA evidence.

11. Appellate counsel on the second direct appeal failed to submit issues to the appellate court concerning the Motion for New Trial that had been filed in District Court prior to the appeal. To the extent that the State may argue that BROWN is procedurally barred from raising said issue by way of post conviction habeas corpus, BROWN alleges a denial of effective assistance of counsel caused the procedural bar and that BROWN was prejudiced thereby.

(b) Ground two: PETITIONER WAS DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO DUE PROCESS OF LAW AND A FAIR TRIAL BY THE ACTIONS AND INACTIONS OF THE INVOLVED LAW ENFORCEMENT AGENCIES.

Supporting FACTS (Tell your story briefly without citing cases or law.):

1. The Carlin Police Department and related prosecutorial agencies failed to preserve and test the teeth scrapings of Megan thereby suppressing exculpatory evidence.

2. The Carlin Police Department and related prosecutorial agencies failed to adequately collect and

preserve items of evidence containing alleged DNA thereby contaminating the evidence resulting in incorrect or inaccurate results.

3. The Carlin Police Department and Washoe Crime Lab failed to preserve and test the bedding collected from BROWN'S bed to establish the absence of blood or evidence that BROWN was the perpetrator of the crime.

4. The Carlin Police Department and related prosecutorial agencies failed to preserve and lost the letter from BROWN'S doctor that he had no bite marks, scratches or bruises on his body.

WHEREFORE, Petitioner prays that the court grant Petitioner relief to which he may be entitled in this proceeding.

DATED: 8/27/01

RESPECTFULLY SUBMITTED:

/s/_____
DAVID M. SCHIECK, ESQ.

VERIFICATION

Under penalty of perjury, the undersigned declares that he is the Petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true.

/s/
TROY DON BROWN

EXHIBIT 1

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 27426

[Filed February 25, 1997]

TROY DON BROWN,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Appeal from a judgment of conviction entered pursuant to a jury verdict of two counts of sexual assault of a child under the age of fourteen and one count of child abuse by sexual abuse causing substantial mental harm. Fourth Judicial District Court, Elko County; Thomas L. Stringfield, Judge.

Affirmed in part, reversed in part, and remanded.

Dennis E. Widdis, Reno,
for Appellant.

Frankie Sue Del Papa, Attorney General, Carson City; Gary D. Woodbury, District Attorney, and John S. McGimsey and Robert J.

Lowe, Deputy District Attorneys,
Elko County,
for Respondent.

OPINION

PER CURIAM:

Appellant Troy Brown was tried and convicted of sexually assaulting Jane Doe, a nine-year-old girl.[1] Troy was convicted of two counts of sexual assault of a child under fourteen years of age, and one count of child abuse by sexual abuse. He was acquitted of one count of attempted murder. Troy claims on appeal that (1) he was improperly denied bail; (2) the DNA evidence was improperly admitted because no evidentiary hearing was held; (3) sufficient evidence did not exist to support his conviction; (4) double jeopardy barred his convictions for both sexual assault and child abuse by sexual abuse; and (5) the district judge abused his discretion during the sentencing phase of the trial.

We conclude that the district judge properly denied bail for Troy, that the DNA evidence was properly admitted at trial, and that sufficient evidence existed to support Troy's conviction. However, we conclude that Troy's conviction for both sexual assault and child abuse by sexual abuse violated the double jeopardy provision of the Constitution and that the conviction for child abuse must be vacated. Finally, we conclude that the district judge abused his discretion during the sentencing phase of the trial and the case must be

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[1] The victim's real name has been changed to protect her identity.

remanded to the district court for a new sentencing hearing on the remaining sexual assault conviction.

FACTS

In the early morning hours of January 29, 1994, Jane Doe was sexually assaulted in the bedroom of her trailer home at 1637 Pruett Street in Carlin. Jane Doe and her four-year-old sister were home alone while their mother, Pam, was drinking at a bar, and their step-father, Wayne, was working the night shift at his job. Troy was arrested, tried, and convicted for the crime.

On January 28, 1994, before Wayne went to work, Pam received a telephone call from Raquel Brown. Raquel was married to Trent Brown, Troy's brother. Raquel wanted to know if Pam would like to join Raquel and Trent at a local bar named "CG's" for a drink and also to know if Jane Doe could babysit her children for the approximately one-half hour they expected to stay at the bar. Pam agreed that Jane Doe could babysit the children for that short amount of time and at approximately 6:30 p.m. Pam took Jane Doe and her sister over to Raquel's house located across the street at 1709 Pruett Street. Pam and Raquel then went to CG's to meet Trent.

Raquel and Trent stayed at CG's for a very short time and returned home at approximately 7:30 p.m. Pam, however, remained at the bar. When Raquel and Trent returned home, all of the children were watching a movie; when the movie ended at approximately 9:30 p.m., Raquel took Jane Doe and her Sister back to their trailer. When Jane Doe got back to the trailer, she attempted to call her mother at CG's to tell her

that she and her sister were home, but the telephone line at CG's was busy. Jane Doe then called the Peacock Bar to see if Pam was there; Troy, who was drinking at the Peacock Bar, answered the phone. Jane Doe asked Troy if Pam was there, and Troy stated that he thought that she was at CG's. Jane Doe said that she was trying to find Pam in order to tell her that she and her sister were home safely, and Troy said that he would go to CG's to deliver Jane Doe's message. Troy then went to CG's, but when he arrived, Pam was already talking to Jane Doe on the telephone. Jane Doe had already informed Pam that she and her sister were home safely.

Pam stated that after she finished talking to Jane Doe, she and Troy went to the Peacock Bar where they had a drink and played a game of pool. Pam stated that Troy was drunk but that he behaved like a gentleman and made no sexual advances toward her. Pam stated that the last time she saw Troy was sometime between 11:00 p.m. and midnight. Pam stated that at approximately midnight or 12:30 a.m. she received a call at the Peacock Bar from Jane Doe[2] who told Pam that some man was at the trailer looking for Pam and that the man had hurt her. Pam immediately left the bar and drove home, which was a short distance away, where she found Jane Doe covered in blood from the waist down.

Pam called 911, and police officer Michael Terry and the paramedics responded to the scene at approximately 1:15 a.m. Michael Skinner, an

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[2] The bartender on duty stated that the call actually came just before 1:00 a.m.

emergency medical technician, assessed Jane Doe's injuries, and Jane Doe told Skinner that she felt pain in her vaginal area. While the police and the paramedics were present, Pam stated that her ex-husband had done this because he had threatened to "f--- [Pam's] daughter in order to get back at [Pam]." Trial testimony indicated that the police attempted to locate Pam's ex-husband, but the results of their efforts were not admissible at trial because of the hearsay rules.[3]

Jane Doe was taken to the hospital where it was confirmed that she had been penetrated both vaginally and anally. Jane Doe had lost about fifteen percent of her blood and required a vaginal reconstruction. She also had bruises on her neck and had scratches on her face. A "sexual assault kit" was taken at the hospital, which included a vaginal smear (because sperm was present) and a blood sample. Debris was also collected from Jane Doe's teeth because she stated that she had bitten her assailant.

Jane Doe described to Connie Walker, a police officer specialized in questioning child victims, what had happened in the trailer. The interview took place in the early morning hours of January 29, 1994, shortly after the sexual assault had occurred, and a second interview took place on February 1, 1994. Jane Doe stated that she fell asleep with a night light on, but that the man who assaulted her must have turned it off because it was off when the man left. Jane Doe

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[3] The implication from the permitted testimony was that the police had determined that the ex-husband had a credible alibi and was not involved in the assault.

said that the man touched her "butt" and then put his "thingy" into her vagina. She also stated that the man placed his fingers into "the front and back" of her. Jane Doe described the assailant as follows: he did not wear a hat and had blonde or sandy-colored hair which was curly at the bottom and thinning on top; she thought he had a small moustache; he was wearing dark jeans, a black jacket with "a zipper for sure," a western type shirt, boots, and a watch which scraped her face. At the trial, Jane Doe had difficulty remembering the details of what had happened and stated that what she had told Walker at the interviews was probably correct.

When pressed by police to tell who the assailant reminded her of, Jane Doe stated "Troy," and when the police said, "Who?," Jane Doe said, "Trent. Yes, Trent." Jane Doe stated that Trent was Raquel's husband, Trent Brown. Jane Doe also stated that the assailant's hair looked like Troy's but then changed her mind and said that the hair looked like Trent's hair. Finally, Jane Doe stated that the assailant smelled like cologne but that it was an "awful smell," and that it was "gross smelling . . . [like] beer or puke or something." Jane Doe was shortly thereafter admitted to a hospital where she stayed for twelve days and was diagnosed with post-traumatic stress disorder.

By the late hours of January 28, 1994, Troy was very intoxicated. He testified that he had been drinking steadily at several different bars and had consumed ten shots of hard liquor, each followed by a beer chaser -- a total of twenty drinks. Testimony indicated that on the night in question, Troy was wearing dark jeans, a cowboy hat, a black satin jacket with a CG's logo on the back, and boots. Troy stated

that he did not wear a watch and therefore did not know what time he had left the Peacock Bar. The bartender on duty stated that Troy left the bar no later than 12:20 a.m. However, another bartender, whose shift had ended but who was still at the Peacock Bar, stated that she believed that she had seen Troy at the bar at approximately 1:30 a.m.

Troy stated that he had left the bar and walked to his trailer on 1717 Pruett Street, approximately ten trailers away from Jane Doe's. Troy stated that because he was so intoxicated, he vomited several times on his way home and some of the vomit got on his pants and shirt. He also stated that because he was going on a one week trip to Utah later in the day on January 29, 1994, he needed all of his clothes which, other than the ones he was wearing, were packed. He washed the pants and shirt he was wearing when he got home because he had vomited on them. Travis Brown, Troy's younger brother, testified that he was sleeping on the couch at Troy's trailer and woke up when Troy got home. Travis stated that he then looked at his digital clock, and it read 1:32 a.m. Travis stated that he saw no traces of blood anywhere in the house.

At 5:00 a.m. on January 29, 1994, Officer Terry went to Troy's home to question him about the sexual assault. Terry awoke and questioned Troy, who was wearing only boxer shorts. Officer Terry stated that he saw no blood on Troy. He also stated that he checked Troy's hands because Jane Doe had told him that she had bitten her assailant's hand, but he found no evidence of any bite marks. Terry also stated that he looked at Troy's boots and saw no blood. After Troy left to go to Utah, the police went back with a search warrant and took Troy's bedding. Troy called the

Carlin police to see if he was wanted for arrest, and he was told that he was not. While in Utah, Troy went to a nurse to get a full body examination because Jane Doe had stated that she had bitten and scratched her assailant, and Troy wanted a record of his condition.

Dave Prescott, another of Troy's friends living in Troy's trailer, testified that he had asked Troy on January 29, 1994, whether Troy was involved with the crime and that Troy had answered that he wished that he could remember what had happened. Troy testified that he had told Prescott that he wished that he could remember what time he got home.

Because rumors persisted about Troy's involvement in Jane Doe's assault, Troy voluntarily went in for questioning at the Carlin Police Department on February 3, 1994. Troy gave the police the black satin coat and black cowboy hat that he was wearing on the night of the crime. Troy repeatedly denied involvement in the crime, even though the interrogating officers implied that they had found Troy's fingerprints in Jane Doe's bedroom. In actuality, Troy's fingerprints were not found anywhere in Jane Doe's trailer, and the one fingerprint that was located on the night light in Jane Doe's room did not match Troy's.

While in a foster home several days after the assault, Jane Doe saw a television report of Troy's arrest and stated that she knew that the man on television was her assailant. Walker and police officer Roy Ladd went to the foster home; Jane Doe told Walker that the man on television had attacked her and had also sent her flowers. However, the card attached to the flowers was signed by Trent and Raquel, not Troy. Additionally, Ladd showed Jane Doe

a photo lineup which included Troy's picture and several other people Jane Doe did not know; Jane Doe was unable to identify her assailant from the pictures Ladd showed her.

At trial, the defense called Madonna and Jay Doke as witnesses. They testified that at 1:05 a.m. on January 29, 1994, they were picking up their children from the babysitter's house on Pruett street near Jane Doe's trailer. Madonna stated that as they neared the babysitter's house, she saw a man wearing a black cowboy hat, a black satin jacket, and dark jeans staggering down the middle of the road. She also stated that the man's jacket had a fluorescent green emblem on the back that looked like a skull or bandit. Jay testified that the man wore the same clothes that Madonna had described and also stated that the emblem on the back of the man's jacket was bright green. Testimony indicated that Troy's CG's jacket had an orange and yellow emblem on the back.

Troy voluntarily surrendered to the police and was arrested on or about February 7, 1994. On February 28, 1994, Troy stipulated to his commitment to the Lakes Crossing facility for a psychiatric evaluation. After approximately two months, Troy was found competent to stand trial and was returned for trial. Bail had not been set prior to Troy being sent to Lakes Crossing, and after he returned from Lakes Crossing, bail was set at $ 200,000. Troy's bail was later reduced to $ 100,000. Troy was charged with one count of sexual assault on a child under the age of fourteen resulting in substantial bodily harm by placing his penis into Jane Doe's vagina (Count I), one count of sexual assault on a child under the age of fourteen by placing his penis into Jane Doe's rectum (Count II),

one count of attempted murder for trying to strangle or choke Jane Doe (Count III), and one count of abuse or neglect of a child less than eighteen years old resulting in substantial bodily harm by forcibly penetrating Jane Doe's vagina and/or rectum (Count IV). Troy's trial commenced on September 27, 1994.

Marie Fassett, a criminalist in the Washoe County Sheriff's Office, examined evidence collected by the police for the presence of bodily fluids, including blood and semen, and stated that she found semen on Jane Doe's underwear and in the contents of the sexual assault kit. She also examined Troy's boots and found no blood on the boots. However, Fassett stated that she did not examine pubic hairs found in a fleece jacket recovered from Jane Doe's room because her laboratory conducted hair exams only if there was an absence of biological evidence, which she said was not the situation in this case. She also stated that she did not examine Troy's bedding for the presence of hair, fiber, or bodily fluids because she was informed that Troy never went to bed the night of the assault; however, Terry stated that Troy was still in bed when he woke Troy at 5:00 a.m. on January 29, 1994. Fassett stated that she did not examine the bedding and other evidence because the DNA evidence against Troy was overwhelming.

At trial, Renee Romero testified that she had conducted a DNA test on stains found on Jane Doe's underwear. Romero explained in detail what DNA is and how it is tested. Romero testified that the DNA sample tested from Jane Doe's underwear matched Troy's and that only 1 in 3,000,000 people had the same DNA code as the one tested. Troy's counsel cross-examined Romero regarding how she conducted the

tests, the amount of DNA required to run the tests, and the databases against which the DNA tests were compared to determine the statistical probability that others would have the same DNA code. However, Troy's counsel did not call his own expert DNA witness even though the court provided funds for such a witness.

At the conclusion of trial, Troy was found guilty of Counts I, II, and IV and was acquitted of Count III, the attempted murder charge. The jury sentenced Troy to life in prison with the possibility of parole (after serving ten years) for Count I. The district judge imposed sentences for Counts II and IV.[4]

At the sentencing hearing, the district judge stated that he was going to make a record of the events so that everyone would know exactly what transpired during the proceeding. While making the record, the district judge specifically stated that he was going to consider Troy's psychiatric reports from Lakes Crossing. The district judge stated that he was reviewing the reports because Troy and his family felt

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[4] In 1994, NRS 200.366(3) stated:

> The trier of fact in a trial for sexual assault shall determine whether substantial bodily harm has been inflicted on the victim in connection with or as part of the sexual assault, and if so, the sentence to be imposed upon the perpetrator.

Because the jury determined that Brown was guilty of Count I--sexual abuse resulting in substantial bodily harm--it was authorized to impose a sentence for that count. However, the district judge retained the authority to sentence Brown for Counts II and IV.

that Troy was wrongfully convicted and that they were the victims in the case. The district judge then mentioned certain portions of the report which highlighted the dysfunctionality of Troy and his family.

Before sentencing Troy on Counts II and IV, the district judge informed Troy that it was going to make a "big difference" in the length of the sentence whether Troy was finally going to admit his guilt or if he was going to maintain his innocence. Furthermore, the district judge considered additional DNA testing performed after Troy was found guilty; apparently, Troy's family was not convinced of Troy's guilt and had more DNA tests performed with the district judge's permission. The results of the second DNA test showed that the semen taken from Jane Doe's vaginal swab matched Troy's and that only 1 in 10,000 people had similar DNA. The district judge stated that the additional results confirmed what he already knew from the trial--that Troy was guilty. After Troy again maintained his innocence, the district judge sentenced Troy to the maximum penalty, which has life in prison with the possibility of parole after ten years for Count II and twenty years in prison for Count IV. All of Troy's sentences were imposed consecutively.

Troy now appeals his conviction and sentence.

DISCUSSION

The district court's denial of Troy's bail did not warrant reversal of the convictions.

Troy was held without bail from February 7, 1994, until May 2, 1994, because the justice of the peace,

following the district attorney's recommendation, refused to set bail. The State has acknowledged that the justice of the peace erred by not setting bail immediately.

In State v. Teeter, 65 Nev. 584, 200 P.2d 657 (1948), this court addressed the issue of erroneously holding a defendant without bail. In Teeter, the defendant was held without bail for the entire proceedings, and this court concluded that the denial of bail substantially affected the validity of the judgment because:

> 1. It operated to curtail and restrict, as counsel for defendant has urged, the opportunity of defendant to prepare properly for trial.
>
> 2. A defendant, if he appears for trial as a prisoner in the custody of officers, is in a less favorable position than a defendant on bail. He is not only handicapped by embarrassment and humiliation, but there is some probability, at least, that that sort of appearance may make an unfavorable impression upon the jurors, to which risk one clearly entitled to bail, as was defendant here, should not be required to be subjected, until his guilt has been proved.
>
> 3. There is also the probability that denial of bail, published in the newspapers as was done in the instant case, may make upon the public mind generally an impression that the state's case against defendant is strong, or bail would have been allowed--that is, that the proof must be evident and the presumption great of his guilt--and that such impression may infiltrate into the mental consciousness of jurors.

Id. at 609, 200 P.2d at 670.

Applying the Teeter factors, we conclude that Troy's being held without bail did not substantially affect the judgment such that reversal of the convictions is warranted. First, from February 28 to May 2, which comprised most of the time that Troy was held without bail, Troy was confined to Lakes Crossing for a psychiatric evaluation. Therefore, if bail had been granted, Troy still would have had to stay in Lakes Crossing; Troy even admits that during his time at Lakes Crossing he was not prejudiced by his lack of bail setting. Furthermore, Troy did not allege any substantial interference with the preparation of his defense while he was being held without bail, other than the fact that his attorney did not engage in trial preparation during Troy's stay at Lakes Crossing. However, this lack of preparation cannot be attributed to Troy's being held without bail. Second, Troy was granted bail before the trial began and therefore did not appear before the jury while in custody. Finally, Troy presented no evidence that his being held without bail was published in the media such that it may have infiltrated into the consciousness of the jurors.

Therefore, we conclude that the district judge's denial of bail did not substantially affect the judgment such that reversal of the convictions is warranted.

The district court did not err in admitting DNA evidence.

Troy argues that the district judge erred in not conducting a pretrial hearing to determine whether the DNA results were trustworthy and reliable. However, Troy made no objection to either the lack of

a pretrial evidentiary hearing or to qualifying Romero as an expert witness on DNA evidence. Failure to object in the district court precludes consideration of the issues on appeal; however, this court may address plain error sua sponte. Sterling v. State, 108 Nev. 391, 394, 834 P.2d 400, 402 (1992). Because we conclude that the failure to conduct an evidentiary hearing was not plain error, we will not consider this issue.

Sufficient evidence existed to convict Troy.

The standard of review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt. Kazalyn v. State, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992). We conclude that a jury, acting reasonably, could have been convinced of Troy's guilt beyond a reasonable doubt.

Testimony indicated that Troy left the bar around 12:15 a.m., that Troy lived relatively close to the bar, and that Troy lived very close to Jane Doe. Troy had enough time to get from the bar to Jane Doe's house and to assault Jane Doe before she made the telephone call to her mother at approximately 1:00 a.m. While Jane Doe could not identify her assailant, her description of his clothing was similar to what Troy was wearing; she also said that her assailant smelled like beer or vomit and testimony indicated that Troy had been drinking beer and had vomited several times that night. Furthermore, testimony indicated that Troy got home at approximately 1:30 a.m., which gave him enough time to assault Jane Doe. Additionally, the Dokes testified that they saw someone resembling Troy in a black jacket and black hat stumbling in the

road near Jane Doe's house at 1:05 a.m. Troy also washed his pants and shirt when he got home, arguably to remove the blood evidence from his clothes. Finally, the DNA evidence indicated that semen collected from Jane Doe's underwear matched Troy's and that only 1 in 3,000,000 other people had matching DNA (the second DNA test indicated that 1 in 10,000 people had matching DNA).

The district court erred in separately sentencing Troy for sexual assault of a child and child abuse by sexual abuse because such sentences violate the constitution's double jeopardy clause

Troy was convicted of Counts I and II, which were for sexual assault on a child under fourteen years of age, pursuant to NRS 200.366. According to NRS 200.366, sexual assault on a child under fourteen years of age is defined as follows:

> A person who subjects another person [under the age of fourteen] to sexual penetration . . . against the victim's will or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his conduct, is guilty of sexual assault.

NRS 200.366(1). Separate penalty enhancements exist dependent upon whether the sexual assault causes substantial bodily harm or not. NRS 200.366(2)(a) and (b).

Child abuse is defined as follows in NRS 200.508:

> 1. A person who:

> (a) Willfully causes a child who is less than 18 years of age to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect . . . is guilty of a gross misdemeanor unless a more severe penalty is prescribed by law for an act or omission which brings about the abuse, neglect or danger.
>
> . . . .
>
> 3. As used in this section:
> (a) "Abuse or neglect" means physical or mental injury of a non-accidental nature, sexual abuse, sexual exploitation . . . .

NRS 432B.100 states that "sexual abuse" includes acts upon a child constituting:

> 1. Incest under NRS 201.180;
> 2. Lewdness with a child under NRS 201.230;
> 3. Annoyance or molestation of a child under NRS 207.260;
> 4. Sado-masochistic abuse under NRS 201.262;
> 5. Sexual assault under NRS 200.366;
> 6. Statutory sexual seduction under NRS 200.368; and
> 7. Open or gross lewdness under NRS 201.210.

(Emphasis added.)

The prosecution's charging document claimed that Troy had committed child abuse in that he had caused Jane Doe to suffer mental and physical pain by virtue of his sexual abuse, to wit: he forcibly penetrated Jane Doe's vagina and/or anus. Therefore, the prosecution actually charged Troy with child abuse pursuant to

NRS 200.508 by virtue of his sexual assault as defined by NRS 200.366. Given the definition of "sexual abuse" in NRS 432B.100, this is the only reasonable interpretation of what the prosecutor claimed constituted the "sexual abuse."

To determine whether Troy's convictions for sexual assault and child abuse by sexual abuse/sexual assault are barred by the double jeopardy provisions of the state and federal constitutions, this court must apply the test from Blockburger v. United States, 284 U.S. 299, 304 (1932), which states: "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."[5]

Applying the Blockburger test, we conclude that Troy's conviction for both sexual assault and child abuse by sexual abuse/sexual assault was improper. As charged in this case, child abuse by sexual abuse requires a sexual assault pursuant to NRS 200.366, plus resultant physical pain or mental suffering; sexual assault requires only those elements present in NRS 200.366. Therefore, a conviction for sexual assault does not require proof of a fact other than or

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[5] We have earlier stated that we must also consider the statute's legislative history to see if the legislature intended for the defendant to receive separate sentences for the same conduct. Talancon v. State, 102 Nev. 294, 298-99, 721 P.2d 764, 767 (1986) (citing Missouri v. Hunter, 459 U.S. 359 (1983)). The legislative history of the statutes at issue gives no indication of whether the legislature authorized separate sentences for sexual assault and child abuse by sexual abuse arising from the same conduct.

additional to any facts necessary to prove child abuse by sexual abuse/sexual assault. In every case such as this one, the child abuse by sexual abuse/sexual assault cannot occur without the sexual assault, and therefore, the sexual assault becomes an element of child abuse by sexual assault. Given this analysis, Blockburger mandates that Troy cannot be convicted of both child abuse by sexual abuse/sexual assault and sexual assault. See also Meador v. State, 101 Nev. 765, 771, 711 P.2d 852, 856 (1985) (applying Blockburger and concluding that double jeopardy barred appellant's convictions for both lewd acts with a child and sexual assault because proof of a lewd act did not require proof of a fact distinct from the elements of sexual assault since a lewd act necessarily occurred during the sexual assault).

Double jeopardy bars one of the convictions, and we therefore vacate the conviction for child abuse and maintain the convictions for sexual assault. The underlying crime at issue was the sexual assault, and while the child abuse count required proof of an extra element, i.e., that the sexual assault caused physical pain and mental suffering, the extra element did not transform the child abuse charge into the greater crime at issue.

The district court abused its discretion in sentencing appellant.

We conclude that the district court abused its discretion in sentencing Troy by (1) using the Lakes Crossing psychological reports as a basis for the sentence and (2) imposing a harsher sentence because Troy maintained his innocence and refused to admit his guilt. However, we conclude that the district court

did not abuse its discretion in referring to the post-guilt-phase DNA testing and results.

"A sentencing judge is allowed wide discretion in imposing a sentence; absent an abuse of discretion, the district court's determination will not be disturbed on appeal." Randell v. State, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993). "[I]f the judge relies upon prejudicial matters, such reliance constitutes an abuse of discretion that necessitates a resentencing hearing before a different judge." Castillo v. State, 110 Nev. 535, 545, 874 P.2d 1252, 1259 (1994).

The district court's consideration of the Lakes Crossing psychological report was an abuse of discretion.

On February 28, 1994, Troy stipulated to his commitment to Lakes Crossing for psychological evaluation. The court ordered Troy committed to Lakes Crossing to determine whether he was competent to stand trial, was of sufficient mentality to be able to aid and assist in his defense, and was legally sane at the time of the alleged crime.

At the sentencing hearing, the district judge reviewed Troy's psychological reports generated at Lakes Crossing and stated that he was going to consider those reports during sentencing. Based on the Lakes Crossing psychological reports, the district judge stated the following: he believed that Troy was a victim, not because he was falsely accused, but because his parents subjected him to abuse and neglect all of his life; Troy had been convicted of driving under the influence of alcohol two times, and Troy believed the sheriff was trying to pick on him and make an example out of him; Troy was taken for psychological

evaluations years earlier because his parents were concerned about his violent behavior when he was intoxicated; according to the psychological test administered at Lakes Crossing, Troy was defensive and unwilling to acknowledge psychological problems, was "immature, egocentric, moody, and insecure," had a "poor self-concept" and a "lack of self-confidence," and was likely to act out sexually; Troy grew up in a dysfunctional family in which "alcoholism, domestic violence, and child abuse were present."

We conclude that the district court's consideration of the Lakes Crossing psychological reports was an abuse of discretion. In Estelle v. Smith, 451 U.S. 454 (1981), the United States Supreme Court concluded that the testimony of a psychiatrist who evaluated a criminal defendant for purposes of competency was improperly used during the penalty phase of a trial. During the penalty phase, the psychiatrist testified regarding information he learned through the psychological examination, stating among other things that the defendant was a sociopath whose condition would only get worse, that the defendant would continue his behavior, and that the defendant had no regard for other human beings' lives. Id. at 459.

The jury imposed the death penalty, but the United States Supreme Court reversed the Sentence on the grounds that the defendant was entitled to the protection of the Fifth Amendment at the court ordered psychiatric interview and was not apprised of his right to remain silent. Id. at 462. This protection existed even though the psychiatrist's testimony was used only for purposes of punishment and not guilt, because

> [a]ny effort by the State to compel respondent to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment. Yet the State's attempt to establish respondent's future dangerousness by relying on the unwarned statements he made to [the psychiatrist] similarly infringes Fifth Amendment values.

Id. at 463 (footnote omitted).

Nevada cases have utilized a similar analysis. In Esquivel v. State, 96 Nev. 777, 617 P.2d 587 (1980), this court stated that it was improper for the prosecution to impeach a defendant with statements the defendant made during a court ordered mental examination. Id. at 778, 617 P.2d at 587. A defendant should feel free in a clinical climate to discuss all relevant facts without fear that those statements may be used against him later; "[f]air play dictates nothing less." Id.

In McKenna v. State, 98 Nev. 38, 639 P.2d 557 (1982), this court reversed McKenna's sentence when the prosecutor presented substantive evidence from a psychiatrist who testified that McKenna had admitted during a court ordered psychological examination that he had murdered the victim. This court, citing Esquivel, reversed the conviction, stating that it was unfair for the State to appoint a psychiatrist to examine an accused and then employ the confidential contents of that psychiatric interview to obtain a conviction. Id. at 39, 639 P.2d at 558; see also Winiarz v. State, 104 Nev. 43, 752 P.2d 761 (1988).

Even though these Nevada cases only address the use of a court ordered psychiatrist's testimony in the guilt phase, the United States Supreme Court has stated that it could "discern no basis to distinguish between the guilt and penalty phases of . . . trial so far as the protection of the Fifth Amendment privilege is concerned" and that it is improper to use such psychiatric testimony at either the guilt phase or the penalty phase. Estelle, 451 U.S. at 462-63. We realize that Estelle, Esquivel, and McKenna all concerned the use of the psychological reports in the penalty phase of a first degree murder case and that the instant case concerns the use of such reports [unreadable] sentencing hearing of a non-first-degree-murder case; however the rationale from those cases applies here. See Pens v. Bail 902 F.2d 1464, 1466 (9th Cir. 1990) (in a rape case, unwarned statements given in a psychiatric evaluation about other offenses could not be used to enhance a sentence); State v. Valera, 848 P.2d 376, 382 (Hawaii 1993) ("the use at sentencing of statements previously obtained in violation of a defendant's privilege against self-incrimination violates that defendant's privilege against self-incrimination"). Pursuant to this case law, we conclude that the district judge abused his discretion and that Troy is entitled to a new sentencing hearing. The district judge ordered the psychological examination of Troy and then relied on the conclusions of that exam, including his unwarned statements to the psychiatrist, to determine that Troy was likely to act out sexually and that he was not falsely convicted. Such consideration of the reports violates the "fair play" rules set forth in Esquivel and McKenna and the Fifth Amendment concerns set forth in Estelle, and constitutes reversible error.

The district court's imposition of a harsher sentence because Troy maintained his innocence and refused to admit his guilt was an abuse of discretion.

During the sentencing hearing, the district judge informed Troy that he was convinced of his guilt and that he believed that Troy's continual declaration of innocence merely enabled Troy to face his parents. The district judge stated that he could show Troy no mercy if Troy continued to profess his innocence and also implied that he was going to give Troy consecutive sentences if Troy did not state that he was guilty and explain his involvement in the events on January 29, 1994. The district judge stated that he was going to take a thirty minute recess so that Troy's counsel could "explain [to Troy] the significance" of what the district judge was trying to convey, and concluded by stating:

> If you are going to continue this status as a victim, if you are not man enough now, and this is not just going to hurt you, it's going to hurt the lives of your brothers, your two brothers' families, your other siblings, and your parents, particularly your mother, who I think has been a victim of a lot of things, like you have, too. . . .
>
> I'm offering you the opportunity to be a man, and to explain exactly what happened that night, and to get it off your shoulders morally, spiritually, and every other way, and to take the burden off your parents' shoulders. I will show you pity if you do that. But if you're going to be-- if you show no remorse, if you are unable to be reformed because of your attitude, then I cannot show you any pity.

The court then took a thirty minute recess. When the court reconvened, the district judge asked Troy if he was guilty of the crime, and Troy stated, "No sir, I'm not." After hearing testimony from Troy's mother, the district judge asked Troy if he had anything to say to the court, and Troy responded:

> Just that I know that I'm not guilty. I know there was evidence presented that -- that convinced 12 honest people of this community that I was, and all I'd like to say is I -- I'm not guilty.

The district judge then sentenced Troy to the maximum penalty on Counts II and IV and ordered those sentences to run consecutively.

In Bushnell v. State, 97 Nev. 591, 637 P.2d 529 (1981), the district judge based his sentence on the fact that the appellant maintained his innocence. In overturning appellant's sentence, this court stated:

> [Appellant] had not waived his right to remain silent. A defendant retains his Fifth Amendment rights after a jury verdict because the appellate process is still open to him. Imposition of a harsher sentence based upon the defendant's exercise of his constitutional rights is an abuse of discretion and the sentence cannot stand.

Id. at 593, 637 P.2d at 531 (citations omitted); see also Thomas v. State, 99 Nev. 757, 758, 670 P.2d 111, 112 (1983) (citing Bushnell and concluding that in relying on the fact that the appellant had refused to admit his

guilt, the district court abused its discretion in determining a sentence).

The Fifth Amendment states that no person "shall be compelled in any criminal case to be a witness against himself." The district court violated Troy's Fifth Amendment rights by considering his "lack of remorse" when he still had a constitutional right to maintain his innocence and by threatening to impose a harsher sentence if Troy refused to admit his guilt. Troy was unable to express remorse sufficient to satisfy the judge without foregoing his right to not incriminate himself, and the fact that he took the stand at trial does not change this analysis because Troy maintained his innocence. As such, requiring Troy to either express remorse or receive a harsher sentence violated Troy's Fifth Amendment rights and constituted an abuse of discretion. See Bushnell, 97 Nev. at 593, 637 P.2d at 531 (stating that "[i]mposition of a harsher sentence based on the defendant's exercise of his constitutional rights is an abuse of discretion").

Therefore, we conclude that the district judge abused his discretion in relying on the fact that Troy refused to admit his guilt when it imposed Troy's sentence, and that Troy should receive a new sentencing hearing.

The district court's reference to the post-trial DNA testing was not an abuse of discretion.

After the trial but before the sentencing hearing, defense counsel approached the court with a request to allow additional independent DNA testing to give Troy's parents peace of mind about the results of the

trial. After discussing the matter with the prosecution and the defense, the district judge appropriated funds for the additional testing. The additional DNA test confirmed that the fluids taken from Jane Doe's underwear matched Troy's DNA and further showed that only 1 in 10,000 people had DNA matching that present in the tested fluids (the DNA test at trial indicated that only 1 in 3,000,000 people had matching DNA). The district judge stated that the result of this additional test was "simply just further proof of what we already knew from the first DNA testing, that this vicious crime was committed by Troy Don Brown."

In Goodson v. State, 98 Nev. 493, 495-96, 654 P.2d 1006, 1007 (1982), this court stated that "an abuse of discretion will be found when the defendant's sentence is prejudiced from consideration of information or accusations founded on impalpable or highly suspect evidence." We conclude that the district court did not abuse its discretion in considering the additional DNA tests. Troy's counsel requested the DNA tests and even picked the laboratory which performed the test. Troy now contends that the tests were considered without any evidentiary scrutiny, laying of foundation, or establishment of methods of reliability. However, Troy placed the evidence before the court, had an opportunity to make all of the above-mentioned arguments, and failed to do so. Furthermore, it does not appear that the district judge gave much weight to the test results because he stated that the results only confirmed what he already knew, i.e., that Troy was guilty. Based on these reasons, we conclude that it was not an abuse of discretion for the district judge to consider the additional DNA test results at the sentencing hearing.

CONCLUSION

The district court's failure to set bail immediately was not so prejudicial to Troy that it constituted reversible error. Furthermore, the DNA evidence was properly admitted at trial, and sufficient evidence existed to convict Troy. However, the double jeopardy clause precluded Troy from being convicted of both sexual assault and child abuse by sexual abuse/sexual assault, and Troy's conviction for child abuse must be vacated. Finally, we conclude that the district judge abused his discretion during the sentencing phase of the trial and the case must be remanded to the district court for a new sentencing hearing on the remaining sexual assault conviction (Count II).[6]

/s/_____, C.J.
Shearing

/s/_____, J.
Springer

/s/_____, J.
Rose

/s/_____, J.
Young

ATTEST: A FULL, TRUE AND
CORRECT COPY.

CLERK OF THE SUPREME COURT

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[6] The Honorable A. William Maupin, Justice, did not participate in the decision of this appeal.

By /s/ _____
Deputy Clerk

EXHIBIT 2

IN THE SUPREME COURT OF
THE STATE OF NEVADA

No. 32025

[Filed September 8, 2000]

TROY DON BROWN,	)
	)
Appellant,	)
	)
vs.	)
	)
THE STATE OF NEVADA,	)
	)
Respondent.	)
	)
TROY DON BROWN,	)
	)
Appellant,	)
	)
vs.	)
	)
THE STATE OF NEVADA,	)
	)
Respondent.	)
	)

ORDER DISMISSING APPEAL

This is an appeal from an amended judgment of conviction entered after resentencing and from a denial of a motion for a new trial. Appellant was

convicted of sexual assault and sentenced to life with the possibility of parole.

Citing Buschauer v. State, 106 Nev. 890, 804 P.2d 1046 (1990), appellant contends that the district court erred in allowing the victim's mother to give victim impact testimony at the sentencing hearing without appellant having first received notice of the contents of the mother's statement and without receiving the victim's medical records from her psychological treatment. Unlike Buschauer, the witness here did not testify regarding prior bad acts of appellant. Rather, the witness's testimony at the sentencing hearing was limited to the parameters listed in Buschauer wherein neither notice nor cross-examination was required. Moreover, no medical records were used during the impact statement and appellant was allowed to cross-examine the witness. Accordingly, we conclude that the district court did not abuse its discretion in allowing the witness to testify. See Sherman v. State, 114 Nev. 998, 1012, 965 P.2d 903, 913 (1998) (stating that "[t]he trial court's determination regarding the admissibility of evidence during a sentencing hearing will not be disturbed on appeal absent an abuse of discretion"); Wesley v. State, 112 Nev. 503, 519, 916 P.2d 793, 804 (1996).

Appellant next contends that the district court erred in denying his request to appoint an expert to examine the victim's psychological records and testify at sentencing whether the sexual assault or her allegedly dysfunctional family life caused her mental problems. We have held that a defendant should be provided with the assistance of a defense psychologist or psychiatrist to examine a child victim and testify at the trial when the State is provided with such

assistance. Marvelle v. State, 114 Nev. 921, 966 P.2d 151 (1998); see Lickey v. State, 108 Nev. 191, 827 P.2d 824 (1992). Because the State did not have the assistance of a mental health expert at sentencing, we conclude that the district court did not err in denying appellant's request for an expert at sentencing.

Appellant also argues that he should have been notified that there would be an impact statement, who would make it, and what its contents would be pursuant to NRS 176.015 (4). Because the statute requires only that the State give notice to the victim, not to the defendant, appellant's argument lacks merit.

Finally, appellant contends that Judge Memeo should have recused himself from resentencing appellant because there was a question of the judge's impartiality due to the fact that he had held the position of Elko County Chief Civil Deputy District Attorney for a period of ten years immediately prior to becoming a judge. "A judge's decision not to recuse himself voluntarily is given 'substantial weight' and will be affirmed absent an abuse of discretion. The burden is on the party asserting the challenge to establish sufficient facts warranting disqualification." Kirksey v. State, 112 Nev. 980, 1006, 923 P.2d 1102, 1118 (1996) (citation omitted).

At issue in this case is whether a reasonable person, knowing all the facts, would have reasonable doubts regarding Judge Memeo's impartiality. See Matter of Varain, 114 Nev. 1271, 1278, 969 P.2d 305, 310 (1998) (citation omitted). While supervising the civil division of the district attorney's office, Judge Memeo had no knowledge of, or involvement in,

appellant's criminal case. Nor did Judge Memeo have any involvement in the victim's child protection case. That case was handled, as were all child protection cases at the time, separately from the civil division by a deputy district attorney who was supervised directly by the district attorney. We conclude that, based on these facts, a reasonable person would not have reasonable doubts regarding Judge Memeo's impartiality. Accordingly, by reason of the foregoing, we

ORDER this appeal dismissed.

/s/_____, J.
Young

/s/_____, J.
Agosti

/s/_____, J.
Leavitt

cc: Hon. J. Michael Memeo, District Judge
Attorney General
Elko County District Attorney
Donald York Evans
Elko County Clerk

DAVID M. SCHIECK, ESQ.
NEVADA BAR NO. 0824
302 EAST CARSON AVE., STE. 600
LAS VEGAS NV 89101
702-382-1844
ATTORNEY FOR BROWN

IN THE FOURTH JUDICIAL DISTRICT COURT OF NEVADA IN AND FOR ELKO COUNTY

CASE NO. 5833
DEPARTMENT NO. I

[Filed August 30, 2001]

TROY DON BROWN,	)
	)
Petitioner,	)
	)
vs.	)
	)
WARDEN OF LOVELOCK CORRECTIONAL CENTER, and THE STATE OF NEVADA,	)
	)
Respondent.	)

POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

DATE: _____
TIME: _____

COMES NOW, Petitioner, TROY DON BROWN, by and through his attorney DAVID M. SCHIECK, ESQ., and for his Supplemental Points and Authorities in support of Petition for Writ of Habeas Corpus (Post Conviction) states as follows:

STATEMENT OF THE CASE

Petitioner Troy Don Brown (hereinafter referred to as BROWN) was charged and convicted of Sexual Assault of a Child Under Age 14 with substantial bodily harm (vaginal penetration), Sexual Assault of a Child Under Age 14 with substantial bodily harm (anal penetration) and Child Abuse by Sexual Assault causing substantial bodily harm. He was acquitted of the additional charge of attempted murder. The trial was held from September 26, 1994 through September 30, 1994. The jury sentenced BROWN to Life with the Possibility of Parole and at formally sentencing on June 23, 1995 the Court imposed a consecutive life sentence with the possibility of parole and a consecutive twenty year term. The Judgment of Conviction was entered on June 28, 1995.

On direct appeal the Nevada Supreme Court affirmed the sexual assault convictions, vacated the child abuse by sexual assault conviction, and remanded the case for resentencing on the remaining sexual assault conviction. Brown v. State, 113 Nev. 275, 934 P.2d 235 (1997). The Court's opinion was issued on February 26, 1997. The resentencing occurred on March 13, 1998 and BROWN was once again sentenced to a consecutive life sentence with the possibility of parole. An Amended Judgement of Conviction was entered on March 18, 1998.

BROWN filed a direct appeal from the Amended Judgment of Conviction. An Order Dismissing Appeal was issued by the Nevada Supreme Court on September 8, 2000.

STATEMENT OF FACTS

For purposes of these Supplemental Points and Authorities, BROWN includes a summary of the testimony presented at trial. In must, however, be remembered, as set forth in detail below, that BROWN asserts that virtually no investigation was done by defense counsel prior to trial and only minimal preparation. Therefore the testimony presented was virtually unopposed at trial and does not accurately portray the facts of the case. (See e.g. Buffalo v. State, 111 Nev. 1145, 901 P.2d 647 (1995) wherein the Court found that the overwhelming evidence that appeared after trial was entirely different from the evidence that came to light after post-conviction pleadings).

Shortly after midnight on Saturday, January 29, 1994 9-year-old Megan Allred was sexually assaulted in the bedroom of her trailer at 1639 Puett Street in Carlin, Nevada. She and her 4-year-old sister, Dallas, were home alone while her mother, Pam Henle, was out drinking at a nearby bar. Her step-father, Wayne Henle was allegedly at work. According to Megan, a blond man with curly hair, who smelled of cologne, entered her bedroom, and sexually assaulted her, both vaginally and anally. The man had put a sock around her neck and choked her and she played dead and the man left. Her lighted make-up mirror that she used as a night light had been turned of and turned away. The police recovered one fingerprint from the mirror which

did not belong to BROWN and that was never identified.

Megan checked on her sister who had slept through the incident on the top bunk and felt like she had to go to the bathroom. When she discovered that she was bleeding profusely she called her mother and the bar between 12:30 and 1:00. When Pam arrived home she called 9-1-1 and the police and ambulance arrived at 1:18 AM.

Megan could not identify her attacker, but described him as wearing a black coat with a zipper which had scratched her. The man was also wearing a watch which had scratched her face. He was not wearing a hat and had very little hair on top of his head. When pressed by the police to tell who the man reminded her of, she said "Troy" and then stated, "Trent, yes Trent". Trent was the brother of Troy and both Trent and Troy were friends of the Henle's and had been to the trailer to visit the Henle's. Megan recalled that she had bit her assailant on the hand.

Examination at the hospital confirmed anal and vaginal penetration and extensive blood loss. Megan required vaginal reconstruction, and had bruises on her neck, consistent with choking, and a scratched face. A sexual assault kit was collected at the hospital, and included a vaginal smear, blood sample and teeth scrapings. All physical evidence was taken by the Carlin police department and later taken to the Washoe County Crime lab.

By the late hours of January 28, 1994 22 year-old Troy BROWN was highly intoxicated. He had been power drinking kamikazes with beer chasers for

several hours at two local bars, the Peacock and CeeGee's. BROWN did not own a watch and was not sure exactly what time he left the bars to go home. One bartender at trial thought it was 12:20 or so, and another testified that it was closer to 1:30. BROWN was wearing dark jeans and a black satin coat with no zipper. He had sandy brown hair and wore a black cowboy hat with a silver rim. When BROWN walked home he vomited along the way, and had vomited earlier in the evening at one of the bars.

According to roommate and younger brother, Travis Brown, BROWN arrived home at 1:32 AM based on digital clock in their trailer. The police later determined that the clock was 6 minutes fast. BROWN put his pants and shirt into the washer to get rid of the vomit and went to bed. Travis saw no blood on his brother anywhere.

At 5:00 AM on the morning of the assault, Carlin Police Officer Michael Terry went to BROWN'S trailer at 1717 Puett St and awakened BROWN who was sleeping in only his underwear. No blood was seen and there were no bites on BROWN'S hands. Later that day the police executed a search warrant and took the bedding from BROWN'S bed.

BROWN went to Utah on a pre-planned trip and when the Carlin police went to Utah he voluntarily gave them a statement. He gave them his black coat, pants, and cowboy hat. He consistently denied any involvement, telling the police he had been in two bars in Carlin that night with Pam and others. He had answered the phone at the Peacock bar when Megan called to let her know at about 10:00 or 10:30 PM that she and her sister were at home, having completed

babysitting for Trent and Raquel Brown. Megan and Dallas had been at Trent's trailer at 1709 Puette Drive babysitting for their 2 younger children, while Trent and Raquel were out drinking with Pam. Raquel had taken the girls home after she and Trent went home while Pam stayed and drank.

While in Utah, BROWN saw a doctor who confirmed that there were no bite marks or scratches on BROWN. When he learned there was a warrant he returned to Nevada and surrendered himself.

During the interview of BROWN the police lied to him and told him that they found his fingerprints in Megan's bedroom and that someone in a passing car could identify him. BROWN continued to deny his involvement. When an arrest warrant was issued BROWN surrendered and blood was drawn for the purpose of performing DNA tests.

While in a foster home in the days after the assault, Megan saw a TV report of BROWN'S arrest and stated that she knew it was him because he had sent her flowers. When showed (a photo lineup containing BROWN'S photograph she identified him as someone she knew but not as being her assailant. At trial Megan did not identify BROWN as her assailant. The card and flowers had been sent by Trent and Raquel Brown because they thought it would make Megan feel better.

At BROWN'S preliminary hearing on July 6, 1994 Renee Romero of the Washoe County Crime Lab testified that there was not enough stain in Megan's panties to do an RFLP-type DNA test. The PCR test she had done in February, 1994 gave a frequency of 1

in 22 likelihood that the semen found compared with BROWN'S. When BROWN went to trial in September, 1994 Romero testified that she went back and on August 8, 1994 found additional vagina stain evidence in the panties and performed the RFLP DNA test. She said the statistical probabilities indicated 1 in 3 million frequency for the population.

The bedding seized from BROWN'S residence was never examined or tested in the crime lab because serologist Marie Fassett was told by police that the suspect never went back to is bed. Although a police officer and ambulance driver Marylou Tognarelli testified at trial that she observed the collection of the teeth scrapings from Megan, the sample was never located or tested by the lab.

Jay and Leah Dokes were picking up their kids from the babysitter at 1:05 AM on Puett Street and observed a man in the street wearing a black jacket with a bright green emblem on the back. BROWN'S black jacket had no such emblem. Travis testified that BROWN'S jacket had orange and yellow on the back and no zipper. Pam Henle had danced with BROWN during that evening and he had on no cologne.

A neighbor, Ellen Johnson from 1365 Puett Drive, testified that two or three days after the crime, a young man with longer dirty blond hair who had lived in the trailer park disappeared and suddenly reappeared clean shave and with real short hair.

ISSUES RAISED ON DIRECT APPEAL

On the first direct appeal from his conviction and sentence BROWN raised the following claims through

attorney Dorothy Nash Holmes. (The decision of the Nevada Supreme Court as to each issue is in brackets following each issue.):

1. Was it error to deny Troy Brown bail in a non-capital case? ["*We conclude that the district judge's denial of bail did not substantially affect the judgment such that reversal of the conviction is warranted.*"]

2. Should Troy Brown be re-sentenced? ["*We conclude that the district court abused its discretion in sentencing Troy by (1) using the Lakes Crossing psychological reports as a basis for the sentence and (2) imposing a harsher sentence because Troy maintained his innocence and refused to admit his guilt.*"]

3. Is it Double Jeopardy for Troy Don Brown to be convicted and sentenced for both sexual assault of a child and child abuse by means of sexual assault? [*Double jeopardy bars one of the convictions, and we therefore vacate the conviction for child abuse and maintain the conviction for sexual assault.*"]

4. Was the DNA evidence improperly admitted into evidence? ["*Because we conclude that the failure to conduct an evidentiary hearing was not plain error, we will not consider this issue.*]

5. Is the evidence sufficient to convict Troy Brown? ["*We conclude that a jury, acting reasonably, could have been convinced of Troy's guilt beyond a reasonable doubt.*]

As the case was remanded for re-sentencing and entry of an Amended Judgement of Conviction, a second direct appeal was filed after the second

sentencing. In said direct appeal, handled by attorney Donald York Evans, the following issues here raised (with the decision of the Nevada Supreme Court included in brackets):

1. Was it reversible error for the Honorable J. Michael Memeo to conduct the re-sentencing in this case, based on his being formerly employed by the Elko County District Attorney, namely Gary Woodbury., Esq., who in fact argued the case for the State at the re-sentencing hearing? ("We conclude that, based on these facts, a reasonable person would not have reasonable doubts regarding Judge Memeo's impartiality. Accordingly, by reasons of the foregoing, we Order this Appeal dismissed."]

2. Was it denial of Appellant's due process and Sixth Amendment rights of confrontation for the Court to allow the victim's mother to testify about her daughter's psychological condition and medication, without providing the defense with the child's psychological records and appointing the defense an expert to review and evaluate those records? ["Accordingly, we conclude that the district court did not abuse it's discretion in allowing the witness to testify."]

MOTION FOR NEW TRIAL

Prior to sentencing BROWN requested that a Motion for New Trial be filed by Evans. No such motion was filed, and instead only a direct appeal was pursued. After the case was remanded by the Nevada Supreme Court and while awaiting re-sentencing filed after the second sentencing. In said direct appeal, handled by attorney Donald York Evans, the following

issues were raised (with the decision of the Nevada Supreme Court included in brackets):

1. Was it reversible error for the Honorable J. Michael Memeo to conduct the re-sentencing in this case, based on his being formerly employed by the Elko County District Attorney, namely Gary Woodbury., Esq., who in fact argued the case for the State at the re-sentencing hearing? ("We conclude that, based on these facts, a reasonable person would not have reasonable doubts regarding Judge Memeo's impartiality. Accordingly, by reasons of the foregoing, we Order this Appeal dismissed."]

2. Was it denial of Appellant's due process and Sixth Amendment rights of confrontation for the Court to allow the victim's mother to testify about her daughter's psychological condition and medication, without providing the defense with the child's psychological records and appointing the defense an expert to review and evaluate those records? ["Accordingly, we conclude that the district court did not abuse it's discretion in allowing the witness to testify."]

MOTION FOR NEW TRIAL

Prior to sentencing BROWN requested that a Motion for New Trial be filed by Evans. No such motion was filed, and instead only a direct appeal was pursued. After the case was remanded by the Nevada Supreme Court and while awaiting re-sentencing BROWN filed a Motion for New Trial and Motion to Vacate and Continue Sentencing. Said Motion was filed by attorney Dennis Widdis on March 6, 1998 and essentially alleged that the district court should review

all of the evidence to determine the sufficiency of the evidence to support the conviction.

On March 9, 1998 the District Court denied the Motion for New Trial filed by Widdis on the basis that it was untimely filed three and a half years after the jury verdict.

Sentencing proceeded on March 13, 1998 despite the pendency of the Widdis motion. At the hearing the mother of the victim, Pamela Sue Allred, testified for the State and Brown called three character witnesses: Neal Brown, Ron Edwards, and Tiffany Brown. At sentencing, before rendition of the sentence Brown submitted a proper person Motion for New Trial.

On or about August 30, 1998 BROWN, in proper person, filed an "Addendum of Supporting Facts for Defendant's Motion for New Trial and Hearing." This pleading was submitted in proper person as BROWN claimed that counsel Jeffrey Kump was ineffective in not filing the pleading.

ARGUMENT

A.

BROWN IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS PETITION

It has long been the holding of the Nevada Supreme Court that if a Petition for post conviction habeas corpus contains allegations, which, if true, would entitle the Petitioner to relief, an evidentiary hearing is required. Bolden v. State, 99 Nev. 181, 659 P.2d 886 (1983); Grandin v. State, 97 Nev. 454, 634 P.2d 456

(1981); Doggett v. State, 91 Nev. 768, 542 P.2d 1066 (1975). In Drake v. State, 108 Nev. 523, 836 P.2d 52 (1992) the Court remanded the case for an evidentiary hearing over the State's objection where trial counsel had not adequately opposed a Motion in Limine filed by the State. The purpose of the hearing was to determine whether counsel had sufficient cause for the noted failure. Drake, 108 Nev. at 527-528.

Often the State will ask the District Court to deny an evidentiary hearing and deny a Petition based on the perceived strength of the State's case at trial without considering the allegations of the Petition. The State's case perceived strength is principally due to the failure of defense counsel to provide a defense through proper investigation and preparation for trial. Buffalo v. State, 111 Nev. 1139, 901 P.2d 647 (1995).

The Petition filed by BROWN fits squarely within the parameters of the decision in Hargrove v. State, 100 Nev. 398, 686 P.2d 222 (1984), and contrary to the anticipated argument of the State, Hargrove mandates that an evidentiary hearing be granted. In Hargrove, the Nevada Supreme Court stated:

> "Appellant's motion consisted primarily of 'bare' or 'naked' claims for relief, unsupported by any specific factual allegations that would, if true, have entitled him to withdrawal of his plea. Specifically, appellant's claim that certain witnesses could establish his innocence of the bomb threat charge was not accompanied by the witness' names or descriptions of their intended testimony. As such, to the extent that it advanced merely 'naked' allegations, the motion did not entitle appellant to an evidentiary

hearing. See Vaillancourt v. Warden, 90 Nev. 431, 529 P.2d 204 (1974); Fine v. Warden, 90 Nev. 166, 521 P.2d 374 (1974); see also Wright v. State, 619 P.2d 155, 158 (Kan.Ct.App. 1980) (to entitle defendant to an evidentiary hearing, a post-conviction petition must set forth 'a factual background, names of witnesses or other sources of evidence demonstrating . . . entitlement to relief')."

The Petition filed herein and the affidavits attached hereto contain the names of the witnesses and a description of their expected testimony. As such the allegations are not "naked" and an evidentiary hearing should be conducted. It is respectfully urged that this Court grant an evidentiary hearing to BROWN.

B.

BROWN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment guarantees that a person accused of a crime receive effective assistance of counsel for his defense. The right extends from the time the accused is charged up to and through his direct appeal and includes effective assistance for any arguable legal points. Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). The United State Supreme Court has consistently recognized that the right to counsel is necessary to protect the fundamental right to a fair trial, guaranteed under the Fourteenth Amendment's Due Process Clause. Powell v. Alabama, 287 U.S. 45, 53 S.Ct.55, 77 L.Ed. 158 (1932); Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct.

792, 9 L.Ed.2d 799 (1963). Mere presence of counsel does not fulfill the constitutional requirement: The right to counsel is the right to effective counsel, that is, "an attorney who plays the role necessary to ensure that the trial is fair." Strickland, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 657 (1984); McMann v. Richardson, 439 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d. 763 (1970).

Pre-trial investigation is a critical area in any criminal case and failure to accomplish same has been held to constitute ineffective assistance of counsel. The Nevada Supreme Court in Jackson v. Warden, 91 Nev. 430, 537 P.2d 473 (1975) stated:

> "It is still recognized that a primary requirement is that counsel . . . conduct careful factual and legal investigations and inquiries with a view toward developing matters of defense in order that he make informed decisions on his client's behalf both at the pleading stage . . . and at trial."

Jackson 91 Nev. at 433, 537 P.2d at 474. The Federal Courts are in accord that pre-trial investigation and preparation for trial are a key to effective representation of counsel. U.S. v. Tucker, 716 F.2d 576 (1983). A lawyer who fails to adequately investigate, and to introduce into evidence, records that demonstrate his client's factual innocence, or that raise sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance. Hart v. Gomez, 174 F.3d 1067, 1070 (9th Cir. 1999). See also, Evans v. Lewis, 855 F.2d 631 (9th Cir. 1988) holding that a failure to investigate possible evidence could not be deemed a trial tactic where the

lawyer did not view relevant documents that were available.

In U.S. v. Baynes, 687 F.2d 659 (1982) the Court, in language applicable to this case, stated:

> "Defense counsel, whether appointed or retained is obligated to inquire thoroughly into all potential exculpatory defenses and evidence, mere possibility that investigation might have produced nothing of consequences for the defense could not serve as justification for trial defense counsel's failure to perform such investigations in the first place. Fact that defense counsel may have performed impressively at trial would not have excused failure to investigate defense that might have led to complete exoneration of the Defendant."

In Warner v. State, 102 Nev. 635, 729 P.2d 1359 (1986) the Nevada Supreme Court found that trial counsel was ineffective where counsel failed to conduct adequate pre-trial investigation, failed to properly utilize the Public Defender's full time investigator, neglected to consult with other attorneys although urged to do so, and failed to prepare for the testimony of defense witnesses. See also, Sanborn v. State, 107 Nev. 399, 812 P.2d 1279 (1991).

To establish ineffective assistance of trial counsel, a defendant must satisfy the two prongs set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). Under Strickland, a defendant must first show that his counsel's performance was deficient. To be deficient, counsel's performance must be "outside the wide range of professionally competent assistance"

Strickland, 466 U.S. at 690. Upon establishing deficient performance, a defendant must then show that this deficient performance prejudiced his defense. The defendant need not show that the deficient performance more likely than not altered the outcome of the case, but must demonstrate only a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id., at 694.

Specific areas of deficient performance by trial counsel include the following as alleged in the Petition filed herein:

1. Trial counsel failed to object or otherwise prevent BROWN from being seen by the jury while wearing shackles and jail garb.

Just before trial started the Court revoked BROWN'S bail and put him into custody during the trial. He was kept in the jail and transported each day to the Court in his jail clothes and would change into court clothes once he reached the Courthouse. When he would arrive at the Courthouse he would be in shackles and jail clothes and would have to walk past where the jury could see him in restraints and jail clothes. BROWN told his trial counsel about the situation but no objection was made and no motion for mistrial lodged.

The United States Supreme Court and the Nevada Supreme Court have recognized that it is a violation of the defendant's due process rights for a state to go compel an accused to stand trial in prison clothing or

in restraints, as prison attire and obvious restraints, are a constant reminder of the accused's condition and inconsistent with the presumption of innocence mandated by the Constitution, which might affect a juror's judgement. Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed 2d 126 (1926); Grooms v. State, 96 Nev. 143, 605 P.2d 1145 (1980). The failure of a court to order alternatives to visual restraints can result not only in the reversal of a conviction, but also in the reversal of sentence. Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987), r'hrng denied 833 F.2d 250 (1987), cert. denied 108 S.Ct 1487 (1988).

The United States Supreme Court in Illinois v. Allen, 397 U.S. 337, 344 (1970) stated:

> "No person should be tried while shackled and gagged except as a last resort. Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of the judicial proceedings that the judge is seeking to uphold"

In Dickson v. State, 108 Nev. 1, 822 P.2d 1122 (1992) a conviction for possession of a controlled substance was reversed because the defendant was seen in chains by jurors as he was transported to the courthouse. The fact was brought out before the prospective jurors and they were admonished not to allow the incident to affect them. They were also asked questions during voir dire about the incident. Despite these steps, on appeal this Court reversed, stating:

> "Appellant contends, and the state concedes, that it was error to allow the jury to see appellant in chains. We agree. 'A criminal defendant clearly has the right . . . to appear before his jurors clad in the apparel of an innocent person.' Grooms v. State, 96 Nev. 142, 144, 605 P.2d 1145 (1980) (citations omitted); *see, generally*, Illinois v. Allen, 397 U.S. 337 (1970) (the sight of shackles might have a significant effect on the jury's feelings about the defendant, and requiring a defendant to appear in shackles could have an impact on the defendant's Sixth Amendment rights)"

Dickson, 108 Nev. at 3

BROWN was denied his constitutional right to due process and a fundamentally fair trial by the jury being allowed to observe him in restraints and jail clothes. He was further denied his Sixth Amendment right to effective counsel based on the failure of counsel to object or otherwise correct the prejudicial impact of the situation.

2. Trial counsel failed to file a Motion or otherwise object to exclude all DNA evidence to a failure of chain of custody proof.

Counsel had informed Petitioner not to worry about the DNA evidence and that without the DNA evidence the State did not have enough evidence to convict Petitioner. Then at trial, counsel failed to object to the admission of the evidence. There were a number of foundational problems with the DNA evidence. At the preliminary hearing Renee Romero testified that she could not identify the donor of the sperm found on

Megan's panties and pajamas, but that doing DNA PCR testing showed that the sperm on the panties was consistent with BROWN'S DNA. Romero went on to indicate that in the DQ Alpha test the frequency of occurrence of the DNA was one in 22, while for the PCR test it was one in 18,900. Romero did not believe there was enough of a sample remaining to conduct the more discriminatory RFLP examination.

Additionally counsel at the preliminary hearing, stipulated to Romero as an expert despite the fact that she had ever testified before on PCR testing and had only been doing the tests for two months. Counsel also failed to establish the Washoe crime lab was not even certified to perform DNA testing.

The validity of the chain of custody on the blood samples themselves should have been challenged at trial. Medical technologist Jennifer Bonaudi who drew the blood from Megan at the hospital failed to place her name on the blood vial in direct contravention of the affidavit that she prepared concerning the blood draw. Counsel failed to challenge the testimony of Bonaudi and the apparent conflict of her sworn affidavit.

Appellate counsel on the direct appeal attempted to challenge the DNA evidence and the Nevada Supreme Court refused to even review the issue. The failure of trial counsel to object to the lack of pre-trial evidentiary hearing or to qualifying Renee Romero as an expert witness thereby precluded appellate review of the DNA evidence. The Nevada Supreme Court in denying BROWN'S appeal refused to consider appellate review of the DNA evidence stating in relevant portion as follows:

> "Troy argues that the district judge erred in not conducting a pretrial hearing to determine whether the DNA results were trustworthy and reliable. However, Troy made no objection to either the lack of a pretrial evidentiary hearing or to qualifying Romero as an expert witness on DNA evidence. Failure to object in the district court precludes consideration of the issues on appeal; however, this court may address plain error *sua sponte*. Sterling v. State, 109 Nev. 391, 394, 834 P2.d 400, 402 (1992). Because we conclude that the failure to conduct an evidentiary hearing was not plain error, we will not consider this issue."

Brown v. State, 113 Nev. 275, 284, 934 P.2d 235 (1997).

As discussed below, the evidentiary and foundational problems with the collection and testing of the DNA evidence should have prevented the admission of the DNA evidence, or at least, if properly challenged, diminished the importance of the evidence in the eyes of the jury. Obviously BROWN was prejudiced by the admission of this evidence, which was, in reality, the only evidence on which the jury could have based a conviction.

For purposes of these proceedings BROWN adopts and incorporates by this reference the contents of the Opening Brief on the direct appeal that addresses the failures of trial counsel. Included within the arguments that were barred on direct appeal by the failure to object was the following:

"Fassett also testified that in this case, the Carlin police appeared to lack knowledge on evidence labeling for lab work. She said that she was told that the suspect never went back to his bed after the attack, thus there was no point in examining the bedding taken from Troy's bedroom. Of course, the evidence from Troy, Travis, Dave Prescott and Officer Terry all disproved that statement. There was also testimony about the 'lost' teeth scrapings from Megan, who claimed to have bitten her assailant. Given these kinds of evidentiary problems with this particular case, **it is incomprehensible that no pre-trial evidentiary hearings were held to establish the integrity of the evidence** gathering, and lab techniques, and the overall scientific process, before the court would allow the jury to hear expert testimony. There was a poor showing of expertise, a total lack of appropriate foundation and **virtually a non-existent cross-examination of the evidence and evidence custodians in this case.** That was prejudicial to Troy Brown, and in the face of the other evidence which strongly indicated Troy was not the assailant and that there were other likely suspects, the effect of these evidentiary failing was fatal to Troy."

(Opening Brief, pages 31-32) The record thus clearly establishes that trial counsel totally failed to challenge the DNA evidence in the case, failed to preserve valid issues for appeal and thus violated the Sixth Amendment rights of BROWN to effective assistance of counsel.

3. Trial counsel failed to obtain independent testing by an independent DNA expert, instead utilizing the services of an expert that was friends and college roommate with the State's expert and who failed to conduct any independent testing or observe the State's testing.

Prior to the preliminary hearing BROWN was represented by the Elko County Public Defender, who obtained an order that a defense DNA expert be allowed to be present during any testing. Jennifer Mihalovich of Forensic Science Associates was appointed to act as the defense expert, but failed to be present during the majority of the testing done by Romero. It was subsequently learned that Mihalovich attended college with Romero. This relationship constituted a conflict of interest that taints any opinions rendered that support the work of Romero. From what BROWN has been able to determine, prior to trial, all that Milahovich did was review the notes and protocols of Romero without being present to observe whether the samples were properly preserved, handled and tested.

After the trial was over and BROWN convicted, trial counsel obtained a court order that additional testing be performed on the remaining 10% of the vaginal swab and Forensic Science Associates was again utilized and rendered a report who's basic conclusion was the same as Romero, but with a variance of the frequency calculations. This post trial testing did not include any retesting of the DNA profile of either BROWN or Megan, but instead simply adopted the flawed findings made by Romero prior to trial.

4. Trial counsel failed to investigate and present evidence at trial that alternative suspect Wayne Henle had been charged with sexual assault in Utah, had committed a similar act in Elko just months prior to Megan's assault, and had the opportunity to have committed the crime.

Prior to trial it was BROWN'S belief that Megan's step-father may have committed the assault on Megan. This information was relayed to trial counsel along with repeated requests that investigation be conducted concerning Wayne Henle. Investigation would have shown that Henle had committed a sexual assault in Utah and had committed a similar offense in Carlin although changes were not filed on the Nevada episode. (See Exhibits 1, 2, and 3.)

Prior to trial counsel was advised of said exculpatory evidence and failed to take any action to substantiate the information. Filed herewith is an Appendix in Support of Petition containing Exhibit 1, which establishes the validity of the information and was available in public records if counsel had investigated properly. Investigation would also have revealed witnesses that could have testified that Pam Henle had made statements implicating Wayne in having done the same thing in Elko. (See Exhibit 2, statement of Ronald and Nancy Atwood.)

5. Petitioner only spoke to a defense investigator on one occasion and provided names of witnesses to be interviewed, however, neither counsel nor the investigator located or interviewed these witnesses.

Attached hereto is the affidavits of BROWN, and his mother Stella Brown, which contain the names of numerous witnesses that were ready and willing to offer exculpatory evidence at the time of trial. However they were not contacted or interviewed by trial counsel and not used as witness. After trial, and in preparation of this Petition, signed statements have been obtained from many of these witness and are included in the Appendix filed herewith as Exhibits 2 through 7. These witnesses include the following:

a. Essy Sallee – bartender at CeeGee's bar in Carlin who served Troy on the night of the incident and could have established that Troy was still at the bar when Megan was assaulted. (See Exhibit 4.)

b. Debbie Dean – a neighbor of Wayne and Pam Henle that could have testified that Wayne entered her house in the middle of the night in October, 1993 and she caught him crawling around on the floor of her bedroom. This testimony would have established that Wayne Henle was the perpetrator of the assault on Megan. (See Exhibit 3.)

c. Kerry L. Frusetta – BROWN'S girlfriend at the time of the incident. She could have verified that she and BROWN had a normal sexual relationship and had been together with BROWN the night before the incident. (See Exhibit 5.)

d. Clyde Rarrick – was present in both the Peacock and CeeGee's on the night of the incident and could have testified that BROWN was in the bar at the time the incident must have occurred. Rarrick was also aware of a number of in the bar on the night in questions, specifically, Patrick Johnson, Lori Patrick,

Vicki Gillispie and Nicholas Milodragovick. (See Exhibit 6.)

e. Lori Rarrick – wife of Clyde, drove to CeeGee's bar at about 12:15 on the night of the incident and did not observe anyone walking in the area. She additionally could have verified the time frames provided by Clyde and Sallee to corroborate BROWN'S location at the time of the incident. (See Exhibit 7.)

f. Ron and Nancy Atwood – Friends of the Henle's in Utah that had contact with Pam and Wayne when the went to Utah after the assault on Megan. They observed Wayne with a bandage on his hand which he said was because a horse bit him, and also had knowledge of the sexual assault in Utah. Pam Henle Ron that Wayne had done the same thing in Elko. (See Exhibit 2.)

6. Counsel failed to discuss defense strategies with Petitioner and never informed Petitioner that he intended to argue that Petitioner's brother Trent could have committed the crime.

During trial, defense counsel asked questions and made reference in his closing that implied that BROWN'S brother Trent was the assailant because his DNA might be the same as Troy's. Such a defense was interposed with the knowledge and permission of BROWN, and was prejudicial to his defense because it gave validity to the DNA evidence that should have been challenged as unreliable and also told the jury that BROWN was so desperate as to attempt to use his own brother as a scapegoat to avoid conviction.

7. Counsel failed to file a Motion to Dismiss or in the Alternative Suppress Evidence based on the loss of exculpatory evidence, specifically relating to the teeth scraping taken from the victim as part of the sexual assault kit.

At trial witnesses testified that at the emergency room, debris was collected from Megan's teeth by the emergency room doctor because Megan said she bit her assailant and it appeared that there was blood or some other substance on her teeth. The teeth scraping evidence was lost by either the Carlin police or the Washoe crime lab or somewhere in between. BROWN contends that said evidence would have been extremely exculpatory for two reasons. First, the evidence could have revealed the DNA of the attacker. This DNA would not have been contaminated as the other evidence was by the collection methods utilized by the Carlin police. Second, the evidence would have proven conclusively that the assailant suffered a bite wound. Evidence was uncontroverted that BROWN had no bite marks on him, and as such would have to be excluded as being the assailant

It is a well settled principle that the intentional suppression of material evidence by the prosecution constitutes violation of due process, irrespective of the good or bad faith of the prosecution. See, Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1965). The declared purpose of the Court in Brady was to secure a fair trial for the Defendant rather than to punish the prosecution for its conduct. In Brady, 373 U.S. at 87, 83 S.Ct. at 1197, the Court stated:

> "Society wins not only when the guilty are convicted but when criminal trials are fair; our

> system of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the position candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the Courts.'"

The two seminal cases in Nevada in this area are State v. Havas, 95 Nev. 706, 601 P.2d 1197 (1979) and Boggs v. State, 95 Nev. 911, 604 P.2d 107 (1979). In Havas, the prosecution failed to preserve the pants and undergarments of an alleged rape victim. In upholding a dismissal of the rape charges the Court found that the evidence had "the potential for great significance" and "such potential relevance to the guilt or innocence of the accused" that a further showing was unnecessary for triggering dismissal based on due process violations. The evidence had been collected, but not reserved.

More recently this Court found in Sparks v. State, 104 Nev. 316, 759 P.2d 180 (1988) that:

> "A conviction may be reversed when the State loses evidence if:
>
> 1. The Defendant is prejudiced by the loss; or
>
> 2. The evidence was "lost" in bad faith by the government [citation omitted]."

In Sparks, the piece of evidence, a .357 handgun was booked into evidence but then released within a month to the victim's son. The gun was not retrieved for about

5 months, at which time testing showed no evidentiary value.

In such cases, it is the burden of the defense to show that it could be reasonably anticipated that the evidence sought would be exculpatory and material to the defense. Boggs v. State, 95 Nev. 911, 913, 604 P.2d 107, 108 (1979). In Sparks, the Court adopted the test of materiality set forth in United States v. Agurs, 427 U.S. 97, 112-113 (1976) to the effect that the lost evidence "must be evaluated in the context of the entire record". The question is whether when so evaluated a reasonable doubt exists which was not otherwise present. See, Sparks 104 Nev. at 319.

In Howard v. State, 95 Nev. 580, 600 P.2d 214 (1979) when the defendant was arrested and booked, his clothes and shoes were placed in a property bag. When, during trial, the defendant sought to introduce his clothing and shoes, they were no longer in the property bag and his denim pants were missing. The Nevada Supreme Court in reversing the conviction stated:

> "Although the state maintained control over appellant's personal property and took no measures to protect it from theft or loss, there is nothing in the record to suggest bad faith, or connivance, on the part of the state or its agents. However, the record indicates that the loss of appellant's shoes was prejudicial to his defense. Indeed, appellant's shoes and clothing were material to the identification of him as the perpetrator of the offense. Accordingly, since these articles were not produced at the trial, appellant's conviction must be reversed."

Howard, 95 Nev. at 582. See also, Sanborn v. State, 107 Nev. 399, 812 P.2d 1279 (1991), wherein the Court found that the failure to preserve possible fingerprints and blood on a gun recovered at the crime scene entitled Sanborn to a new trial and a curative instruction to the jury.

Most recently in Warner v. State, 112 Nev. Ad. Op. 150 (1996), the Court deviated from the standards set forth in Sanborn, Sparks, and Howard. In Warner, the Court added the requirement that the evidence "possessed an exculpatory value that was apparent before the evidence was destroyed". Warner at page 5. The Court however did not reverse or modify it's opinion in the other three earlier cases.

The loss of the critical teeth scraping evidence should have been the subject of a Motion to Dismiss prior to trial, just as there should have been a Motion to disallow the DNA evidence. The lack of a motion also precluded appellate review should the District Court have denied the Motion.

8. Counsel failed to timely file a Motion for New Trial thereby resulting in the Motion filed by Petitioner being denied by the Court as being untimely. As set forth hereinabove BROWN filed a number of pleadings seeking a new trial while the case was on remand for sentencing. As shown by Exhibit 8, the Order Denying Motion for New Trial, the Court refused to even consider the merits of the new trial request because the motion had not been timely filed. The prejudice to BROWN is thus established by the record of the proceedings.

9. Appellate counsel on the second direct appeal failed to submit issues to the appellate court concerning the Motion for New Trial that had been filed in District Court prior to the appeal. On the second appeal counsel filed to challenge the ruling of the District Court denying the new trial motion as being procedurally barred. To the extent that the State may argue that BROWN is procedurally barred frm raising said issue by way of post conviction habeas corpus, because it was not raised on appeal BROWN alleges a denial of effective assistance of appellate and trial counsel caused the procedural bar and that BROWN was prejudiced thereby.

CONCLUSION

Based on the Petition for Writ of Habeas Corpus (Post Conviction) filed simultaneously with the foregoing Points and Authorities in support thereof, it is respectfully requested that the conviction and sentence of TROY DON BROWN be set aside and a new trial date set.

DATED this 27 day of August, 2001.

RESPECTFULLY SUBMITTED:

/s/_____
DAVID M. SCHIECK, ESQ.

VERIFICATION

Under penalty of perjury, the undersigned declares that he is the Petitioner named in the foregoing Points and Authorities in Support of Petition for Writ of

Habeas Corpus (Post Conviction); that he knows the contents thereof; and it is true of his own knowledge except as to those matters stated on information and belief, and as to such matters he believes them to be true.

/s/
TROY BROWN

AFFIDAVIT OF TROY BROWN

STATE OF NEVADA)
) ss:
COUNTY OF PERSHING)

TROY DON BROWN, being first duly sworn, deposes and says:

I am the Petitioner in this matter and I am currently incarcerated at Lovelock Correctional Center, Pershing County, Nevada, and that I states the following under penalty of perjury:

Just before my trial started the Court revoked my bail and put me into custody during the trial. I was kept in the jail and transported each day to the Court in my jail clothes and would change into court clothes once I reached the Courthouse. When I would arrive at the Courthouse I would be in shackles and jail clothes and would have to walk past where the jury could see me in restraints and jail clothes. I brought this to the attention of Mr. Lockie, but to my knowledge he never objected or did anything to correct the situation.

There were a number of witnesses that I wanted to be interviewed and called to testify at my trial to show that I did not commit this crime. Either myself or my family told Mr. Lockie about these witnesses and to my knowledge they were not contacted and were not called at the trial:

a. Essy Sallee – bartender at CeeGee's bar in Carlin who served me on the night of the incident and could have established that I was still at the bar when Megan was assaulted.

b. Debbie Dean – a neighbor of Wayne and Pam Henle that could have testified that Wayne entered her house in the middle of the night in October, 1993 and she caught him crawling around on the floor of her bedroom. This testimony would have established that Wayne Henle was the perpetrator of the assault on Megan.

c. Kerry L. Frusetta – my girlfriend at the time of the incident. She could have verified that we had a normal sexual relationship and had been together the night before Megan was attacked. She could have verified that I had no bite marks and no scratches on my body after the date of the incident.

d. Clyde Rarrick – was present in both the Peacock and CeeGee's on the night of the incident and could have testified that I was in the bar at the time the incident must have occurred. He also could verify my condition of throwing up, not wearing cologne, not wearing a watch and no zipper on my jacket. All of these physical and provable facts would have established that I was not the person who assaulted Megan irrespective of the questionable DNA evidence.

e. Lori Rarrick – wife of Clyde, drove to CeeGee's bar at about 12:15 on the night of the incident and did not observe anyone walking in the area. She additionally could have verified the time frames provided by Clyde and Sallee to corroborate my location at the time of the incident.

I was out of custody for a period of time before my trial was scheduled to start. During that period of time when I would meet with Mr. Lockie, it would always be with either my mother, Stella Brown or my father.

They also were in communication with Mr. Lockie and myself while I was in custody, before and after the trial. They therefore have personal knowledge of our discussions and the information that I had provided to Mr. Lockie about the case.

After Megan was assaulted I went to visit my family in Utah. This trip had been planned before the incident ever happened. While I was in Utah, within a couple of days of the incident, my father suggested that it might be a good idea for me to have a doctor examine me from head to toe to verify that I had no scratch marks or injuries. This was because it was common knowledge that Megan had bitten her attacker on his hand and had struggled with him. The police were aware of this and had questioned some people about injuries to their hands in the days following the incident. I went to the doctor and obtained a letter from the doctor stating that I had no injuries. The police came to Utah and I gave them a voluntary statement and the doctor's report. When we got to trial the police had lost the letter and Mr. Lockie, who was aware of the letter did not contact the doctor to provide a letter or testimony as to the absence of injury to my hand.

Based on the way Wayne Henle was acting and his estrangement from Pam immediately after the incident, I was suspicious that he may have been the attacker. It was common knowledge that he and Pam were not getting along and when my

* * *

[original pages 33-37 filed out of order;
see infra JA 1121-1125]

* * *

* * *

[original page 1 filed out of order;
see infra JA 1130-1131]

* * *

THE ACTS OF THE DEFENDANT CONSTITUTING THE CRIME WERE:

That at the time and place aforesaid, the defendant did enter or remain unlawfully in a dwelling or any portion of a dwelling with intent to commit a felony, to wit: forcible sexual abuse.

THE VICTIM IS: Susan Sisneios

This information is based on evidence obtained from the following witnesses:

Rusty Atwood
Polly Milone
Susan Sisneios
Deputy Dale Johnson, Duchesne County Sheriff's Department (Complaining Officer)

DATED this 13 day of June, 1993.

/s/
Herbert Wm. Gillespie
Duchesne County Attorney

* * *

[original pages 1-2 and 8 filed out of order;
see infra JA 1132-1135]

* * *

[p.3] examined by my attorney. I also know that I have the right to have witnesses subpoenaed at state expense to testify in court upon my behalf.

WGH 7. I know that I have a right to testify in my own behalf but if I choose not to do so I could not be compelled to testify or give evidence against myself. If I do not want to testify, the jury will be told no inference adverse to me may be drawn from my failure to testify.

WGH 8. I know that if I wish to contest the charge against me I need only plead "not guilty" and the matter will be set for trial, at which time the State of Utah will have the burden of proving each element of the charge beyond a reasonable doubt. If the trial is before a jury the verdict must be unanimous.

WGH 9. I know that if I was tried and convicted by a jury or by the judge that I would have the right under the Constitution of Utah to appeal my conviction and sentence to the Utah Court of Appeals, or where allowed, to the Supreme Court of Utah and that if I could not afford to pay the costs for such appeal, those costs would be paid by the State.

WGH 10. I know that the maximum possible sentence may be imposed upon my plea of guilty, and that sentence may be for a prison term, fine, or both, I know that in addition to any sentence, a 35% or 85% surcharge, required by Utah law, will be imposed.

WGH 11. I know that imprisonment may be for consecutive periods, or the fine for additional amounts, if my plea is for more than one charge. I also how that if I am on probation, parole or awaiting sentencing on another offense which I have been convicted or to which I have plead guilty, my plea in the present action may result in consecutive sentences being imposed upon me.

WGH 12. I know and understand that by pleading guilty I am waiving my constitutional rights set out in the preceding paragraphs. I also know that by [p.4] entering such plea I am admitting and do so admit that I have committed the conduct alleged and I am guilty of the crime for which my plea is entered.

WGH 13. My plea of guilty is the result of a plea bargain between myself and the prosecuting attorney. The promises, duties and provisions of this plea bargain, if any, are fully contained in this affidavit.

WGH 14. I know that any charge or sentencing concession or recommendation of probation or suspended sentence, including a reduction of the charges for sentencing made or sought by either defense counsel or the prosecuting attorney are not binding on the Judge. I also know that any opinions they express to me as to what they believe the Court may do are also not binding on the Court.

WGH 15. No threats or coercion of any kind have been made to induce me to plead guilty, and no promises, except those contained herein, have been made to me.

WGH 16. I have read this affidavit or I have had it read to me to by my attorney, and I uderstand its

provisions. I know that I am free to change or delete anything contained in this affidavit. I do not wish to make any chages because all of the statements are correct.

WGH 17. I am satisfied with the advice and assistace of my attorney.

WGH 18. I am 31 years of age; I have attended school through the 12 grade and I can read and understand the English language. I am not under the influence of any drugs, medication or intoxicants. I do not suffer from any mental condition which affects my ability to understand what I am now doing, or what I was doing when the decision to enter this plea was made.

WGH 19. I understand that if I desire to withdraw my plea of guilty entered today that I must file a written Motion with the Court to do so, within thirty (30) days from today, and the plea may only be withdrawn if the Court allows me to withdraw it after I have shown that I have good cause to do so.

[p.5] WGH 20. Knowing all of my rights and having knowingly and voluntarily waived those rights as set forth above I do hereby enter my plea of guilty to the charge of:

Count 1 - FORCIBLE SEXUAL ABUSE,
a SECOND DEGREE FELONY

WGH 21. That in exchange for Defendant's guilty plea the State agrees to:

(1) Dismiss Count 2 - Burglary of a Dwelling, a Second Degree Felony.

(2) Recommend defendant be given a 45-90 day diagnostic evaluation prior to sentencing (Prosecutor will not oppose ISAT evaluation at defendant's cost). HG.

(3) Accept the recommendation of the diagnostic evaluation as the sentencing recommendation of the State (Prosecutor in all events will not recommend Prison if defendant admits conduct)* HG.

(4) Not oppose any request by defendant to pay fines through community service.

DATED this 1st day of December, 1994.

/s/
WAYNE GENE HENLE, Defendant

APPROVED:

/s/
Herbert Wm. Gillespie
Duchesne County Attorney

/s/
David M. Allred
Attorney for Defendant

[p.6] CERTIFICATE OF ATTORNEY

I certify that I am the attorney for Wayne Gene Henle, the defendant above, and that I know he has read the affidavit or that I have read it to him and I

* Prosecutor will not file any changes based on letter also HG.

have discussed it with him and believe that he fully understands the meaning of its contents and is mentally and physically competent. To the best of my knowledge and belief after an appropriate investigation, the elements of the crime and the factual synopsis of the defendant's criminal conduct are correctly stated and these, along with the other representations and declarations made by the defendant in the foregoing affidavit, are accurate and true.

/s/_____
David M. Allred
Attorney for Defendant

[p.7] CERTIFICATE OF PROSECUTING ATTORNEY

I certify that I am the attorney for the State of Utah in the case against Wayne Gene Henle, Defendant. I have reviewed this affidavit of the defendant and find that the declarations of the elements of the offense charged and the factual synopsis of the defendat's criminal conduct which constitutes the offense appear to be true and correct. No improper inducements, threats or coercion to encourage a plea have been offered defendant. There is reasonable cause to believe that the evidence would support the conviction of defendant for the offense for which the plea is entered.

/s/ Herbert Wm. Gillespie 11/30/94
HERBERT Wm. GILLESPIE
Duchesne County Attorney

* * *

[original pages 1-32 filed out of order;
see infra JA 1081-1114]

[p.33 filed out of order]

brother Trent expressed sympathy to Wayne for Megan, Wayne downplayed the whole incident and stated that "Megan's a tough little girl, she'll get over it". On numerous occasions we expressed to Mr. Lockie that Wayne Henle should be looked at a suspect, but to my knowledge he never investigated or did anything else about checking into Henle's possible involvement.

During none of my discussions with Mr. Lockie did he indicate me that he intended to imply to the jury that the DNA evidence could have been my brother Trent's and not mine. There was absolutely no evidence. The evidence clearly was that Trent was at home with his wife, Raquel, at the time of the assault, and to try to shift blame to brother was a complete surprise. Presenting such a defense without my knowledge was not only alarming to myself and my entire family, it also surely told the jury that I was guilty and desperately trying to shift the blame. It seemed that rather than attack the validity of the DNA foundation and testing, it was simply easier to try to imply that two brothers have the same DNA.

FURTHER, Affiant sayeth naught.

/s/_____
TROY BROWN
SIGNED UNDER PENALTY OF
PERJURY AT LOVELOCK
CORRECTIONAL CENTER ON 8-23-01

[p.34 filed out of order]

AFFIDAVIT OF STELLA BROWN

STATE OF UTAH)
) ss:
COUNTY OF WASHINGTON)

STELLA BROWN, being first duly sworn, deposes and says:

I am the mother of TROY DON BROWN who is currently incarcerated at Lovelock Correctional Center, Pershing County, Nevada, and I state the following under penalty of perjury:

I was involved in Troy's case since the very beginning and due to Troy's incarceration at various stages of the proceedings have communicated with all of his different attorneys concerning his case. After Troy was convicted at trial it became clear to me that Mr. Lockie had not investigated or prepared the case for trial and that a lot of important evidence and testimony was not presented to the jury. As Troy's mother, I felt it was incumbent upon all of his family to try to undo the injustice that was done to Troy. To that end we investigated the case and interviewed the witnesses and have accumulated a great deal of information. Much of this information was told to Mr. Lockie prior to the trial and he did nothing with it. Some of the information was unknown to us prior to the trial, but was available if there had been any effort to investigate and put on a proper defense at the trial. I will try to summarize in this affidavit as much of this evidence and testimony as I can. All of this information has been given to my son also.

At the very beginning of the case it was our feeling that

[p.35 filed out of order]

Megan's step-father was involved in the assault. We implored Mr. Lockie to look into his background and his behavior before and after the incidence, however nothing was ever done.

We became aware prior to Troy's trial, that Pam and Wayne had moved back to Huntington, Utah after the incident and that Pam and Wayne did not live together after the incident. We also lived in Utah, in nearby Loa and would hear things about Wayne and Pam. We learned that Wayne had been arrested for a sexual assault wherein he had crawled into a camper and fondled a women while she slept. This was very similar to Megan's description of how her assailant crept up on her. At the time of the Utah incident Pam made statements that Wayne had done the same thing in Elko, and named the victim, a Ms. Debbie Dean. We were able to obtain copies of the police reports on the Utah assault and to locate and speak with Ms. Dean who verified that Wayne Henle in October, 1993 had crept into her bedroom while she was sleeping, but that she had awakened and called the police, prompting Wayne to make the excuse that he just wanted to talk to her about Pam and that he was crawling on the floor because he was drunk. Wayne then left and Dean told the police that they did not have to come out. This occurred in Carlin. We told Mr. Lockie this information but he did not investigate either of the incidents or make any effort to present this evidence to the jury at trial.

Henle pled guilty in the Utah case and Pam had their marriage annulled based on the actions of Henle.

[p.36 filed out of order]

Wayne Henle claimed to the police that he was at work at the time of the incident. We obtained copies of his log sheet for his heavy equipment and the records showed that the equipment was on standby for a three hour period on the night that Megan was assaulted. This was more than enough time for Henle to have gone to the trailer and assaulted Megan. We gave this information to Mr. Lockie and he did nothing to investigate the situation and did not present the evidence at trial. An investigator could have easily shown that it was possible for Henle to have left work, assaulted Megan, and then returned to work.

We were aware that Troy had been drinking that night at two different bars, the Peacock and CeeGee's. We were able to locate the bartender, Essy Salle, from CeeGee's and speak with her. She stated that she had come on for the graveyard shift at 11:45 and that Troy came into the bar with a couple of his friends and ordered a Coors light and on two occasions went outside for a few minutes to throw up and then came back into the bar. She remembered that Troy stayed about an hour until approximately 12:45 to 1:00 AM. I gave her name and information to Mr. Lockie, but neither he nor an investigator ever contacted Ms. Sallee.

No one was aware that Mr. Lockie was going to imply to the jury that the crime was committed by our son Trent, because he might have the same DNA as

Troy. It seemed that he was thereby conceding that the DNA evidence was correct and reliable and

[p.37 filed out of order]

lost any ability to argue that the DNA was not that of Troy.

FURTHER, Affiant sayeth naught.

/s/_____
STELLA BROWN

SUBSCRIBED AND SWORN to before me
this 27 day of August, 2001.

/s/ Schuyler F. Best
NOTARY PUBLIC
[Notary Seal]

JA 1126

EXHIBIT 1

DUCHESNE COUNTY SHERIFF DEPARTMENT
Arrest Record

[fold-out exhibit, see next 2 pages]

DUCHESNE [illegible] SHERIFF DEPARTMENT
[illegible] Report

06-12-94 219048.ALL 219048

Offense:
ary - No Forced Entry Residence
able Sexual Abuse

HENLE, WAYNE GENE
30 07-29-63 ADULT
N BRO HT 507
M BLU WT 180

SUN 06-12-94 05:15
801 687-9225
520-74-9595
OCIAL

If Juvenile:

WKG
BOX 243
HUNTINGTON UT 84528

Type of Arrest: DCSO
Loc. of Crime: ARGYLE CANYON ATTWOOD
Means: HANDS
Motive: PERS SAT
Distinguishing Characteristics:
Driving (Direction)
Driving (Co. of Registry)
Connecting Objects, People and
Emergency Contact and Phone No.
Case Clearance/Description

ARRESTED
Date: 06-12-94
Time: 12:30

REPORTED
Date: 06-12-94
Time: 13:00

LEVIS, STRIPED SHIRT

2 arrest

VICTIM/WITNESS/INVOLVED
CODES: Deceased, Homicide, Battered, Sexual Assault, Forcible, Nonforcible

Name: SISNEIOS, SUSAN
Addr: 798 W 100 N
CSZ: PRICE UT 84501
AKA:
DOB: 12-03-60
Sex: F Race: W
HP: 801 637-5822
Testify: Yes
Age: 33
ES: N
WP: 801 637-3351

Name: ATWOOD, RUSTY
Addr: BOX 223
CSZ: HOTCHKISS, CO
AKA:
DOB:
Sex: M Race: W
HP: 303 972-4119
Age:
ES: N
WP:

Name: MILANE, POLLY
Addr: 2054 W 3550 N
CSZ: HELPER UT 84526
AKA:
DOB: 09-07-62
F Race: W
HP: 801 472-5890
Age: 31
ES: N
WP: 801 637-2150
SW?

Name: ATWOOD, DAVID B.
Addr: 2054 W 3550 N
CSZ: HELPER UT
AKA:
DOB:
Race:
HP: 801 472-5890
Age:
ES:
WP:

Name: ATWOOD, FERREL
Addr: BOX 1298
CSZ: HUNTINGTON UT
DOB: 11-27-33
HP: 801 687-9711
Age: 60

EXHIBIT 1

BEST AVAILABLE COPY

DUCHESNE [illegible]NTY SHERIFF DEPARTMENT
[illegible]rrest Report

[illegible] 760
[illegible] 9400338
[illegible] 219048

[illegible] 06-12-94 [illegible] 219048.A12

[illegible]

[illegible]
[illegible]: [illegible], [illegible], [illegible], [illegible], [illegible], [illegible]

[illegible] HENLE, PAMULA SUE [illegible] 10-05-65 [illegible] 28
[illegible] BOX 342 [illegible] W [illegible] N
[illegible] HUNTINGTON UT [illegible] 801 687-9715 [illegible]

PROPERTY DETAIL

[illegible]	Quan	Stat.	Article	Manufacturer	Model	Color/Desc	Serial#	IDR	Value
[illegible]	[illegible]	[illegible]	[illegible]	ROAD RANGER	TRAVEL TRAILER	1977 ROAD RANGER TRAVE		28	10 00

Total Stolen Property Value: .00

DUCHESNE COUNTY SHERIFF'S DEPARTMENT
Continuation sheet

==========

DEPUTY: DALE JOHNSON
SUBJECT: SEXUAL ABUSE/BURGLARY
PAGE: #1 IR#: 219048.A12 DR#: 9400338
DATE: 06-12-94

==========

On June 12, 1994 I was dispatched to a report of sexual abuse at the Argyle Cabin area which is at the top of Indian Canyon. I arrived at the intersection of 191 and Argyle and met with Deputy David Boren, Trooper Jeff Chugg, the victim and the witnesses. Leaving most of the people there it took Ferrel Atwood with me and had the officers follow me to where the suspect was. He and his wife was at the Finnigan Trailer. He was taken into custody for questioning by Deputy Boren who transported him to the Duchesne Sheriff Office. After they left I spoke with Mrs. Henle who said she was not surprised by this. I asked her if Mr. Henle had said anything to her about the incident. She said that he had told her that he had been accused of doing something's to Susan. He had told her that he had not done anything and that it was all bull shit.

I left with Ferrel and he directed me to his property where the incident occurred. At the base of the hill to the property was a meadow where the horses were. The road was very steep and had switch backs to the property. At the top of the hill was various trailers and structures (see diagram). The trailer where the incident occurred was on the right side as you top the hill. The trailer a 1977 road ranger (Lic#0092F) belongs to David Atwood. Inside the trailer there was no evidence of the incident. The bed was made and

nothing appeared out of place. There was no items of clothing or fluid drops in the area in question. Ferrel showed the layout of the compound. The trailer where he was sleeping and the van where Henle was supposed to have slept. Ferrel said that David had prepared the van and placed the sleeping bag in it and had told Henle to sleep there. The bag was folded on the bed and it appeared no one had used it. I took Ferrel back to the intersection of 191. Having previously asked the victim (Susan) about needing medical attention I asked her again. She again said no that she was not injured. Susan was wearing shorts and a blouse. She did not have any obvious injuries and no fluid or secretions showed through her clothing. I asked Susan, Rusty, David and Polly to follow me back to the sheriff's office which they did. I contacted dispatch and asked to have a mental health worker respond. Dispatch said that Carol Williams would meet us at the sheriff's office. At the sheriff's office I asked Deputy Boren to take David and Polly and further interview them. (see tape) I had Susan and Rusty come into the deputies office. There I explained to them what procedures were being followed and that Carol was on her way. Susan said she would talk to me and did not want Rusty or Carol there. (The interview was taped) Susan told me of the previous nights talk around the campfire with Wayne (Henle). Susan said when she and Rusty went to bed that Wayne was alone at the campfire. She said they went to bed very late and that she was a heavy sleeper. She said when she woke up she could feel fingers inside her vagina. It was dawn and she was able to see that it was Wayne. She screamed and moved away from him. Her bra had been undone and her panties were missing. (The panties were later found on the floor where Henle had been laying). Henle was asked by Rusty what in hell

he was doing there? He said he was cold and had come in there to get warm. Henle was trying to get out of the camper but was having a hard time because his pants was down around his ankles. (It is unknown weather his underwear was down or not). Rusty and David pursued Hanle into the compound a few minutes later. Rusty threw Hanle on the ground and told him to leave Ferrel came out of his trailer at this point and told Hanle to saddle his horse and leave.

After the interview Susan met with Carol and arranged for there counseling for her in Price.

Mrs. Hanle and her mother came into the office aboubt 1530 and met with myself and Deputy Boren. She said that Wayne had done a similar thing with another woman a few months earlier. He had gone to her residence and said that his wife didn't let him have sex and asked her if he could talk to her. Mrs. Hanle said she didn't trust him and was going to get a divorce.

....Case closed pending court...

HERBERT Wm. GILLESPIE, #1191
DUCHESNE COUNTY ATTORNEY
Attorney for Plaintiff
P.O. Box 206
Duchesne, Utah 84021
(801) 738-2435

IN THE EIGHTH DISTRICT COURT OF THE
STATE OF UTAH IN AND FOR
DUCHESNE COUNTY

Criminal No. 941800041 FS
Judge A. Lynn Payne

[Filed June 13, 1994]

STATE OF UTAH,	)
	)
Plaintiff,	)
	)
vs.	)
	)
WAYNE GENE HENLE	)
	)
Defendant.	)
DOB: 7-25-63	)
	)

The undersigned County Attorney, Herbert Wm. Gillespie, charges the defendant with the following crime:

COUNT I
(crime) FORCIBLE SEXUAL ABUSE
(classification) Second Degree Felony

AT: Duchesne County, State of Utah
ON OR ABOUT: June 12, 1994

IN VIOLATION OF: Section 76-5-404 UCA (1253) as amended

THE ACTS OF THE DEFENDANT CONSTITUTING THE CRIME WERE:

That at the time and place aforesaid, the defendant did touch the anus, buttocks, or any part of the genitals of another, or the breast of a female, or otherwise took indecent liberties with another, with intent to arouse or gratify the sexual desire of any person, without the consent of the other.

THE VICTIM IS: Susan Sisneios

COUNT II

(crime) BURGLARY OF A DWELLING
(classification) SECOND DEGREE FELONY

AT: Duchesne County, State of Utah
ON OR ABOUT: June 12, 1994

IN VIOLATION OF: Section 76-6-202 UCA (1953) as amended

HERBERT Wm. GILLESPIE, #1191
DUCHESNE COUNTY ATTORNEY
Attorney for Plaintiff
P.O. Box 206
Duchesne, Utah 84021
(801) 738-2435

IN THE EIGHTH DISTRICT COURT OF THE
STATE OF UTAH IN AND FOR
DUCHESNE COUNTY

Criminal No. 941800041

[Filed December 7, 1994]

STATE OF UTAH,	)
	)
Plaintiff,	)
	)
vs.	)
	)
WAYNE GENE HENLE,	)
	)
Defendant.	)
	)

AFFIDAVIT OF DEFENDANT IN ADVANCE OF
GUILTY PLEA AND AGREEMENT

WGH I, WAYNE GENE HENLE, under oath, hereby acknowledge that I have entered or will be entering a plea of guilty to the following crime:

CRIME	DEGREE	PUNISHMENT (MIN/MAX)
FORCIBLE SEXUAL ABUSE	SECOND DEGREE FELONY	1-15 year U.S.P. and/or $10,000.00 fine

WGH I have received a copy of the Information which states the charge against me, I have read it and/or have had it read to me, and I understand the nature and elements of the offense to which I am pleading guilty.

The elements of the crime for which I am entering a guilty plea are as follows:

That on or about June 12, 1994, in Duchesne County, State of Utah, defendant did touch the anus, buttocks, or any part of the genitals of another, or the breast of a female, or otherwise took indecent liberties with another with [p.2] intent to arouse or gratify the sexual desire of any person, without the consent of the other.

WGH My conduct that constitutes the elements of the crime charged are as follows:

WGH That on or about June 12, 1994, in Duchesne County, State of Utah, I did touch the anus, buttocks, or genitals, or the breast of Susan Sisneios, or otherwise took indecent liberties her, with intent to arouse or gratify my sexual desire, without Susan's consent.

WGH I am entering this plea voluntarily and with knowledge and understanding of the following facts:

WGH 1. I know that I have the right to be represented by an attorney and that if I cannot afford one, an attorney will be appointed by the Court at no cost to me.

WGH 2. I have not waived my right to counsel.

WGH 3. I have read this affidavit and understand the nature and elements of the charges, my rights in this and other proceedings and the consequences of my plea of guilty.

WGH 4. I have not waived my right to counsel, my attorney is David M. Allred, and I have had sufficient opportunity to discuss this affidavit, my rights and the consequences of my guilty plea with my attorney.

WGH 5. I know that I have a right to a trial by jury.

WGH 6. I also how that if I wish to have a trial I have the right to see and hear the witnesses against me in open court, in my presence, and before the judge and jury, with the right to cross-examine those witnesses or to have them cross-

* * *

[original pages 3-7 filed out of order;
see infra JA 1116-1120]

* * *

[p.8] ORDER

The Court, having heard the representations made to it by counsel, having determined that Defendant is fully aware of his constitutional rights and of the purpose of this proceeding, accepts Defendant's plea of guilty and finds that it is knowingly made and that he is under no undue stress or influence. The Court further approves the terms of the agreement set forth hereinabove.

DATED this 1 day of December, 1994.

BY ORDER OF THE COURT:

/s/ _____
DISTRICT COURT JUDGE

HERBERT Wm. GILLESPIE
DUCHESNE COUNTY ATTORNEY
P.O. Box 206
Duchesne, Utah 84021
(801) 738-2435

IN THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF UTAH DUCHESNE COUNTY,
DUCHESNE DEPARTMENT

Criminal No. 941800041
Judge A. Lynn Payne

[Filed February 23, 1995]

STATE OF UTAH,	)
	)
Plaintiff,	)
	)
vs.	)
	)
WAYNE GENE HENLE,	)
	)
Defendant.	)
	)

JUDGMENT AND ORDER

FORCIBLE SEXUAL ABUSE
SECOND DEGREE FELONY

This matter came on for sentencing on the 9th day of February, 1995, before the Honorable A. Lynn Payne. The plaintiff was represented by Herbert Wm. Gillespie, Duchesne County Attorney. The defendant was present and represented by his attorney, David N.

Allred. The Court heard statements from counsel for the parties and defendant, and indicated that he had read the report of State Corrections. Based upon these statements and the record before the Court:

IT IS ADJUDGED in the defendant has been convicted upon a plea of guilty of the crime of FORCIBLE SEXUAL ABUSE, a Second Degree Felony. Court having asked if the defendant has anything to say why judgement should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ORDERED That the defendant be confined and imprisoned at the Utah State Prison for a term of not less than one (1) nor more than fifteen (15) years, and to pay a fine of $2,000.00. Execution of said prison sentence is suspended and defendant is placed on probation for a period of thirty-six (36) months on the following terms and conditions:

1. Defendant is to sign an agreement with Adult Probation and Parole Department and abide by the terms and conditions thereof.

2. Defendant is to violate no laws.

3. Defendant is to keep Court and Adult Probation and Parole advised of his address and telephone number at all times, and to report to Court when asked to do so.

4. Defendant is to make himself available for search, seizure and chemical testing of bodily fluids, or breath, without warrant, at the request of Adult Probation and Parole or any other law enforcement official.

5. Defendant is to enter into and complete any program of outpatient mental health treatment or counseling as may be recommended by the Department of Adult Probation and Parole, and to successfully complete program as approved by Dr. Roby.

6. Defendant is not to consume any alcoholic beverages or controlled substances during the term of his probation and he is not to be where alcohol is served (except a restaurant) or to associate with people who use alcohol.

7. Defendant is to serve six (6) months in the Duchesne County Jail. Defendant is to report to jail on March 6, 1995.

8. Defendant may do community service hours at $5.00 per hour to pay for fine, as approved by Adult Probation and Parole.

9. Defendant is to pay restitution for counseling if necessary.

DATED this 23 day of February, 1995.

BY ORDER OF THE COURT:

/s/ _____

A. LYNN PAYNE
District Court Judge

CERTIFICATE OF MAILING

I do hereby certify that on the 23rd day of February, 1995, I mailed a true and correct copy of the foregoing JUDGMENT AND ORDER, postage prepaid, to:

Mr. David M. Allred, attorney for defendant, at 265 East Main Street, P. O. Box 575, Castledale, Utah 84513, and

Mr. Kirk Mullins, Adult Probation and Parole, P. O. Box 1823, Roosevelt, Utah 84066, and

Mr. Evan R. Reid, Adult Probation and Parole, 630 West Price River Drive, Price, Utah 84501,

by depositing the same in the United States Mail in Duchesne, Utah.

/s/ DeAnn Mitchell
Secretary

JA 1140

EXHIBIT 2

VOLUNTARY STATEMENT

STATEMENT OF	Ronald & Nancy Atwood
ADDRESS	PO Box 542
	Loa UT 8 [illegible]7
TELEPHONE	(H) 435-836-2144 (W)
DATE	March 29, [illegible]

When Wayne Henley and Pam came back from Elko, they invited us to a BBQ out to Huntington [illegible]. Derrick had noticed a bandage on Wayne's hand & asked him about it. He just said his horse bit him with a [illegible]. Ron & Wayne had talked about [illegible] horses so Ron invited him to [illegible] Canyon.

One week-end he went up there. The 1st night we all partied and I (Nancy) noticed he kept staying [illegible] to Susan who is now Rusty Atwood's wife. I tried to stay away from him as there was something I didn't like about him.

The next morning I heard commotion going on outside of the trailer. David Atwood was beating up Wayne for what he had done. He had crawled into their trailer & was [illegible] with Susan's privates while she was asleep. At first she thought it was Rusty until she woke up & seen Wayne on the floor with his pants down to his knees & his hands under the blanket. She screamed & he crawled out of the trailer. Susan had told Rusty what was going on & David heard, jumped out of the trailer & pulled Wayne off his horse. He was headed to go home. Ferrel called Duchense County Police & they arrested Wayne. He

said he thought that he got into his trailer and he never even had a trailer there.

Pam had asked Ron if [illegible] could borrow the horse trailer to go up to get Wayne's horse and she made a [illegible] about the fact that Wayne had done the same thing to some woman in Elko. She said that he had thought it was his home.

/s/ Ronald Atwood
/s/ Nancy K. Atwood

/s/
Christine Olsen
Notary Public
[Notary Seal]

JA 1142

EXHIBIT 3

VOLUNTARY STATEMENT

STATEMENT OF	Debbi D. Dean
ADDRESS	PO Box 33
	Carlin, NV 89822
TELEPHONE	(H) (702)-754-2650
	(W) (702) 754-6175
DATE	Oct. 24, 1998

In October, 1993, I was awakened by my heeler dogs barking. It woke from a sound sleep, and I told them to hush and go back to bed.

Well, I laid there, trying to go back to sleep but I heard noises of something scooting across the rug.

I jumped out of bed, and turned on the adjoinin bathroom's light, since it was closer. I saw a man's body down on his hands and knees, crawling on the opposit side of the bed.

I ran out to the phone and dialed 911. Upon hearing me talk to the dispatcher Wayne Henle, came out to the living room, and said to hold on, he'd just come over to talk to me about his wife. Said he was crawling cause he was drunk, but he needed to talk to me.

Wayne & his wife were neighbors across the street, and they'd just exchanged vows not to awfully long before.

I told the dispatcher, that it was just a friend who's wife was in trouble, and I apologized bothering them.

I then told Wayne, I'd call Pam, but I wanted him out of my house. He got up and staggered out.

I called Pam. She assured me, she was [illegible]My daughter, had been baby-sitting for them earlier, and they'd been out on a date. Asked Pam to please wake, her, & send her home.

EXHIBIT 4

VOLUNTARY STATEMENT

STATEMENT OF	Essy Sallee
ADDRESS	P.O. Box 292
	Carlin, NV. 89822
TELEPHONE	(H) N/A (W) 754-6585
DATE	3-3-98

The night in question up at Cee Gee's I was working grave yard I (think) then the shift change was at 11:45 p.m. Troy came into the bar ordered a Coors Light in the bottle with a couple of his friends. They said they just came from the peacock. He was wearing a long black trench coat nice shirt and jeans. Went outside stayed awhile came back in then outside again I asked what was wrong they said he was sick. They left about an hour later. Never saw them again. I heard he had a trial and later read it in the paper. I want to know why after all this time I was not called in at the very beginning until now after 5 or 6 yrs. later. You want a statement I refresh my memory. You should've done it then not now. If I get asked about this again I'm going to dumb up because this is bullshit and I'm starting to get pissed. So please leave me alone.

I'm sorry to sound this way but like I said this should've been taken care 5 or 6 yrs ago not 5 or 6 yrs later. This had better be the last time I hear about this.

Thanks. I'm pissed off.

State of Nevada
County of Elko

On March 9, 1998, appeared Esther Sallee and personally signed the above document.

Notary:
/s/ Sharon M. Ankrum /s/ Essy Sallee
[Notary Seal]

EXHIBIT 5

VOLUNTARY STATEMENT

STATEMENT OF	Kerry L. Frusetta
ADDRESS	407 Pennsylvania Ave #1
	Hamilton, MT 59840
TELEPHONE	(H) (406) 363-1516
	(W) (406) 363-6837
DATE	3/3/98

Troy and I had been dating for awhile and having a wonderful, healthy sexual relationship. I had been with him the night before he was arrested at his home. He was a loving, caring normal individual whom I loved to spend time with. He had no mean or threatening bone in his body in order to be able to do such an act as he was blamed for, that would take an insane person to do that to those girls.

Troy always treated me with kindness and with respect. Troy always thought of others before himself. Troy was very good with his nephew & niece, he was also very good with my sister's girls, he absolutely loves kids. Troy is just not the kind of guy who would hurt anyone.

/s/ Kerry L. Frusetta

/s/ Jackie Hays
[Notary Seal]

JA 1147

FAX TRANSMISSION

March 6, 1998

TO Dennis FAX # 702-938-1928
FROM Ms. Kerry Frusetta

ATTACHED Voluntary statement dated 3/3/98.

NO. OF COPIES 2 (including this page)

PLEASE ANSWER BY: ___ FAX TRANSMISSION
___ PHONE CALL
XX NO RESPONSE

FURTHER INSTRUCTIONS: _____

CONFIDENTIALITY NOTICE

This facsimile transmission (and/or the documents accompanying it) may contain confidential information belonging to the sender which is protected by the attorney-client privilege. The information is intended only for the use of the individual or entity named above. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution or the taking of any action in reliance on the contents of this information is strictly prohibited. If you have received this transmission in error, please immediately notify the sender by telephone at (406) 363-1040 to arrange for return of the documents.

JA 1148

EXHIBIT 6

VOLUNTARY STATEMENT

STATEMENT OF	Clyde Rarrick
ADDRESS	1302 Fir - P.O. Box 1417
	Carlin NV. 89822
TELEPHONE	(H) 754-6073 (W)
DATE	3-13-1998

I have had conversations with Essay & several other people. The conversation with Essay brought up details of times and clothing that Troy Brown wore and times that he was there. Essay said that Troy was there at Cee Gee Bar until after 12:30 A.M. on the night in question. Essay discribed the clothing Troy was wearing and the brand of beer he ordered.

I have alway wondered in this case why some people were not questioned. Patrick Johnson my nephew. Debbie Dean, Vicki Gillispee, Lori Rarrick, Nickolas Milodragovick, and my self. These were all people who lived around the crime scene or were in the bar the night in question.

I have always thought Troy Brown was innocent of these charges and always will. Why did the investagators not try to find out who was in the two bars during the time frame. We were between the Peacock Lounge & Cee Gee's clear up till 1:00 or 1:30 AM. in the morning.

/s/ Clyde Rarrick

State of Nevada)

County of Elko)

On March 13, 1998, Clyde Rarrick personally appeared before me, whom I know personally/~~whose identity I verified upon the oath of _____, a credible witness/whose identity I verified on the basis of his/her _____, to be the person who signed this certificate while under oath, being sworn by me, and swears that he/she was present and saw _____ sign his/her name to the above/attached document and that it is his/her signature.~~

/s/ Clyde Rarrick _____
Affiant's signature

Signed and sworn to before me by Clyde Rarrick, this 13 day of March, 1998.

/s/ Sharon M. Ankrum
Notary Public

Residing at Carlin, NV
My commission expires: 1-4-2000

JA 1150

EXHIBIT 7

VOLUNTARY STATEMENT

STATEMENT OF	Lori Rarrick
ADDRESS	1302 Fir - P.O. Box 1417
	Carlin, NV 89822
TELEPHONE	(H) (702) 754 6073 (W)
DATE	3-13-1998

On the night of January 28, 1994 and early morning of January 29, 1994 my daughter Casey Rarrick received a phone call from her father, Clyde, saying he needed a ride home from the bar. I was already in bed so I got up and got dressed and left my house to go get him. I looked at the time it was 12:15 AM. I looked for him walking home, on my way to the bar. I didn't see anyone walking. At the time I lived at 1645 Maggie Court in Carlin. The direction I drove was from Maggie Court - north on Puett Drive - west on Chestnut to Cee Gee's Saloon.

/s/ Lori Rarrick 3-13-98
Lori Rarrick

State of Nevada)

County of Elko)

On March 13, 1998, Lori Rarrick personally appeared before me, whom I know personally/~~whose identity I verified upon the oath of _____, a credible witness/whose identity I verified on the basis of his/her _____, to be the person who signed this certificate while under oath, being sworn by me, and swears that he/she was present and saw _____ sign his/her name~~

~~to the above/attached document and that it is his/her~~ signature.

/s/ Lori Rarrick
Affiant's signature

Signed and sworn to before me by March 13, this ____ day of _____, 1998.

/s/ Sharon M. Ankrum
Notary Public

Residing at Carlin, NV
My commission expires: 1-4-2000

[Notary Seal]

IN THE FOURTH JUDICIAL DISTRICT COURT – DEPT 1 IN AND FOR THE COUNTY OF ELKO, STATE OF NEVADA

NO. CV-HC-01-0607
DEPT. 1

[Filed September 10, 2001]

TROY DON BROWN,	)
	)
Petitioner,	)
	)
vs.	)
	)
WARDEN OF LOVELOCK CORRECTIONAL CENTER, and THE STATE OF NEVADA,	)
	)
Respondent.	)
	)

RETURN TO WRIT OF HABEAS CORPUS

COMES NOW, the WARDEN OF LOVELOCK CORRECTIONAL CENTER and the STATE OF NEVADA, by and through the Elko County District Attorney's Office, and states as follows:

That the above-named Petitioner is presently in my custody in the Lovelock Correctional Center, 1200 Prison Road, Lovelock, Nevada 89419.

That the above-named Petitioner is presently being detained by virtue of a Judgment of Conviction, a copy

of which is annexed hereto. Dated this 10 day of September, 2001.

/s/
CRAIG FARWELL, WARDEN
LOVELOCK CORRECTIONAL CENTER
STATE OF NEVADA

/s/ Tanny Julian
Notary Public
[Notary Seal]

CERTIFICATE OF SERVICE

I hereby certify, pursuant to the provisions of NRCP 5(b), that I am an employee of the Elko County District Attorney's Office, and that on the 10th day of September, 2001, I served the foregoing RETURN TO WRIT OF HABEAS CORPUS on the Defendant(s) above-named by delivering, faxing or mailing or by causing to be delivered, faxed or mailed, a copy of said document to the following:

By delivering to:

HONORABLE J. MICHAEL MEMEO
JUDGE OF THE FOURTH JUDICIAL DISTRICT
COURT- DEPT 1
Elko County Courthouse
Elko, NV 89801

And

By mailing to:

DAVID M. SCHIECK

ATTORNEY AT LAW
302 E CARSON AVENUE / SUITE 600
LAS VEGAS, NV 89101

/s/ Diane L. [illegible]
Caseworker

DA No. HC-1-607-1
FRM: RTNWRIT.HC
EVNT: RTN

IN THE FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

CASE NO. 5833
DEPT. NO. I

[Filed March 18, 1998]

THE STATE OF NEVADA	)
	)
PLAINTIFF,	)
	)
V.	)
	)
TROY DON BROWN,	)
	)
DEFENDANT.	)
	)

AMENDED
JUDGMENT OF CONVICTION
(Jury Verdict - Incarceration)

This Amended Judgment of Conviction is being filed after the re-sentencing of the defendant in compliance with the decision issued by the Nevada Supreme Court.

On the 30th day of September, 1994, the above-named defendant, TROY DON BROWN, [who is further described as follows: Social Security Number 529-29-7693; Date of birth: 09/21/71, (age 26); Place of birth: Gunnison, Utah] was found guilty by a jury of the crime(s) described below and as more fully set forth in the criminal information filed herein. Legal

counsel present at the defendant's trial were, David B. Lockie, Esq., representing the defendant, and Marshall S. Smith, Elko County District Attorney, representing the state.

DESCRIPTION OF CONVICTIONS

COUNT 1: SEXUAL ASSAULT ON A CHILD UNDER THE AGE OF 14 YEARS RESULTING IN SUBSTANTIAL BODILY HARM, A FELONY AS DEFINED BY NRS 200.366

COUNT 2: SEXUAL ASSAULT ON A CHILD UNDER THE AGE OF 14 YEARS, A FELONY AS DEFINED BY NRS 200.366

Amount	Name of Victim
$25,266.48	University of Utah Neuro Psychiatric Hospital/Western Institute Inpatient Psychiatric Facility
$ 3,100.39	Elko Sheriff's Office for hospital bills for the defendant while incarcerated.
$ 359.00	Elko General Hospital for care of the defendant.
$ 61.35	Medicare for victim care.
$ 532.00	Elko Regional Clinic for victim care.

$ 288.00	Nevada State Mental Health Program for outpatient counseling of victim.

BAIL

IT IS HEREBY ORDERED that any bail bond previously posted for said defendant shall be exonerated. Any cash bail posted for said defendant shall be applied first to administrative fees, fines or restitution due pursuant to his judgment and any amount remaining shall be returned by the clerk to the person who posted said cash bail. *See* NRS 178.528.

ENTRY OF JUDGMENT

IT IS FURTHER ORDERED that the clerk of the above-entitled Court enter this JUDGMENT OF CONVICTION as part of the above-entitled matter.

SO ORDERED this 17th day of March, 1998.

/s/
J. MICHAEL MEMEO
DISTRICT JUDGE - DEPARTMENT I

CERTIFICATE OF HAND DELIVERY

Pursuant to NRCP 5(b), I certify that I am the secretary to J. MICHAEL MEMEO, District Judge, Fourth Judicial District Court, Department I, and that on this 18th day of March, 1998, I personally hand delivered a true copy of the foregoing document to:

Gary D. Woodbury, Esq.

Elko County District Attorney
Elko County Courthouse
Elko, NV 89801
{1 File Stamped Copy}
[Box in Clerk's Office]

Dept. of Parole and Probation
Elko County Courthouse
Elko, NV 89801
{1 File Stamped Copy}
[Box in Clerk's Office]

Elko County Sheriff's Office
Elko County Courthouse
Elko, NV 89801
{2 Certified Copies}
[Box in Clerk's Office]

Dated this 18th day of March, 1998.

/s/
LINDA SARMAN

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I hereby certify that I am the secretary to J. MICHAEL MEMEO, District Judge, Fourth Judicial District Court, Department I, and that on this 18th day of March, 1998. I deposited for mailing in the U.S. mail at Elko, Nevada, postage prepaid, a true copy of the foregoing document to:

Dennis E. Widdis, Esq.
711 S. Arlington Ave.
Reno, NV 89509

Dated this 18th day of March, 1998.

/s/
LINDA SARMAN

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT IN AND FOR THE COUNTY OF ELKO, STATE OF NEVADA

CASE NO. CV-HC-01-0000607
DEPT. NO. I

[Filed December 14, 2001]

TROY DON BROWN,	)
	)
Petitioner,	)
	)
vs.	)
	)
WARDEN OF LOVELOCK CORRECTIONAL CENTER, and the STATE OF NEVADA,	)
	)
Respondent.	)
	)

ANSWER IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION) AND MOTION TO DISMISS PETITION

COMES NOW, the Respondent, State of Nevada, by and through the Elko County District Attorney, who hereby respectfully submits its Answer in Opposition To Petition For Writ of Habeas corpus (Post Conviction) and Motion to Dismiss Petition (hereinafter referred to as "Opposition"). This Opposition is made and based upon the following Memorandum of Points and Authorities in support

hereof, as well as the documents, pleadings and exhibits already on file with this Honorable Court.

In compliance with NRS 34.760, the State informs the Court that the Defendant filed a direct appeal from his judgement of conviction, a second appeal from the re-sentencing ordered as a result of the first appeal, as well as an appeal from the denial of the court of Petitioner's motion for a new trial.

All transcripts of all proceedings are available in the file of the Elko County Clerk.

Attached are copies of Petitioner's briefs on appeal and the opinions of the Supreme Court of the State of Nevada.

DATED this 14 day of December, 2001.

GARY D. WOODBURY
State Bar #1915
Elko County District Attorney

/s/ Gary D. Woodbury

POINTS AND AUTHORITIES

Troy Don Brown (Brown) has filed a petition for post conviction relief alleging that he was ineffectively represented by counsel at his jury trial and thereafter. Brown has set out the facts of the case in which counsel is alleged to have been ineffective, but claims the facts drawn from the jury trial do not represent the truth because little or no investigation by Petitioner's trial counsel was done.

The State asserts the following changes or additions to the facts asserted by Brown.

1. There is no evidence from which it can be ascertained that the sexual assault of Megan Allred (Allred) occurred shortly after midnight; indeed, there is significant evidence that the attack may have occurred as late as approximately 1:00 a.m.

2. Allred was not consistent in her claim that the man who attacked her smelled of cologne.

3. Allred called her mother at the bar to tell her of the attack. The mother testified that she immediately drove the short distance home and then immediately called authorities. That call was made at approximately 1:15 a.m.

4. Allred stated that she tried to bite her attacker, but was not sure she was successful.

5. While the doctor thought he might have taken scrapings of Allred's teeth, that was doubtful. No police officer saw the doctor taking teeth scrapings. Marilou Tognarelli (Tognarelli) believed she saw the scrapings put in the rape kit.

6. Brown never saw a doctor regarding the absence of bite marks. He saw a physician's assistant.

7. In Brown's conversations with police, his denials of his involvement in the attack were equivocal.

The State will respond to Petition's allegations in the order in which Petitioner has presented them.

MOTION TO DISMISS

The petition requesting relief for errors occurring at trial is untimely. NRS 34.726 requires petitions for post conviction relief to be filed within one year following remittitur from the Supreme Court if the case has been appealed, unless the petitioner shows good cause for not doing so. The Supreme Court decided the appeal from the Judgement of Conviction on February 26, 1997. Remittitur issued on March 18, 1997. The appeal reversed a portion of the conviction and remanded for sentencing on one count. Defendant filed his petition for post conviction relief in 2001, more than four years after the issuance of remittitur. The question posed is whether the fact that the decision on appeal remanded the case for a re-sentencing stayed the time provisions of NRS 34.726, or constitutes good cause for delay. Petitioner has not addressed his failure to timely file. The State therefore requests that the petition be dismissed.

Presumably, Petitioner did not address the issue of timeliness because he filed the petition within one year after remittitur issued on his second direct appeal from the sentencing and his motion for new trial. It is the State's position that all claims of ineffective assistance of trial counsel had to be included in a post-conviction petition filed within one year after remittitur of the first appeal. The Nevada Supreme Court has specifically held that the "statutory time limit at NRS 34.726(1), like the former one-year time limit at NRS 177.315, evinces intolerance toward perpetual filing of petitions for relief, which clogs the court system and undermined the finality of convictions", Pelligrini v. State, Supreme Court case number 35999, filed November 15, 2001. Although the

Supreme Court did not directly decide the instant issue in Dickerson v. State, 114 Nev 1084 (1998), its reasoning regarding not reading a statute to reach an absurd result is instructive. There the Defendant sought to file a post conviction petition more than one year after the judgement of conviction, based on the theory that he had attempted but failed to properly file a direct appeal, and the remittitur from the improper appeal was the date from which the one year period prescribed in NRS 176.726 ran. The Court held at page 1088, "If the appeal referred to in NRS 34.726(1) meant any appeal, whether this court obtained jurisdiction or not, petitioners would be able to file successive notices of appeal year after year and thus perpetually restart the on-year limitation period." In this case, Brown is attempting to reach the same result by ignoring the first appeal and relying on the second. He should not be allowed to do so. The petition insofar as it addresses trial issues is not timely.

The State additionally asserts and relies on NRS 34.800, the laches statute, which in subsection 2 creates a rebuttable presumption of prejudice to the State of Nevada if the petition is filed more than five years after the filing a judgment of conviction. Petitioner must be given an opportunity to respond to this allegation NRS 34.800(2).

1. TRIAL COUNSEL FAILED TO OBJECT OR OTHERWISE PREVENT BROWN FROM BEING SEEN BY THE JURY WHILE WEARING SHACKLES AND JAIL GARB.

Petitioner first claims that during the trial he had to walk in jail garb past "where the jury could see" him in restraints and jail clothes, and that he complained

to trial counsel who did nothing. The State cannot determine from Brown's affidavit whether he claims that the jury did see him in restraints and jail clothes, or whether he was positioned in such a way as they could see him, nor does he state whether this occurred in the penalty or guilt phase. If the jury saw him in jail garb and shackles at the penalty phase, it is not error, Duckett v. State, 104 Nev 6 (1988).

Petitioner's allegations, therefore, are bare or naked allegations which do not justify an evidentiary hearing on this issue, Hargrove v. State, 100 Nev 398 (1984).

The Court is obliged to dismiss the petition on this issue if it could have been presented to the trial court or raised on direct appeal unless the Court finds cause for the failure to raise it and actual prejudice, NRS 34.810. Petitioner's affidavit arguably establishes why the issue was not raised in the trial court (he told trial counsel and counsel did nothing), but he offers no reason why the issue was not raised on direct appeal which was conducted by counsel different from trial counsel. Brown has not claimed that his appellate counsel in the first appeal was incompetent. A constitutional question can be raised on appeal even if the defendant didn't object at trial, Hardeson v. State, 84 Nev 125 (1968). Brown was certainly aware before appeal that it was improper for jurors to see him restrained or in jail clothes, since he alleges that he informed trial counsel that was happening and trial counsel did not raise the issue. At the pre-trial hearing on September 26, 1994, the Court, having just revoked the Defendant's bail, clearly stated that safeguards would be put in place to see that what Petitioner now complains about would not happen - see page 15, line

19, pre-trial hearing, Transcript of Proceedings (TOP), September 26, 1994. The Petitioner was present, TOP, page 2, line 5. Brown was obliged to present the alleged error in a direct appeal, and has shown no cause why he did not do so.

The State submits herewith the affidavit of trial counsel, David Lockie (Lockie), and the affidavit of John Croswell (Croswell), Lieutenant at the Elko County Jail. Lockie asserts that Brown never told him of the problem. Croswell asserts that at no time was Brown transported to the courthouse in jail garb and that his shackles were always removed in the basement of the courthouse prior to any possibility that the jury could see him. The State suggests that the claim is a recent fabrication by the Petitioner.

In order for Brown to be entitled to an evidentiary hearing on this issue, Brown must set forth a factual background, names of witnesses or other sources of evidence demonstrating entitlement to relief, Hargrove v. State, 100 Nev at 503 (1984). Brown has, thus far, not set forth a factual background which meets that test.

Brown may be entitled to an evidentiary hearing on this issue only if the Court determines that the allegations go beyond bare claims for relief, that he was actually seen by the jury in restraints and jail garb during the guilt phase, and that there exists good cause for the issue not being raised on direct appeal. The necessity for such a hearing can be better determined if the Court requires Brown to clarify by supplemental affidavit whether he claims the jury did see him in restraints and jail garb, if so, at what stage

of the proceeding that occurred, and why the issue was not raised on direct appeal.

2. TRIAL COUNSEL FAILED TO FILE A MOTION OR OTHERWISE OBJECT TO EXCLUDE ALL DNA EVIDENCE TO A FAILURE OF CHAIN OF CUSTODY PROOF.

Petitioner argues that the Washoe County Crime Lab was not certified to perform DNA testing; that the blood drawn from the victim was not identified by placing the victim's name on the vial; that the Washoe County serologist was mistaken regarding whether the Petitioner had gone to bed after the crime and as a result did not test certain other materials; and that teeth scrapings from the victim were lost.

The question of whether a pre-trial evidentiary hearing should have been sought by trial counsel concerning the DNA evidence was presented to the Supreme Court on direct appeal. Specifically, Brown argued in his appeal that, the Washoe County Crime Lab was in its "infancy in conducting DNA work", that Renee Romero (Romero) was not properly qualified as an expert either at trial or preliminary hearing, that inaccurate population frequency statistics were used, that Romero was first of the opinion that there was insufficient semen for RFLP testing, that additional testing on Brown's bedding was not done because of a mistaken assumption that Brown had not gone to bed after the incident and that teeth scrapings from the victim were lost. There is not a single new argument in Brown's Petition.

The Supreme Court examined Brown's appellate allegation for plain error and found none, Supreme

Court Opinion, page 13, attached to the Petition. "Plain Error" has been defined by the Nevada Supreme Court as error which either had a prejudicial impact on the verdict when viewed in context of the trial as a whole, or seriously affects the integrity or public reputation of judicial proceedings, Libby v. State, 109 Nev 905 (1993). The law of the case on this issue is that there was no prejudicial impact on the verdict based on the allegations of Petitioner. All of the claims of Petitioner have been litigated and decided in the appeal and cannot support this petition, Hall v. State, 91 Nev 314 (1975). Petitioner's attempt to cast the question in a new factual and legal setting is of no avail, Hogan v. Warden, 109 Nev 952 (1993).

Brown also alleges that there existed a chain of custody error in handling the victim's blood that was used in the DNA testing. Jennifer Bonaudi (Bonaudi), a medical technician at the Elko General Hospital, testified at trial that she withdrew blood from the victim, whom she identified from a photograph, placed the vial into an envelope containing the victim's name, sealed it and then signed as the first person in the chain of custody, transcript of trial testimony - September 29, 1994, at page 239, commencing at line 12. Bonaudi testified that the envelope is considered to be the label for the tube of blood. She then handed the sealed envelope to a Carlin police officer. Chris Murphy (Murphy), a Carlin police officer, was present for the blood draw, received the sealed envelope from Bonaudi and transported it to the Carlin Police Department where he placed it in a refrigerator, and subsequently released it to Officer Mike Terry (Terry) of the Carlin Police Department for transportation to the Washoe County Crime Lab - September 29, 1994, trial transcript, commencing at page 242, line 26.

Maria Fassett (Fassett) of the Washoe County Crime Lab received the envelope on February 2, 1994. To establish a valid chain of custody, it is not necessary to negate all possibilities of substitution or tampering with the exhibit, or to trace its custody by placing each custodian on the stand. It is sufficient if it can be established that it is reasonably certain that no tampering or substitution took place. Doubt goes to the weight of the evidence, not its admissibility, Sorce v. State, 88 Nev 350 (1972). A sufficient chain of custody was established in connection with the blood drawn from the victim. Petitioner's claim of error is belied by the record in the case and cannot support his claim for relief, Vaillancourt v. Warden, 90 Nev 431 (1974).

Petitioner's quarrels with the qualifications of Romero and the Washoe County Crime Lab to do the DNA testing are repelled by the record as well as having been previously litigated. Romero spelled out her qualifications to testify as an expert on DNA analysis and comparison and her CV was placed into evidence - September 29, 1994, trial transcript, commencing at page 299. Romero was accepted by the Court as an expert, as she had been in other District Courts. Romero gave the jury a comprehensive review of the theory of DNA analysis and comparison which substantiated her expertise. The jury was properly instructed (jury instruction #10) how to evaluate expert testimony.

At the preliminary hearing, trial counsel cross-examined Romero extensively on her qualifications as well as the laboratory's qualifications to perform DNA testing. Romero's responses were cogent and well reasoned. Trial counsel could easily have determined, as his affidavit asserts, that rather

than cross-examine Romero before a jury whereby she would have an opportunity to reassert her knowledge and qualifications to do DNA testing, that it would be wiser to concentrate on the one area of weakness regarding the DNA, that being that initially Romero thought she had a too small sample of semen to complete an RFLP test.

Trial counsel has submitted an affidavit explaining the tactical choices he made to deal with the DNA evidence. Examination of the closing argument of trial counsel makes clear his tactical choices were followed. First he attacked the failure of the State to provide any objective information regarding the scientific validity of DNA testing and the usefulness of the statistical calculations derived therefrom. He also attacked the failure of Washoe County to test other submitted materials, such as pubic hairs, and other semen samples.

The affidavit of trial counsel Lockie further establishes that he did retain a DNA expert who inspected the Washoe County Crime Lab facilities and rendered him an opinion that Washoe County Crime Lab was capable of accurately testing DNA. An affidavit from Romero dated March 29, 1994, establishes that both Petitioner's trial counsel and Petitioner's DNA expert were present for testing at the Washoe County Crime Lab. On March 24, 1994, the parties entered into a stipulation allowing defense experts access to all DNA testing. The billing of trial counsel establishes that on July 12, 1994, he spent three hours preparing to meet DNA evidence, that on August 3, 1994, he involved himself in two hours of preparation in connection with DNA evidence, and that thereafter on May 5, May 18, May 24, July 6,

August 9, August 30, and September 7, he did additional work on preparing for the DNA evidence. The billing of trial counsel also shows that he employed Forensic Scientists Associates, at a cost of more than $2,200.

Contrasting the failure of counsel in this case to request a pre-trial determination of the admissibility of the DNA with the issues posed in Drake v. State, 108 Nev 523 (1992), it is clear why a hearing is not necessary. There, trial counsel failed to object to the State's motion to exclude a rape victim's criminal record which consisted of prostitution. Obviously trial counsel believed that the rape shield law forbade use of her prior convictions, which the Supreme Court found to be questionable. Thus an evidentiary hearing was necessary to find out if counsel had other reasons for not contesting the motion of the State. Here, trial counsel made no similar misreading of the law, and no hearing is thus necessary to further examine his tactical decisions.

3. TRIAL COUNSEL FAILED TO OBTAIN INDEPENDENT TESTING BY AN INDEPENDENT DNA EXPERT, INSTEAD UTILIZING THE SERVICE OF AN EXPERT THAT WAS FRIENDS AND COLLEGE ROOMMATE WITH THE STATE'S EXPERT AND WHO FAILED TO CONDUCT ANY INDEPENDENT TESTING OR OBSERVE THE STATE'S TESTING.

Petitioner makes this argument with no citation to any legal authority, and without an affidavit or citation to the record supporting the factual claims. Courts are free to require citation to relevant authority

rather than to attempt to do petitioners legal research for him. Medical Device Alliance, Inc. v. Robert Ahr, et. al., 116 Nev Ad Op 91. The burden is on Petitioner to establish his case and he has failed.

The affidavit of Romero is submitted herewith and establishes that no relationship, other than professional, existed between her and Mihalovich at all pertinent times.

Trial counsel's affidavit establishes that even if he had known (assuming the accuracy of Petitioner's unsupported assertion) that a personal relationship existed between the State's expert and the defense expert, he would not have concluded that a conflict of interest of any sort existed.

The State has been unable to find any authority that a conflict of the nature Petitioner alleges existed between the experts, without more, would support a finding of error.

There was DNA testing by an independent laboratory hired and paid for by the Defendant which was presented at sentencing which further confirmed Brown to have been the source of the semen analyzed from the vaginal swab of the victim.

2. TRIAL COUNSEL FAILED TO INVESTIGATE AND PRESENT EVIDENCE AT TRIAL THAT ALTERNATIVE SUSPECT WAYNE HENLE HAD BEEN CHARGED WITH SEXUAL ASSAULT IN UTAH, HAD COMMITTED A SIMILAR ACT IN ELKO JUST MONTHS PRIOR TO MEGAN'S ASSAULT, AND HAD

THE OPPORTUNITY TO HAVE COMMITTED THE CRIME.

Petitioner has attached a series of documents establishing that one Wayne Henle (Henle), the victim's stepfather, had been charged with and convicted of sexual assault in Utah, the conviction having occurred after trial in this case. Petitioner claims that because trial counsel failed to put on such evidence, he was ineffective. Trial counsel's affidavit establishes that he had evidence sufficient to confirm in his mind that Henle did not perpetrate the attack. Counsel is forbidden, SCR 172 and SCR 173, to put on evidence that he knows is misleading, even though he is obliged to zealously represent his client.

Moreover, there is essentially no argument that, but for the DNA evidence, there was insufficient evidence to convict Brown. Testimony concerning Henle would, at best, have been cumulative, and at worst, would or could have resulted in Henle being excluded by DNA comparison as defense counsel feared.

No evidentiary hearing is necessary on this issue, because even if counsel failed to properly investigate Henle's record or failed to put it in evidence, no harm or prejudice occurred.

3. PETITIONER ONLY SPOKE TO A DEFENSE INVESTIGATOR ON ONE OCCASION AND PROVIDED NAMES OF WITNESSES TO BE INTERVIEWED, HOWEVER, NEITHER COUNSEL NOR THE INVESTIGATOR LOCATED OR INTERVIEWED THESE WITNESSES.

Petitioner argues that a series of witnesses existed which may have established an alibi for him by showing that he was still at a bar when the assault occurred. Petitioner's mother names one of those persons as Essy Sallee (Sallee). Petitioner identifies Kerry Frusetta (Frusetta), Clyde Rarrick (Rarrick), and Lori Rarrick (Ms. Rarrick).

In order to assess the value of any proposed testimony providing an alibi, it is important to determine, if possible, when the attack occurred.

The victim's mother, Pam Henle (Ms. Henle), was very unsure when she received the call from her child informing her of the attack. It could have been at midnight or 12:30 a.m., Ms. Henle trial testimony, page 89, line 12. She had no knowledge of how long it was between the time of the attack and when the child called her, page 90, line 4, Id. She thought it took her about five minutes to get home from the bar and call 911, page 99, line 18. From the time Ms. Henle got home until she called 911 was just a matter of seconds, page 91, line 21, Id. The 911 call came in at approximately 1:15 a.m., testimony of Officer Terry of the Carlin Police Department, page 156, line 11. The Defendant arrived at his own residence at 1:32 a.m., testimony of Travis Brown, page 200, line 7. However, his clock was approximately six to seven minutes fast, page 200, line 18, et seq. Lieutenant Roy Ladd (Ladd) testified that at a normal walking speed it took approximately 12 minutes to get from the Peacock Lounge to the victim's residence, page 263, line 17, and four minutes to get from the victim's residence to the Defendant's residence, page 263, line 20.

While the victim testified the attack went on for two hours, page 112, line 16, her estimation appears to be unreliable when considered in connection with objective facts and her own description of the attack. In the event the jury were to believe that the attack took place over a period of two hours, the State's witnesses themselves, as well as the Petitioner's, provided him a perfect alibi, which obviously the jury did not accept.

In the estimation of the State, it is essentially impossible to determine when the attack began and how long it lasted. To complete the acts described by the victim could take a relatively short time, probably less than 15 minutes. The acts consisted of vaginal penetration, anal penetration, one or the other of which, or possibly both, resulted in ejaculation, and choking the victim throughout, testimony of Allred, and Dr. George Winch. The child did not know how long the attacker was in the residence before she was awakened, and was not asked how long after he was there.

Sallee's purported testimony, if consistent with her statement of March 3, 1998, attached to the petition, would be that the Defendant came into CeeGee's Bar on the night in question, with two friends. She was told they had just come from the Peacock Lounge. They stayed at CeeGee's for about an hour or until about 12:45 a.m. Then Defendant and his friends left. Such testimony, had it been received by the jury, is inconsistent with the Defendant's own trial testimony, which was that after he left the Peacock Lounge, he went into CeeGee's, "looked around, ordered a beer, took a couple drinks out it, and took it with me and headed home", Trial Transcript, Defendant's testimony

at page 448, line 3 through line 9. It is also inconsistent with Defendant's statement dated February 3, 1998, and attached to his supplemental Pre-Sentence Report. He also told Detective Ladd that his connection with the Peacock, after he left CeeGee's was to walk in, vomit in the toilet and then leave (D-120). All three versions contradict the proposed testimony of Sallee.

The statement of Rarrick attached to the petition adds nothing. In his statement, he admits having no knowledge regarding the presence or absence of Petitioner at any particular bar at any particular time on the night of the attack.

The testimony of neither of these persons adds any validity to the Petitioner's claim that he could not have committed the offense because he had an alibi.

Trial counsel sought out and found an alibi witness, Beverly Scarlett Patrick (Patrick), who testified that Brown was in the Peacock Lounge until 1:30 to 2:00 a.m. (page 435 commencing at line 15).

As outlined in the argument on issue number 4 and in trial counsel's affidavit, additional alibi evidence would simply have been cumulative. There was insufficient evidence to convict the Defendant unless the DNA evidence established his guilt, but the insufficiency of the evidence established at trial, combined with the alleged evidence not discovered by trial counsel is simply not enough to make the DNA evidence suspect.

4. <u>COUNSEL FAILED TO DISCUSS DEFENSE STRATEGIES WITH PETITIONER, AND</u>

NEVER INFORMED PETITIONER THAT HE INTENDED TO ARGUE THAT PETITIONER'S BROTHER TRENT COULD HAVE COMMITTED THE CRIME.

The State is aware of no authority, and none has been cited, which would support the granting of a post conviction writ on this issue.

5. COUNSEL FAILED TO FILE A MOTION TO DISMISS OR IN THE ALTERNATIVE SUPPRESS EVIDENCE BASED ON THE LOSS OF EXCULPATORY EVIDENCE, SPECIFICALLY RELATING TO THE TEETH SCRAPINGS TAKEN FROM THE VICTIM AS PART OF THE SEXUAL ASSAULT KIT.

As the Lockie affidavit points out, Dr. Campbell did not believe he had recovered scrapings from Allred's teeth. He testified that there would be a written record of it had he done so, but no record existed. The sole person to testify that such scrapings were done is Tognarelli, a volunteer ambulance driver, page 371, line 7.

Petitioner offers no separate factual verification of whether scrapings were taken or not and no claim of bad faith for the loss, if it happened is offered, and, other than a bare allegation that the scrapings might have been exculpatory, no evidence that he was prejudiced by the loss,

Merely hoped for exculpatory conclusions from the lost evidence are not sufficient, Boggs v. State, 95 Nev 911 (1979). Petitioner cannot, therefore, prevail on this

issue even if his trial counsel should have filed a motion, because he would have lost the motion.

6. COUNSEL FAILED TO TIMELY FILE A MOTION FOR NEW TRIAL THEREBY RESULTING IN THE MOTION FILED BY PETITIONER BEING DENIED BY THE COURT AS BEING UNTIMELY.

Petitioner raised the question of whether the evidence at trial was sufficient to convict him. The Supreme Court held that it was, see the Supreme Court opinion attached to the Petition. That there was sufficient evidence is now the law of the case. The failure of trial counsel to file a motion for a new trial is moot and cannot support relief.

Petitioner asserts that his counsel was ineffective for failing to file a motion for new trial. Petitioner, in proper person, filed a motion for new trial on March 16, 1998. His motion was based upon grounds other than newly discovered evidence, and it was therefore necessary that it be filed within seven days of the verdict. The verdict was rendered on September 30, 1994. As the motion for new trial properly acknowledged, if the jury returned a verdict of guilty, but the trial court believed he had not been proven guilty, the trial court is free to grant a new trial. In this case, however, the sentencing judge, Tom Stringfield, stated specifically and directly at sentencing: "First, as I sit here, there is no doubt in my mind whatsoever of your guilt" - sentencing hearing, page 9, line 19, June 23, 1995. Obviously, the Court was not in a frame of mind to re-weigh conflicting evidence and Petitioner's trial counsel having failed to file a motion for new trial was not ineffective. The

motion, obviously, would have been in vain in any event.

7. APPELLATE COUNSEL ON THE SECOND DIRECT APPEAL FAILED TO SUBMIT ISSUES TO THE APPELLATE COURT CONCERNING THE MOTION FOR NEW TRIAL THAT HAD BEEN FILED IN DISTRICT COURT PRIOR TO THE APPEAL.

Appellate counsel, for the reason expressed above, could not therefore have been ineffective. The trial court has discretion to resolve conflicting evidence different from the way in which the jury did and find that the verdict was not based on substantial evidence, State v. Purcell, 110 Nev 1389, 1394 (1994). The trial court, without the necessity of the filing of a motion for a new trial, clearly indicated that it did not resolve any conflicting evidence different from the jury. Given that the trial court's discretion must, of necessity, have wide latitude, Petitioner cannot and has not made a case that he has undermined confidence in the verdict.

The Petitioner, as his points and authorities admit, in order to prevail on the theory of ineffective assistance of counsel, must not only show a deficient performance, he must show as well that his defense was prejudiced to an extent which makes the jury verdict unreliable, Warner v. State, 102 Nev 635 (1992). In order to be entitled to an evidentiary hearing, the Defendant must "set forth a factual background, names of witnesses or other sources of evidence demonstrating entitlement to relief", Hargrove v. State, 100 Nev at 503 (1984), citing Wright v. State, 619 P. 2d 155 (1980 Kans Ct. App) (internal quotations omitted). The Defendant's

allegations must not be repelled or belied by the record, for if they are, he is entitled to no hearing. The point of having an evidentiary hearing is to resolve real or apparent disputes regarding material facts, Vaillancourt v. Warden, 90 Nev 431 (1974). The Petitioner has raised no factual issues, which if true, would establish that his counsel's performance was sufficiently poor to undermine the Court's confidence in the jury verdict in order for his conviction to be reversed, State v. McNelton, Number 32488 (1999). That is so because, absent the DNA findings, there was insufficient evidence to convict the Defendant of the crime. His trial counsel clearly established other possible persons who might have attacked Allred and Allred was clearly unable to identify her attacker. What trial counsel could not do, and the affidavits presented in this petition by Brown cannot do, is to definitively establish that Brown could not have committed the offense or that someone else did, so that the DNA conclusions reached cannot be true, or alternatively, that the DNA conclusions are not reliable. In short, the DNA evidence at trial and sentencing, from testing done by the Washoe County Crime Lab and by Brown's expert respectively, established that Brown's semen was on the panties and vagina of the child. There is no reasonable explanation for the presence of his semen other than that he was the rapist.

DATED this 14 day of December, 2001.

GARY D. WOODBURY
State Bar #1915
Elko County District Attorney

JA 1181

/s/ Gary D. Woodbury

NOTICE

TO: DAVID M. SCHIECK, Attorney for Troy Don Brown, and to the Clerk of the Fourth Judicial District Court.

A hearing on the habeas corpus has been scheduled for the 21st and 22nd days of February, 2001.

DATED this 14th day of December, 2001.

GARY D. WOODBURY
State Bar #1915
Elko County District Attorney

/s/ Gary D. Woodbury

CERTIFICATE OF SERVICE

I hereby certify, pursuant to the provisions of NRCP 5(b), that I am an employee of the Elko County District Attorney's Office, and that on the 14th day of December, 2001, I served the foregoing ANSWER IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION) AND MOTION TO DISMISS PETITION by maling or delivering, or causing to be mailed or delivered, a copy of said document to the following:

By delivering to:

The Honorable J. Michael Memeo
District Judge - Department I
Elko County Courthouse
Elko, NV 89801

By mailing to:

David M. Schieck
302 E. Carson Avenue, Suite 600
Las Vegas, NV 89101

/s/ Karen Cracraft
Caseworker

AFFIDAVIT

STATE OF NEVADA)
)SS.
COUNTY OF ELKO)

COMES NOW, DAVID B. LOCKIE, who first being duly sworn, deposes and says:

1. That Affiant is an attorney duly licensed to practice law in the State of Nevada.

2. That I was appointed to represent Troy Don Brown (Brown) prior to his preliminary examination held July 6, 1994.

3. That prior to my appointment Brown's previous counsel, the Elko County Public Defender's Office, had obtained the services of Jennifer S. Mihalovich (Mihalovich) as an expert in the field of DNA analysis and comparison to assist in the defense of Brown. I continued her employment from the time of my appointment. Her qualifications are considerable as is evident from the attached Curriculum Vitae.

4. I had never heard that Mihalovich and Renee Romero (Romero) were personally as well as professionally acquainted until I read the allegation in Brown's Petition for post-conviction relief. I have also seen the affidavit of Romero submitted in connection with the State's Opposition to Brown's Petition. However, even had I believed that Romero and Mihalovich were personal friends, I would have continued her employment. I have considerable experience hiring expert witnesses and it has always been clear that while many experts are acquainted

with each other, that does not interfere with their willingness or ability to objectively criticize erroneous procedures or conclusions of their colleagues.

5. Mihalovich visited the Washoe County Crime Laboratory and viewed the evidence in Brown's case. Mihalovich informed me that the Washoe County Crime Lab was fully capable of performing accurate DNA testing. She further informed me that she had reviewed Romero's test procedures and could find no fault with them.

6. Mihalovich informed me that she had seen the panties from which the sample of semen tested for DNA by Romero came, and that in her opinion there was sufficient semen to support RFLP testing. Mihalovich also performed her own post-trial testing which confirmed the results that were being reported by Romero.

7. Throughout my representation of Brown, it was clear to me that the principal evidence against him was the DNA testing and conclusions by Romero. Prior to trial, I considered seeking to exclude the DNA evidence based on Romero's preliminary hearing testimony that there was insufficient semen on the panties to support an RFLP test and then having changed her mind. It appeared to me throughout pre-trial preparation that the prosecutors did not fully appreciate the complications that change created for him and the opportunities it created for Brown. It further appeared to me that the chances of successfully excluding the DNA evidence on that theory were extremely small and that on balance, rather than alerting the prosecutor to his problems, it would be

better for Brown if I saved this issue for closing argument.

8. I also considered challenging Romero's qualifications before the jury. Prior to trial, I knew Romero as an extremely effective and persuasive witness. Indeed, at preliminary hearing I challenged her qualifications extensively on cross examination. By the time of trial she had, I believe, twice been qualified in the Fourth Judicial District Court as an expert in DNA testing and conclusions. It was evident to me that for me to challenge her qualifications in front of the jury was very likely to be a losing proposition for Brown and that challenging her qualifications in a pre-trial motion was fruitless, since I was familiar with her CV well before trial and it appeared to me that she was a qualified expert in the field.

9. Brown never told me that he was being exposed to the jury in jail garb and/or shackles.

10. The evidence that Brown had no bite marks or other injuries on either hand was unrebuked. The results of the medical examination obtained by Brown were offered and admitted at trial.

11. Brown's relationship with Kerry L. Frusetta was made known to me by Brown's mother in a note dated August 30, 1994, the purpose of which was to inform me of character witnesses. The note stated:

> "Kerry ... Deanns sister, she was going out with Troy when this all happened. They were together the night before Megan was attacked."

I did not surmise from that note that it meant that Brown and Frusetta had engaged in sexual relations the night before the attack. Indeed, Brown's recitation of his activities for the night preceding the attack on the victim to authorities and at trial did not include any contact with anyone named Kerry, and was sufficiently detailed so that it precluded such contact.

12. Before trial, I knew that Wayne Henle (Henle) was at work at a mine north of Carlin on the night of the attack. I cannot now remember precisely how I came by that information, but I do know that an investigation was made, whether at my instance or that of the State, and that during, or as a result of, that investigation I saw a copy of Henle's time card which indicated no absences from his work at the time of the attack. All of the evidence in the case was sufficient to make me sure that the attack was not perpetrated by Henle, not the least of which evidence was that the victim and Henle lived together and she looked on him as her father. It is improbable that had he been the attacker that she would not have recognized him.

I cannot now recall whether I knew that Henle had been charged and convicted of sexual assault in Utah for actions taking place in June 1994, or about the 1993 incident with Debbi Dean, but it would not have changed my trial strategy regardless. My reasoning is as follows: absent the DNA evidence, it was not possible for Brown to be convicted because there were a number of other possible suspects or scenarios proven or suggested at trial by circumstantial evidence, as well as sufficient alibi evidence to support, indeed mandate, an acquittal.

Given the DNA evidence that was going to come in, I either had to overcome it, or definitively show that Brown was not guilty. All that Brown now complains of is that I did not raise additional possibilities, or additional reasonable doubts through alibi or character witnesses. My answer is that those possibilities or facts supporting reasonable doubt that were in the record were more than sufficient to obtain an acquittal, but only if the DNA evidence could be overcome. In short, did not have, and Brown has not now shown, definitive proof of Brown's innocence which would make it impossible for the DNA evidence to be correct.

The State had it within its power to exclude all or any other possible suspects by the simple expedient of testing their DNA. Such exclusions would have definitively eliminated any reasonable doubt argument based on other possible suspects which were before the jury. I could not, therefore, let the State know that I was concentrating on a particular suspect, since it would or could trigger such a definitive DNA exclusion by the State. In that regard, let me reiterate that the one in three million figure being used by Romero was a very conservative number and given my knowledge that Washoe County had appropriately tested the DNA from the semen, it was virtually impossible that another suspect with DNA identical to that of Brown existed.

13. I do not believe that scrapings of the victim's teeth were taken by the emergency room physician. The testimony of Dr. Bruce Campbell is that he did not recall taking scrapings from the victim's teeth, that a written record would exist if he had done so, and no record was produced - Trial Transcript, testimony of

Dr. Bruce Campbell, page 357, line 19. Moreover, the victim was not sure she had bitten her attacker in any event - Trial Transcript, page 372, line 6.

DATED this 15th day of November, 2001.

/s/
DAVID B. LOCKIE
Attorney at Law

Subscribed and sworn to before
me this 15th day of November, 2001.

/s/ Danielle R. Leyva
NOTARY PUBLIC
[Notary Seal]

JA 1190

RENEE ROMERO

EDUCATION:

1/90 - 12/94

Masters of Science, Cell and Molecular Biology
December 1994
University of Nevada, Reno, Nevada
Emphasis: DNA Technology

9/84 - 6/88

Bachelor of Arts in Chemistry with the fulfillment of Bachelor of Science in Criminalistics, June 1988
Michigan State University, East Lansing, MI
Emphasis: Forensic Laboratory Work, Chemistry and Criminal Justice

TRAINING:

9/15/97 - 9/19/97

Forensic Science Research and Training Center
FBI Academy
Quantico, Virginia
Laboratory Quality Assurance

5/22/97 - 5/23/97

California Criminalistics Institute
Sacramento, California
Statistics in DNA Analysis

9/11/95 - 9/15/95

Synetics Corporation

Vienna, Virginia
CODIS Local and State Training

5/25/95 - 5/26/95

Promega Corporation
Madison, Wisconsin
DNA Typing with STR'S

3/29/93 - 4/2/93

Forensic Science Research and Training Center
FBI Academy
Quantico, Virginia
The Second International Symposium on The Forensic Aspects of DNA Analysis.

11/16/92-11/20/92

Forensic Science Research and Training Center
FBI Academy
Quantico, Virginia
Advanced Aspects of Forensic DNA Analysis School

11/30/92-12/9/92

The Perkin-Elmer Corporation
Forensic Training Program
Alameda, California
Amplitype HIA-DQ alpha Forensic DNA Amplification and Typing Workshop

1/13/92 - 2/8/92

Forensic Science Research and Training Center

FBI Academy (University of Virginia
6 Grad. Credits)
Quantico, Virginia
Forensic Appl. of DNA
Lab Appl. of DNA

6/24/91 - 6/28/91

Forensic Science Research and Training Center
FBI Academy
Quantico, Virginia
An International Symposium on the Forensic Aspects of Trace Evidence

9/90 - 12/90

Washoe County Sheriff's Office/ University of Nevada, Reno
Reno, Nevada
DNA laboratory rotation
Emphasis: RFLP analysis

10/24/90

Southwest Association of Forensic Science
Tucson, Arizona
Serial Numbers Restoration

10/2/89 - 10/6/89

Bureau of Alcohol, Tobacco, and Firearms
Rockville, Maryland
Arson Accelerant Detection and Identification

7/31/89 - 8/4/89

California Criminalistics Institute

Sacramento, California
Hairs and Fibers Identification

6/88 - 9/88

Washoe County Sheriff's Office
Reno, Nevada
Criminalist Intern
Emphasis: Controlled substances and crime scene investigation

EMPLOYMENT:

3/89 - Present

Washoe County Sheriff's Office
Forensic Science Division
Reno, Nevada
CRIMINALIST

Currently responsible for DNA analysis and development. Have been cross trained in controlled substance identification and several aspects of trace evidence.

DNA EXPERT WITNESS TESTIMONY

Have qualified as a DNA Expert in the following jurisdictions:

Second Judicial District - Nevada
Third Judicial District - Nevada
Fourth Judicial District - Nevada
Sixth Judicial District - Nevada
Ninth Judicial District - Nevada
US District Court - Reno Nevada
First Judicial District - Idaho

Second Judicial District - Idaho
First Judicial District - Alaska

TEACHING APPOINTMENTS:

8/97	Society of Industrial Microbiologists 1997 Annual Meeting, Guest Speaker Reno, Nevada Forensic DNA Typing of Degraded Biological Evidence
7/95	National Judicial College Reno, Nevada DNA Technology
7/94	National Judicial College Reno, Nevada PCR, DNA Technology
3/93	University of Nevada, Reno Reno, Nevada Guest Speaker-DNA Evidence
7/92	National Judicial College Reno, Nevada DNA Technology.
7/92	Nevada Highway Patrol Crime Scene Investigation Reno, Nevada Evidence; Hair and DNA
12/90	Arson Investigation III Carson City, Nevada

Arson Accelerant Collection and Identification

8/90

Crime Scene Investigation School
Reno, Nevada
Controlled Substance Collection, Packaging, and Identification

8/89

Crime Scene Investigation School
Reno, Nevada
Controlled Substance Collection, Packaging, and Identification

ORGANIZATIONS:

1988-1991	Trainee Affiliate, American Academy of Forensic Science
1992-1994	Provisional Member, American Academy of Forensic Science
1995-present	Member, American Academy of Forensic Science
1993-present	Member, Technical Working Group DNA Analysis Methods
1993-present	Laboratory representative for COmbined DNA Index System

PUBLICATIONS:

Romero, R., Juston, A., Ballantyne, J., and Henry, B. The Applicability of Formalin

Fixed Paraffin Embedded Tissue in Forensic DNA Analysis. The Journal of Forensic Science (July, 1997).

Shipp, E., **Roelofs, R.**, Togneri, E., Wright, R., Atkinson, D. and Henry, B. (1992). Effects of Argon Laser Light, Alternate Light Source and Cyanoacrylate Fuming on DNA Typing of Human Bloodstains. The Journal of Forensic Science (Jan, 1993).

ABSTRACTS:

Riolo, J. and **Romero, R.** (9/1997). Increase Sensitivity of the HLA DQα PCR System, Eighth International Symposium on Human Identification. Scottsdale, Arizona.

Stacks, B., **Romero, R.**, Henry, B. (2/1996). Potential Sample Sources for DNA Typing Methods - A Discussion for the Non-DNA Forensic Scientist. American Academy of Forensic Sciences 48th Annual Meeting Nashville, Tennessee.

Romero, R., Fassett, M., (2/1992). Effects of Various Laundering Conditions and Substrate Materials on the Results of Presumptive, Species Identification and HLA DQα Typing of Bloodstains (part II). The American Academy of Forensic Sciences 46th Annual Meeting. San Antonio, Texas.

Roelofs-Romero, R., Shipp, E., Togneri, E., Wright, R., Atkinson, D., and Henry, B. (3/1993). Effects of Fingerprint Enhancement Techniques on DNA Analysis by Restriction Fragment Length Polymorphism (RFLP) and Polymerase Chain Reaction (PCR) Methods. The Second International Symposium on The Forensic Aspects of DNA Analysis. FBI Academy, Quantico, Virginia.

Roelofs, R., Shipp, E., Togneri, E., Wright, R. Atkinson, D. and Henry, B. (5/1992). Effects of Argon Laser Light, Alternate Light Source and Cyanoacrylate Fuming on DNA Typing of Human Bloodstains. Northwest Association of Forensic Scientists, Reno Nevada.

AFFIDAVIT

STATE OF NEVADA)
) SS.
COUNTY OF ELKO)

COMES NOW, JOHN CROSWELL, who first being duly sworn, deposes and says:

1. That Affiant is a Lieutenant in the Jail Division of the Elko County Sheriff's Office and was serving in that capacity at all times pertinent to the trial and sentencing of Troy Don Brown.

2. In my position I bear responsibility to transport or cause the transportation of persons incarcerated in the Elko County Jail to and from court.

3. That throughout my time in the position to which I am assigned I was aware that it was possibly reversible error for a jury to see a defendant in shackles or prisoner clothing during the time of trial or sentencing by the jury.

4. Troy Don Brown was incarcerated by court order from September 26th at the conclusion of a pretrial conference until September 29th.

5. Though I have no specific memory 7 years after the trial, it was at the time of Troy Don Brown's trial, and is, the practice of the Elko County Sheriff's Office to require defendants to change into civilian clothes at the jail and to have their shackles removed at an isolated part of the Elko County Courthouse long before they arrive at any place in the courthouse where the jury might see them.

6. I have made inquiries of other jail personnel who worked for the Elko County Sheriff's Office in 1994 at the time of trial, and no one recollects any change in this procedure for Troy Don Brown or any other defendant.

7. That any complaints by Troy Don Brown that the jury had seen him in shackles or jail clothing never came to my attention until his petition for post conviction relief.

DATED this 15 day of November, 2001.

FURTHER, YOUR AFFIANT SAYETH NOT.

/s/ _____
JOHN CROSWELL

Subscribed and Sworn To Before Me
this 15 day of November, 2001.

/s/ Charolette Felton
NOTARY PUBLIC
[Notary Seal]

DA No. HC-1-607-1
FRM: AFFIDAVIT
EVNT: AFF

JA 1200

AFFIDAVIT

STATE OF NEVADA)
) SS.
COUNTY OF ELKO)

COMES NOW, Renee Romero, who first being duly sworn, deposes and says:

1. That I am employed as a Criminalist at the Washoe County Sheriff's Office, Forensic Science Division.

2. That I am informed by the Elko County District Attorney's Office that in his Petition for Post Conviction Relief, Troy Don Brown has alleged that Jennifer Mihalovich of Forensic Science Associates and I attended college with each other.

3. That I did not know Jennifer Mihalovich when I attended college. If she attended the same college as I did, I do not, and did not, know it.

4. I met Jennifer Mihalovich only in connection with my work in forensic science approximately four years after I graduated from college. At the time of the Brown investigation and trial we had never socialized together. Although subsequent to the trial, a professional relationship developed which potentially includes attendance at the same professional meetings.

5. There is nothing in my relationship with Jennifer Mihalovich which could possibly justify an accusation that Jennifer Mihalovich would alter any of her scientific findings in Mr. Brown's case in order to

support my conclusions in Mr. Brown's case. Our scientific conclusions were independently achieved. These findings were not discussed prior to the conclusion of the trial.

DATED this 19 day of November, 2001.

FURTHER, YOUR AFFIANT SAYETH NOT.

/s/
RENEE ROMERO

Subscribed and Sworn To Before Me
this 19th day of November, 2001.

/s/ Evelyn M. Taylor
NOTARY PUBLIC
[Notary Seal]

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In The Supreme Court of the United States

E. K. MCDANIEL, WARDEN and THE ATTORNEY GENERAL OF THE STATE OF NEVADA,

Petitioners,

v.

TROY BROWN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX, Volume 4

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TABLE OF CONTENTS

VOLUME 1

Relevant Docket Entries United States District Court for the District of Nevada (Reno) . . . . JA 1

Relevant Docket Entries United States Court of Appeals from the Ninth Circuit . . . . . JA 19

Fourth Judicial District Court, Criminal Information, filed July 20, 1994 . . . . . JA 28

Fourth Judicial District Court, Jury Trial Transcript Day 2, September 28, 1994 . . . . JA 34

VOLUME 2

Fourth Judicial District Court, Jury Trial Transcript Day 3, September 29, 1994 . . . JA 330

Fourth Judicial District Court, Jury Trial Transcript Day 4, September 30, 1994 . . . JA 588

VOLUME 3

Fourth Judicial District Court, Trial Exhibit H, Renee Romero Report, February 11, 1994 . JA 746

Fourth Judicial District Court, Trial Exhibit I, Renee Romero Report, June 6, 1994 . . . . . JA 749

Fourth Judicial District Court, Trial Exhibit G, Renee Romero Report, September 15, 1994 . . . . . JA 752

Fourth Judicial District Court, Exhibit 31, RFLP picture 100.000000 - 99.999976% . . JA 754

Fourth Judicial District Court, Exhibit 28A (same as J10), Renee Romero Curriculum Vitae . . . . . JA 755

Fourth Judicial District Court, Exhibit K, Wayne County Medical Clinic, Inc., physicial examination report . . . . . JA 761

Fourth Judicial District Court, Instructions 1-18, filed September 30, 1994 . . . . . JA 762

Fourth Judicial District Court, Instructions 1-3, filed September 30, 1994 . . . . . JA 781

Fourth Judicial District Court, Verdict 1A, filed September 30, 1994 . . . . . JA 783

Fourth Judicial District Court, Verdict 2A, filed September 30, 1994 . . . . . JA 784

Fourth Judicial District Court, Verdict 3B, filed September 30, 1994 . . . . . JA 785

Fourth Judicial District Court, Verdict 4A, filed September 30, 1994 . . . . . JA 786

Fourth Judicial District Court, Verdict 1B, filed September 30, 1994 . . . . . JA 787

Fourth Judicial District Court, Transcript of Proceedings, Sentencing Hearing, June 23, 1995 . . . . . JA 789

Supreme Court of Nevada, Appellant's Opening Brief, November 9, 1995 ..... JA 812

Supreme Court of Nevada, Respondent's Answering Brief, December 18, 1995 .... JA 852

Supreme Court of Nevada, Appellant's Reply Brief with Exhibit A (9 fold-out pages), January 29, 1996 ..... JA 878

Fourth Judicial District Court, Sentencing Rough Draft Transcript of Trial Proceedings, March 13, 1998 ..... JA 923

Fourth Judicial District Court, Petition for Writ of Habeas Corpus (Post-Conviction), August 30, 2001 ..... JA 1036

Fourth Judicial District Court, Points and Authorities In Suppport of Petition for Writ of Habeas Corpus (Post-Conviction) (2 fold-out pages), August 30, 2001 ..... JA 1081

Fourth Judicial District Court, Answer in Opposition to Petition for Writ of Habeas Corpus (Post Conviction) and Motion to Dismiss Petition, December 14, 2001 ..... JA 1160

VOLUME 4

Fourth Judicial District Court, Rough Draft Transcript of Prodeedings Motion to Dismiss and Writ of Habeas Corpus Hearing, Febraury 21, 2002 ..... JA 1202

Fourth Judicial District Court, Findings of Fact, Conclusions of Law, And Order Denying Writ of Habeas Corpus, March 7, 2002 ..... JA 1489

Supreme Court of Nevada, Order of Affirmance, November 21, 2003 ..... JA 1500

United States District Court, Response in Opposition to Motion to Dismiss, April 15, 2005 ..... JA 1507

United States District Court, Petitioner's Reply, March 1, 2006 ..... JA 1530

United States District Court, Exhibits 196, 197 and 198 to Motion to Expand Record, March 1, 2006 ..... JA 1552

United States District Court, Reply to Opposition to Motion to Expand the Record and Motion to Strike, May 30, 2006 ..... JA 1587

United States District Court, Order, July 31, 2006 ..... JA 1595

United States District Court, Motion For Reconsideration of Leave to File Supplemental Answer, August 21, 2006 ..... JA 1599

United States District Court, Response in Opposition to Motion for Reconsideration of Leave to File Supplemental Answer, September 22, 2006 ..... JA 1606

United States District Court, Order, October 18, 2006 ..... JA 1614

The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

Appendix A: Ninth Circuit Order Amending Opinion and Amended Opinion, dated July 21, 2008 ..... 1a

Appendix B: United States District Court, Judgment in a Civil Case, dated December 15, 2006 ..... 29a

Appendix C: United States District Court, Order on Merits, dated December 14, 2006 . 31a

Appendix D: United States District Court, Order, dated July 22, 2005 ..... 55a

Appendix E: Fourth Judicial District Court, Amended Judgment of Conviction, dated March 18, 1998 ..... 63a

Appendix F: Nevada Supreme Court Opinion, dated February 26, 1997 ..... 68a

Appendix G: Ninth Circuit Order denying rehearing, dated July 30, 2008 ..... 97a

Appendix H: Statutes 99a

Appendix I: Nevada Supreme Court, Appellant's Opening Brief, dated November 20, 1995 .. 111a

Appendix J: Nevada Supreme Court, Appellant's Reply Brief, dated March 4, 1996 ..... 122a

Appendix K: United States District Court, First Amended Petition for Writ of Habeas Corpus By A Person In State Custody Pursuant to 28 U.S.C. § 2254, dated November 12, 2004 .. 130a

Appendix L: United States District Court, Motion to Dismiss, dated March 28, 2005 . 175a

Appendix M: United States District Court, Answer, dated October 19, 2005 ..... 186a

Appendix N: United States District Court, Motion to Expand Record, dated March 1, 2006 ..... 219a

Appendix O: United States District Court, Opposition to Motion to Expand Record and Motion to Strike, dated March 30, 2006 ... 222a

IN THE FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

[caption omitted in printing]

MOTION TO DISMISS AND WRIT OF HABEAS CORPUS HEARING
ROUGH DRAFT TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that the above-entitled matter came on for hearing on February 21, 2002, at the hour of 9:30 a.m. of said day, before the HONORABLE J. MICHAEL MEMEO, District Judge.

The Petitioner, was present in court and represented by David M. Schieck.

The Respondent, was represented in court by Gary D. Woodbury, Elko County District Attorney.

[p.2] THE COURT: And please be seated. All right. This is case number 6-0-7, Habeas Corpus. Troy Don Brown. Petitioner versus Warden, Respondent. And we have the defendant present in court, personally. He is in custody. He is represented by his attorney, Mr. Schieck. And we have Mr. Woodbury on behalf of the State. This is the time and date set for a hearing on the various matters dealing with Post-Conviction Writ of Habeas Corpus.

Are the parties ready to proceed?

MR. WOODBURY: The State is prepared, Your Honor.

MR. SCHIECK: Yes, Your Honor.

THE COURT: All right. It seems to me anyway the first issue we've got to take up is the Motion to Dismiss, Mr. Woodbury.

MR. WOODBURY: Thank you, Your Honor. The statue NRS 34.726 provides that unless there is good cause showing for a delay a petition of challenge is the validity of the judgment of sentence must be filed within one year after the entry of Judgment of Conviction. Or if an appeal has been taken from the judgment within one year after the Supreme Court issues it's Remittitur. That leaves open the question of what happens in the case where there are successive appeals by the defendant. I guess that's the argument of the defendant in this case that leaves open that question. And what the defendant has opted to do is to ignore the first [p.3] Remittitur that came from the Nevada Supreme Court in 1997. The case is -- as the Court is aware, was decided on appeal by affirming the Judgment of Conviction or affirming the verdict of the jury and the sentencing of the jury as to Count One. But it struck one of the convictions and it remanded the case for re-sentencing on the Second Count based on some errors that were made by Judge Stringfield.

The response of the defendant has been look this is -- for one I guess the statute isn't clear and number two it provides for evaluation by the Courts on appeal of post-conviction relief. And the State's response to that is, yes it does provide for that. But it is the case that a -- that the Supreme Court and the legislature are both looking at successive Post-Conviction Relief Writs. That's inherent in the nature of it because they simply provide that if you have -- they provide that if

you have -- if the issue was not right. If you couldn't of raised it on your first Post-Conviction Writ then you get to do -- if you show good cause for the delay or that a prejudice result to the defendant. So the State's view is that while the argument for judicial economy is usually an effective one the legislature and the Supreme Court both contemplate that there will be successive Writs in some cases.

In this case -- and what you balance that against is proposition that so much time passes. There is a statute that [p.4] says five years as a rebuttal of presumption of prejudice is the State. If you have to have a new trial after five years there's that rebuttal of presumption. And in the case which exists like this one or probably a thousand others scenarios that you could lay out, it is going to occur that if there is a five year period between the time of trial and the last post -conviction relief. So in the estimation of the State -- on Remittitur issued in 1997 for the Judgment of Conviction of -- at that time it became obligatory upon the defendant to file his first Post-Conviction Writ of Habeas Corpus challenging the ineffective assistance of counsel that he now claims.

When you balance that statute with the prejudice that now exists to the State and it exists far beyond the State. It exists to the defendant or to the -- it does exists to the defendant too but it -- we have -- we're now seven years. Almost seven and a half years past the time of trial when memories of trial counsel have faded. Some of the witnesses are -- in this case and I would represent to the Court that the child's mother is now dead. The prejudice is just staggering and it vastly outweighs the right of a defendant to ignore the first Remittitur that issued out of the Supreme Court.

Now the question I guess in the Pellegrini case. The Supreme Court has been found by the Ninth Circuit on a [p.5] couple of occasions -- more than a couple, several occasions to be taking too much discretion to allow discretion to override the statutory prohibitions of time. And the Supreme Court went about in Pellegrini clarifying its' position on that. And I think that the reasonable reading of that decision, the Pellegrini decision -- although it doesn't address this issue directly is that there are now intending to enforce those rules.

So then the question is as the defendant has argued. Is the statute ambagious? And the statute doesn't say at any point you could ignore Remittitur that issues -- it says within one year after Remittitur issued. Remittitur issued from the conviction in 1997. So their argument has to be that you should read that as saying that if the Remittitur issues and if there is a reversal of any part -- wether or not it's relevant to the conduct of trial counsel. Then you should find the ambiguity and you should then allow them to back to the Supreme Court have a Remittitur reissue in the final case. And in this case it's simply the sentencing decision that this Court made and that asks too much of it. The defendant was obliged at the time of the Remittitur in 1997 to file his Petition for Post-Conviction Relief.

So, the Court -- this Court might be reluctant to do that for a couple of reasons. As a general proposition of a statute design ambagious and if the Court finds it ambagious [p.6] it must be read in the light most favorable to the defendant. That is essentially a fundamental rule. You balance that against the Supreme Court's notions in Pellegrini that say that we

are going to start reading these time prohibitions more precisely and with less discretion and that weighs in favor of our argument.

So one of the things the Court could do and it might take several forms. I'm not just exactly sure what the Court's view would be on this. This needs to be litigated because it leads not only the State that the Courts and perhaps defendants in some sort of state of ambiguity about what they should do when Remittitur issues and the case is partly reversed on matters not concerning the actual conduct of the trial. In this case it was in sentencing. The Court might withhold it's decision on the Motion to Dismiss and go ahead and conduct the evidentiary hearing because if you don't do that what will happen is if you grant the Motion to Dismiss it will go to the Supreme Court and -- at least in theory could be reversed and sent back for another evidentiary hearing and we would have all appeared here for not.

So if there was a way for the Court to consider the merits of the Motion to Dismiss -- it might be that you're just going that the Motion to Dismiss is denied and that's the end of it. But if the Court is inclined to grant the motion to Dismiss we would suggest that the Court find means to [p.7] conduct the hearing as well. Thank you.

THE COURT: Mr. Schieck. I guess one thing we should take up right now, however; is we had two requests for media entry in this case. One was by the Free Press, the other was by the radio station. And I briefly discussed this matter with counsel in Chambers. Is there any objection to media entry, Mr. Woodbury?

MR. WOODBURY: The State has no objection.

THE COURT: Mr. Schieck.

MR. SCHIECK: No objection, Your Honor.

THE COURT: All right. Okay. Then I think the Free Press is here now and they've had considerable experience with reporters in our courtroom at any rate and they know their responsibility so I don't expect a problem. And Mr. Schieck, Motion to Dismiss.

MR. SCHIECK: Thank you, Your Honor. For the record I want to put a couple of dates into my arguments so I'm sure the Court has a grasp of exactly what we are talking about time-wise.

On June 28, 1995 the original Judgment of Conviction was entered by the District Court. The trial had actually taken place the previous September but due to certain post-trial motions and proceedings that went on the Judgment of Conviction didn't actually get entered until June 28, 1995. Mr. Brown was sentenced two days prior to that formal judgment [p.8] being entered.

The direct appeal was then timely filed by Mr. Brown to the Nevada Supreme Court, and on February 26, 1997 they remanded the case back down to District Court for re-sentencing on Count Two. Having confirmed the conviction in sentencing on Count One. That sentencing then took place March of 1998 and the Amended Judgment of Conviction, which included the sentence on Count Two -- which again ran consecutive to Count One was entered on March 18, 1998.

A direct appeal was then timely filed from that Judgment of Conviction to the Supreme Court on September 8, 2000, issued it's Remittitur on that second direct appeal. The Writ of Habeas Corpus was filed -- that causes us to be here for these proceedings was filed on August 30, 2001. Which is within one year of the Order Dismissing Appeal and the Remittitur on the second direct appeal.

So, clearly the Writ is filed within the one year time frame of Remittitur on appeal number two. And the question that this Court has to decide and I suppose eventually the Nevada Supreme Court has to decide is whether NRS 34726 starts the one year running as to Count One. And the sentence on Count One back in 1998 -- excuse me, 1997, February 26, 1997. And then the one year starts running on the second Remittitur on September 2000. So we actually have -- the statutes say you now are guaranteed successive [p.9] petitions anytime there's a remand for a new sentencing and you are going to have successive writs filed and potentially pending at the same time on separate issues on separate counts. So you are separating counts for purposes of writ. Writ number one attacks Count One. Now, two is not final yet and Writ number two attacks Count Two because that one doesn't become final until the second appeal is decided.

It is our position that the Nevada Supreme Court is going to say, no we want the entire matter heard in one writ when the case is finally and completely concluded in District Court. All matters are resolved, direct appeal is pursued on all matters and exhausted then you file your writ and you load the wagon with everything that addresses all counts. That is the more logical interpretation of the statute and I would urge

it is the interpretation that the Nevada Supreme Court would take if and when it gets to them. And the analogy I draw, it is quite common in this state for the Nevada Supreme Court to vacate a death penalty and remand a case for a new penalty hearing while leaving the conviction in tact. And there are a number of cases they've done it -- Flanaghan and Moore case comes to mind but a number of cases.

I don't believe the proper interpretation of the statute is to say, you have to file your writ while you're waiting to go to your second penalty hearing because you got a remanded penalty hearing and we have to prepare for that [p.10] penalty hearing. While you've got another attorney attacking the performance of trial counsel at trial. It's going to create a procedural mess -- specially in capital cases but the analogy can be drawn certainly to this case.

So I would urge the Court to interpret 34726 as to say you get one writ. That writ is timely filed. It filed within one year of the issuance of the Remittitur on the direct appeal that finally concludes exhaustion of all issues that can be raised on direct appeal and have been raised on direct appeal -- whether a first or second direct appeal by the Petitioner.

THE COURT: All right. The Court will reserve ruling on the Motion to Dismiss and proceed with the evidentiary hearing. And I do see Laurie Gilbert -- I didn't see you the first time. But I see you there so -- she has also covered many proceedings in this Court and those rules.

So, all right. Mr. Schieck, you may proceed.

MR. SCHIECK: Thank you, Your Honor. We would call Dexter Baker.

THE COURT: Dexter Baker. And face the Court Clerk. Raise your right hand and be sworn.

(WHEREUPON the witness was sworn.)

DEXTER K. BAKER, JR.

called as a witness on behalf of the Petitioner, after being duly sworn, testified as follows:

[p.11] THE COURT: And please take the witness stand. And state your full name and spell your last name.

THE WITNESS: My name is Dexter K. Baker, Jr. B-A-K-E-R.

THE COURT: Mr. Schieck.

MR. SCHIECK: Thank you. Your Honor.

DIRECT EXAMINATION

Q. (BY MR. SCHIECK) Mr. Baker, where are you currently employed?

A. I'm self-employed as a consultant in Reno, Nevada.

Q. And are you familiar with a company known as Leadcor Industries?

A. Yes, I am.

Q. And how are you familiar with Leadcor Industries?

A. I've worked for them for a number of years and I am currently consulting for them.

Q. In what capacity?

A. I'm a business development, marketing consultant for Leadcor Industries out of Reno.

Q. And how long have you been doing consulting work for Leadcor Industries?

A. This last year, since February I've been a consultant and I was with them for five years prior to that. I left for a period of possibly a year and then during that year I consulted for them again. And then I was in permanent [p.12] employment coming from Seattle originally.

Q. I want to take you to January of 1994. At that period of time were you doing any work for Leadcor Industries?

A. January 1994, yes.

Q. What were you doing for Leadcor during that period of time?

A. I was a chief safety officer and business development representative.

Q. What does a chief safety officer do?

A. I worked on Workmen's Compensation claims, all safety issues, etcetera.

Q. In that capacity did you have access to the business records of Leadcor Industries?

A. Yes, I did.

Q. What records did you have access to?

A. I had the ability to have access to employee records, safety records, job reports, anything that would revolve around the employee and or activities.

Q. Are you familiar with an individual by the name of Troy Brown?

A. Yes, I am.

Q. And when did you first meet Mr. Brown?

A. I met Mr. Brown the day after the fatality at the job site representing Leadcor Industries.

Q. Do you recall approximately when that was?

[p.13] A. I'm afraid I don't recall but it was -- no I'm afraid I don't. It was that night of which is on record. It was a death of a Leadcor employee on the Newmont side so I'm sure that can be resurrected. I just didn't come with that date.

Q. Are you familiar with an incident that occurred in Carlin on January 28, into January 29, 1994?

A. Yes, I am.

Q. In relation -- and what is that incident that you have become familiar with?

A. That was the incident with Troy Brown and accusations thereabout.

Q. This case that we are here on now?

A. Yes, it is.

Q. In relation to that date when had the fatality happened?

A. I would have to go back and say that the investigation went on for -- I'm going to say six to eight months. That was the investigation for the fatality.

Q. And had you been present there in Carlin during that six to eight months working on that case?

A. Yeah. I didn't reside in Carlin, I didn't reside in Elko, I came out of Reno.

Q. And you indicated that you are familiar with the business records maintained by Leadcor?

[p.14] A. Yes, I am.

Q. Are you familiar with documents known as daily job time cards?

A. Yes, I am.

Q. And what are daily job time cards for Leadcor Industries?

A. That's your activity sheet and it shows the hours the employee worked and what functions they were doing during those hours. And also what equipment was being utilized.

Q. And are these records that are maintained in the ordinary course of the business of Leadcor?

A. Most definitely.

Q. Then are you familiar with the individuals that were working at Leadcor in January of 1994 that filled out daily job time card?

A. Yes, I was.

Q. And how was it that you were familiar with those individuals?

A. Because of my history of working with the company for probably four years -- during a four year period of several different projects. A lot of the same supervisors, superintendents, operators, would go from job to job. It was the nature of the mining business.

Q. How is it that you became aware of the incident that happened on January 28, 1994?

[p.15] A. I recall getting a phone call. I couldn't say who it was from making reference to -- my co-workers knew that I was deeply involved in the fatality and facilitating of the accident.

Q. Was Mr. Brown a witness to that accident?

A. Yes, he was.

Q. Do you have any idea when it was that you became aware that Mr. Brown was being charged with this?

A. It was after -- well naturally it was after the night of the incident. And I've got to say it was within a couple days of it going public. My recollection was that something appeared in the paper about the arrest of or a series of things that red flagged -- red flagged Mr. Brown's name being involved in the incident.

Q. Had you had regular contact with Mr. Brown prior to the incident?

A. Yes, I did.

Q. How often?

A. Let me just say as often as required in the investigation of the accident. In the very beginning interviewing everybody that was involved in the fatality. Mr. Brown was one of the closest to -- closest to the physical accident location and to the friend of -- a friend of who was fatally injured.

Q. Did you become acquainted with any members of [p.16] Mr. Brown's family?

A. Yes, I did.

Q. And we are talking about prior to January 28, 1994.

A. Prior to the incident, correct?

Q. Correct?

A. Yes.

Q. In what context?

A. During the investigation as time went on in evaluating who was where and who was standing in particular positions. I facilitated the investigation with the M.S.H.A. and other agencies.

Q. What is M.S.H.A.?

A. Mine safety. It's the federal arm of OSHA mine safety and it's administered by the State.

Q. And is that a -- is there initials or give us exactly

A. Mine Safety -- M-S-H-A, Health and Safety or something like that.

Q. I believe you were answering on how you came into contact with Mr. Brown's family?

A. Yes. The contact was through -- number one, during the after math of the fatality I held and conducted numerous safety meetings, a lot of evaluation of employees that were affected by fatalities. Normal things that large companies do to make sure their employees are dealing with the loss of a [p.17] friend and a work related injury. And as time went on through that -- there was a couple of Troy's brothers that also worked for Leadcor and I got to know them through the process of them being -- working at the company. And I got to know the family from that point on. And then later I had conversations and communications with Stella Brown the mother.

Q. Did you ever have the occasion to view the daily job time cards from Leadcor for January 28, 1994?

A. Yes, I did.

Q. Do you recall when -- and those again are the records that are kept in the ordinary course of Leadcor?

A. Yes, they are.

Q. And do you recall when you had the occasion to review the January 28, 1994 daily job time cards?

A. It's going to be around -- about from the time of the preliminary hearing for Mr. Brown to the trial date. I was involved in understanding where the case was going. Mr. Brown was a witness in a company's records for the fatality so he was somebody I needed to keep track of. And during that period of time talking with the family and some questions were raised about where time that night -- night shift, first shift employees, etcetera, etcetera. I was able to secure the records.

Q. Where you aware whether anyone who worked at Leadcor had a family relationship with the victim?

[p.18] A. Yes.

Q. And what was that relationship?

A. Well, I knew that the father -- the stepfather of Megan -- I'm going to use first names of people, I don't have my notes, of Megan was an employee of Leadcor.

Q. Did you look at his daily time card for that day?

A. Yes, I did.

Q. And why did you look at the daily time card that would include his name?

A. In reviewing the time card I was involved with trying to understand the sequence of events and it was part of what I needed to know about Troy Brown. Not following his case just being available for it and Mr. Hinkley -- the stepfather, Hinle. I think I'm saying the name wrong. But there was a relationship, there was a second shift and just during my cursory discussions with employees felt I needed to know where everybody was.

Q. If I were to show you a copy of the daily job time card for January 28, 1994, would you recognize it?

A. Yes, I would.

MR. SCHIECK: May I approach the witness, Your Honor?

THE COURT: Go ahead.

MR. SCHIECK: Would, Your Honor, like to look at a copy?

[p.19] THE COURT: If you have one that would be fine.

Q. (BY MR. SCHIECK) I'm going to hand you, Mr. Baker what has been marked for identification as

Defendant's Proposed Exhibit A. And ask if you could review that document and tell me if you recognize it?

A. Yes, I do.

Q. What do you recognize it to be?

A. It's a time sheet and record of said activity.

Q. This is not an original?

A. No, this is not an original.

Q. Is it a true and correct copy of the original?

A. Yes, it is.

Q. Did you in fact make the copy of the original?

A. I originally made the copies of the originals.

Q. And again the original is a document maintained at Leadcor that you had access to in your position of chief safety officer for the company?

A. Yes.

MR. SCHIECK: I'd move for the admission of Defendant's A for purposes of this hearing. Your Honor.

THE COURT: Objection to A.

MR. WOODBURY: I ask that I take the witness on voir dire examination, Your Honor.

THE COURT: Go ahead.

[p.20] VOIR DIRE EXAMINATION

Q. (BY MR. WOODBURY) Are you the custodian of records at Leadcor Industries?

A. I'm not the custodian.

Q. Were you ever?

A. No, I was never the custodian of records.

Q. Okay. And when was the first time that you made these copies from the original?

A. The first time was -- like I said before -- I don't know the exact date, it's between the preliminary hearing prior to the trial. Whatever that period of time is -- it was I would say the time frame was probably right in the middle of that.

Q. Okay. Where did you make the copies at?

A. These copies were made at the job site.

Q. And who was present when you made them?

A. To recall the exact person would of been the administrative person on site. It would have been the person that was involved with the time sheets -- office staff.

Q. Okay. That person didn't make the copies for you, you made them?

A. I going to turn around and say that because it was a small office that I took the copies, actual time sheets, put them on the copy machine and made copies.

Q. Okay. And this was not done in connection with any [p.21] business that you had as the person concerned with safety and marketing for Leadcor?

A. If I could go back. I was both positions but my involvement with this site, this accident was strictly safety.

Q. But -- well, this time card doesn't have anything to do with that accident, right? This has to do with whether or not Troy Don Brown or Wayne Henle had an appropriate alibi for the night of January 24, doesn't it?

A. Well, what I am going to do is I'm going to go back and say that the investigation that we were handling for the company that involved a witness. Troy Brown, was being compromised because of something that happened on the date January 28. It was being compromised so, in compromised -- as we go down the road with a federal investigation I had a witness that maybe credible or not credible.

Q. And so what were you doing checking out an alibi?

A. I was checking to find out where -- where the husband -- the stepfather was.

Q. But the husband didn't have anything to do with Troy Don Brown. Troy Don Brown was a witness and

you were afraid that he would not be a credible witness, right?

A. Sure, that was my motivation.

Q. That was your motivation and in order to find out if he was a credible witness somebody told you that Wayne Henle was a possible suspect, right?

[p.22] A. I originally started with Wayne Henle, he was a member that worked for Leadcor -- different shift and the stepfather of the incident.

Q. But he wasn't a witness. The only reason Wayne Henle was important to you was to establish an alibi for Troy Don Brown to determine his credibility as a witness, right? Wayne Henle wasn't a witness to the accident, was he?

A. No, Wayne Henle was not a witness as far as I could tell.

Q. No. But Troy Brown was a witness to the accident?

A. Excuse me. Troy Brown was a witness to the accident, yes.

Q. Yes. And the reason you went to get this time card was because you thought Wayne Henle might provide -- might not have an alibi for the crimes that Troy Brown was charged with, is that right?

A. I'll agree with that.

Q. Okay. And you did that at the insistence of the Brown family, did you not? They asked you to do that did they not?

A. I was probably free thinking as much as the family was. I don't recall a direct request to do this.

Q. Then how did you find out that Wayne Henle might be a person that would perhaps exonerate Mr. Brown?

A. It's basic logic. He worked for the same company. [p.23] He's the stepfather in the crime. I connected the dots.

Q. Had there been an indication to you from some person that Wayne Henle was a possible suspect?

A. In discussions with others, yes.

Q. In discussions with who?

A. I'm going to say several people and let's just include the family.

Q. And that includes the Brown family, right?

A. Let's include the family, yes.

MR. WOODBURY: We object to the offer of State Exhibit 1, Your Honor. He is not the custodian of records and what he was doing was not done within the ordinary course of investigation.

MR. SCHIECK: Your Honor, he did testify that it was done in the ordinary course of his investigation

into the fatality. He also testified that this is a true and correct copy of the original that he made from the Leadcor files. For purposes of this hearing I would ask that the Court admit the document.

THE COURT: It seems to me that he is another qualified witness other than the custodian. So, I will admit -- what is it Exhibit --

MR. SCHIECK: -- A.

THE COURT: A. Go ahead, Mr. Schieck.

Q. (BY MR. SCHIECK) Mr. Baker, can you explain what [p.24] is shown on the daily time card?

A. Yes, I can. It's the shift record of 1-28-94. It's swing shift and it identifies the project name and the project number. And it is on the Leadcor Industries sheet and it is x-ed off in the day column of Friday. And it lists the employees names and their labor code and it has nine employees. And then it breaks down the class of work, activity and the descriptions. And then it puts in hours of those particular employees on that particular function, and the labor code. And then goes across the page to the far right to the total hours and then there is an employee initial. That's the first half of the page.

The second half of the page is the foreman's signature. And what his responsibility at that time is, is to keep track of the equipment. And it's all part of the job costing effort to describe the equipment that was used on the site, the class and activity which goes across the top. And then in those individual blocks the equipment is logged in for the hours used.

Q. Are you familiar with the names of the individuals on Exhibit A?

A. The names I'm most familiar with -- and lets just say before I looked at the time sheet -- okay, is Brian Perry, and he was the -- Brian Perry was the foreman.

Q. And the name Wayne Henle appears on the time card?

[p.25] A. Yes, it does.

Q. And what does it indicate that Mr. Henle was doing on swing shift on January 28, 1994?

A. If you go straight across there's a five next to -- there's a column that has a five two times. The first five as you read to the top of the page relates to road maintenance and flagging. The second five -- the second five again is road maintenance and flagging. Let me just double check what I'm reading. Yes, correct.

Q. The swing shift at Leadcor -- would the swing shift encompass the hours right before and after midnight?

A. Yes, they would.

Q. And you told us at the bottom of the page represents information filled in by the foreman?

A. Yes it is.

Q. And what does that show in respect to Mr. Henle?

A. It shows that -- let's see number three -- okay. What has been done is they have taken the equipment number, and that's just like the menu of the equipment used that day and they've designated that Wayne was on the grader. And on -- there's four-hours of the class and activity which is a one-five. Then there's three-hours of standby and then a total hours of seven.

Q. What is standby?

A. Standby is when the activity has been completed and [p.26] there's nothing else to do. And it's important that when the equipment is not moving and functioning and it's idling it is on standby. So, it's either working in production or doing whatever it's assignment was or it is at standby ready to do whatever it's called to do.

Q. But this would indicate then that he was not operating the equipment for three-hours of the seven-hours he was at work?

A. Yes, it does.

Q. And is there anything that is on these time cards that would reflect where he was at during that three-hour time period?

A. No, it doesn't.

Q. It shows that he only worked seven-hours that day. Are you aware of why he only worked seven-hours that day?

MR. WOODBURY: I'm going to object that assumes facts that are not in evidence. The equipment only worked seven-hours it says. I believe that the time card itself indicates 10 hours.

THE COURT: I'll sustain that. Go ahead.

Q. (BY MR. SCHIECK) Can you explain the discrepancy between showing that he worked 10 hours and the equipment was operated for seven-hours?

A. I can only explain it in my own -- my own terms because I asked the question a long time ago and the answer I [p.27] got --

MR. WOODBURY: I'm going to object to him repeating any answer he got is hearsay.

THE COURT: Unless there is an exception that would be sustained. Go ahead.

A. Okay. The --

Q. (BY MR. SCHIECK) No, it's sustained.

A. Oh.

Q. Did you talk to any of the other individuals that are listed on this time sheet?

A. I talked to Brian Perry.

Q. What about any of the other individuals?

A. No.

Q. Had you talked to other individuals at Leadcor concerning Mr. Henle's activities of that night?

A. I only talked to Brian.

Q. And without telling me what Brian told you, did he give you information concerning that evening?

A. Yes, he did.

Q. Of Mr. Henle's activities?

A. Yes, he did.

Q. At some point and time did you become aware of who was representing Mr. Brown on these criminal charges?

A. Yes, I did.

Q. How did you come by that information?

[p.28] A. My contact was with Stella Brown.

Q. Who did you learn was representing Mr. Brown?

A. Repeat?

Q. Who did you learn was representing Mr. Brown?

A. Mr. David Lockie.

Q. Did you have any contact with Mr. Lockie?

A. Yes, I did.

Q. Do you recall when you had contact with Mr. Lockie?

A. In the beginning my contact with Mr. Lockie was just to introduce myself, who I was, where I was in the scheme of things with Mr. Brown. And that not knowing anything other than the fact that I knew Mr. Brown and up to the night before the incident I was with Mr. Brown in a federal deposition. I made myself available to Mr. Lockie.

Q. Do you recall when the first contact was?

A. It was prior to the preliminary hearing. An exact date I would have to look at my time sheets -- my records, my personal records.

Q. You told us that you looked at the daily job time card in specifically of what Mr. Henle was doing that night. Did you ever discuss the contents of this document with Mr. Lockie?

A. Yes, I did.

Q. Do you recall when that was?

A. That was after the preliminary and prior to the [p.29] trial.

Q. What did you tell Mr. Lockie?

A. I told Mr. Lockie that I had these sheets available. I was concerned on the fact that I was going to be out of town and not be able to fulfill a commitment that I said I could be available if he

needed me. And there was discussion about the time sheet.

Q. What did you tell him specifically about the time sheet?

A. I told him that the time sheet appeared to have a gap in it.

Q. What gap is that?

A. The timing.

Q. Specifically the three-hours standby?

A. The four-hours and three-hours of standby and the 10 hours for time paid.

Q. Did you give Mr. Lockie a copy of this?

A. My recollection -- was at that time my communication -- was through Stella Brown and if I had copies I would have sent them to her. But this was the only piece of -- a copy of anything that I participated in that my recollection is that I sent a copy also to David Lockie.

Q. I'm not clear. Is your recollection that you sent one to Mr. Lockie or you did not?

A. It is.

[p.30] Q. That you did?

A. I just stepped through my own personal logic on this.

Q. How many conversation did you have with Mr. Lockie prior to Mr. Brown going to trial?

A. Several.

Q. Do you recall the exact number?

A. Not the exact number. My day timer would normally indicate certain things. I recall reasons, not days.

Q. Other than the time card discussion, do you recall any other reasons why you talked to Mr. Lockie?

A. Yes, I do.

Q. And what were those?

A. That was in the attempt to assist and understanding one of the -- one of Mr. Brown's consultants for David Lockie for the DNA testing.

Q. Were you ever contacted by an investigator working on this case through Mr. Lockie?

A. No, I wasn't.

Q. Were you ever contacted by Mr. Lockie for more details or specifics concerning the job time card?

A. No, I wasn't.

Q. In your position as chief safety officer for Leadcor, if an attorney had wanted to talk to one of the employees that were working for Leadcor would they have to go [p.31] through you?

A. I was their contact because of the fatality -- I represented the company. Their logic would have been for them to come through me. I fielded a lot of issues and the company would of just said talk to Mr. Baker and then I would have dealt with any request accordingly.

Q. Did you receive any request for Mr. Lockie or his investigator to speak to any Leadcor employees concerning the activities of Mr. Henle on January 28, 1994?

A. No. I did not.

Q. When you talked with Mr. Lockie -- the conversation that you recollect concerning the DNA, what did Mr. Lockie tell you?

A. Okay. The question is when I talked to Mr. Lockie about DNA. My conversation with him was to be able to have the ability to ask Jennifer -- the consultant, and I forgot her last name. You'll have to help me with that. She was in California and she was to assist in the process of DNA examinations and testing and there were questions that were coming up on timing, availability, so on and so-forth. And when I first called Jennifer, she said well, Mr. Baker you have --

MR. WOODBURY: I'm going to object to anything Jennifer said. It's hearsay.

THE COURT: We are getting into a lot of hearsay [p.32] here. Go ahead.

MR. SCHIECK: Thank you, Your Honor. Can I have the Courts indulgence for one minute? I'd pass the witness, Your Honor.

THE COURT: Cross-examination.

MR. WOODBURY: Thank you, Your Honor.

CROSS-EXAMINATION

Q. (BY MR. WOODBURY) Your name is Dexter Baker?

A. Dexter K. Baker, Junior.

Q. What relationship do you have -- it sounds to me like you have a closer relationship with the Brown family then you have thus far told us, do you?

A. I have none.

Q. The only thing that you were trying to accomplish back in January of 1994, was to protect the credibility of one of your witnesses?

A. Yes.

Q. How many witnesses to this accident were there?

A. I'm going to say six.

Q. And were they all -- was Mr. Brown somehow differently situated then the other witnesses?

A. Yes, he was.

Q. What is the significance of that different situation?

A. The man died in his arms.

[p.33] Q. Okay. The man died in a truck accident or something?

A. He was crushed.

Q. Okay. And other people had seen him being crushed by the equipment?

A. Yes.

Q. And why was it important then that Mr. Brown had the man in his arms when he died?

A. He was closest to him.

Q. There was differences of opinion about what had happened?

A. Not really.

Q. Why out of six witnesses -- if they are all saying the same thing why is Troy Brown so critical?

A. I can answer that.

Q. I hope so.

A. I can answer that.

Q. Would you?

A. I will. Mr. Brown was a clue witness and I treated all of the others with the information they gave equal -- we all did. I was the facilitator.

Q. Well it sounds like --

A. Let me --

Q. It sounds like there was something going to happen if Troy Brown was not a critical witness, what was that?

[p.34] A. Not really.

Q. Oh, okay. That's all. When it says -- when this time card says -- well first of all, who fills out the time card?

A. Brian Perry.

Q. Okay. And you recognize his handwriting?

A. I recognize his signature.

Q. The printed names, who put those in?

A. Brian Perry.

Q. Okay. And you recognize his printing? Do you recognize his printing?

A. I recognize the printing on this form.

Q. As who's?

A. Brian Perry's, only because he signed the form.

Q. So, it could have been anybody writing these names in on the time card, you don't know, you weren't present?

A. I wasn't present when those names were written down.

Q. And you are not involved in payroll -- or you weren't involved in payroll?

A. I'm not involved in payroll, no.

Q. Okay. And so it appears that Brian Perry, a foreman for Leadcor wrote down that Wayne Henle worked 10 hours on January 28, 1994?

A. Yes, he did.

Q. That is reflecting this record, right?

[p.35] A. We are reading the same thing, yes.

Q. What is a swing shift, what shift -- from what time to what time?

A. I don't recall. I'm sorry, I don't recall.

Q. Do you have -- where was this job being done?

A. Newmont.

Q. And Newmont had several sites at that time?

A. Yes, they did.

Q. And what site was this?

A. I'm going to offer this -- I'm going to say Rodeo Creek because that's what it says at the top. Rodeo Creek was the project.

Q. Where was Rodeo Creek?

A. On the one site -- David has a map, I don't -- it was on Newmont Mine site.

Q. How far north of Carlin?

A. It was a 30-minute drive.

Q. Thirty minute? You must have driven it?

A. I've driven it a hundred times but I'm not prepared to say what exactly the driving time is.

Q. I'm not asking exactly. Okay. And it appears from this that Brian Perry said that on swing shift January 28, 1994 Mr. Henle worked a full 10 hours.

A. He got paid for 10 hours.

Q. What it says it that he worked five, and then he [p.36] worked five and that's 10 hours right?

A. Okay. Let me just -- I question that --

Q. I understand. My question is --

A. -- for 10 hours.

Q. Okay. The problem you're having and what you think this time card demonstrates is that the one-dash-two -- excuse me, the one-dash-five that is described to Wayne Henle in the top of the time card. When you go down and you look at one-dash-five in the bottom it says four?

A. Yes.

Q. And what that means is that of the five-hours Mr. Henle worked the piece of equipment operated four-hours, right?

A. No.

Q. Okay. What does it mean?

A. It means that Mr. Henle got off work early and got paid for 10 hours because he got a phone call that his daughter was hurt --

Q. No, no, no.

A. I asked Brian that question.

Q. I don't -- what you want to do is you want put in hearsay testimony and you know that you are not supposed to do this, right?

A. I'm taking your direction.

Q. All right. Now, what I'm asking you is what does [p.37] that four stand for?

A. The four stands for the equipment was being used and the meter was running for four-hours.

Q. Okay. And that coincides, does it not with the five-hours that first appears in the Wayne Henle activity?

A. That corresponds.

Q. That corresponds. All right. So, Mr. Henle worked five-hours this time card shows and four of those hours he was on a piece of equipment?

A. That's right.

Q. Okay. Which five-hours was that, was that the first five, the last five, what?

A. The four was on the grader, it would be the first five-hours.

Q. Okay. How do you know that just out of curiosity?

A. Because -- okay -- I do not know it.

Q. Okay.

A. I can't read through the numbers.

Q. And then Mr. Henle's job is not only road maintenance, his job is also flagging?

A. That's a term, yes.

Q. Flagging means he is out there directing traffic to insure safety, right?

A. This is in the middle of the night.

Q. I don't know about that but --

[p.38] A. That's what --

Q. -- you don't know that because you don't even know what swing shift is?

A. Well, I know it's in the evening --

Q. -- all right --

A. -- swing shift.

Q. But you don't know from what time to what time?

A. I can make some guesses but I don't want to be

Q. -- I don't want you to make guesses.

A. That's right.

Q. You don't know?

A. It could be found out though.

Q. Okay. Then what did he do during that hour? You don't know right, his time card doesn't reflect that?

A. That's right.

Q. Okay. And then the second five-hours that he worked -- let me go back. You say that in the middle of night there is never any flagging?

A. It's dark.

Q. I know what it is at night but are you saying there is never any flagging?

A. I'm not saying that there is never any flagging.

Q. So, but you sounded skeptical when I said --

A. -- I'm skeptical, yes.

Q. Okay. The flagging doesn't require a piece of [p.39] equipment, right?

A. No, it doesn't.

Q. So it wouldn't be reflected here. And then the second five-hours is reflected two-dash-five road maintenance and flagging. Why is -- what does two-dash-five mean?

A. I don't know.

Q. And so you don't know whether that second five-hours or two-dash-five is -- where it appears or where it occurs in the shift.

A. They screwed up.

Q. Okay. But it appears that he was doing the same thing for five-hours but they listed it separately. Why did they do that, do you know? Or why does the time card reflect that?

A. I didn't question it.

Q. Okay. And it is when road maintenance is complete the person is not necessarily required to sit on the equipment or run the equipment?

A. It is not required, no.

Q. They can get off the equipment, right?

A. Yes, he can.

Q. Now you talked to Mr. Lockie and you told him about this information, is that correct?

A. Yes, I did.

Q. Did you ever write a statement to that affect?

|p.40| A. I wasn't asked to.

Q. I didn't ask that. I said did you ever --

A. -- I never wrote a statement.

Q. Okay. And yet this came out as early as just after the preliminary hearing?

A. I'm saying between the two times.

Q. Okay. So there is no doubt in your mind that Mr. Lockie knew that you thought there was a discrepancy between the hours that Mr. Henle worked up there and the showing of the equipment used during that period of time?

A. Yes.

Q. All right. And you think you communicated that to him through Stella Brown?

A. No, I communicated it directly to him.

Q. How many times.

A. I'm going to say -- well at least once and I'm going to say twice because I did have several conversations with Mr. Lockie.

Q. Did Mr. Lockie seem receptive to what you were saying?

A. No.

Q. He did not understand what you were saying?

A. He understood -- it was not relevant.

Q. And where is Brian Perry now days?

A. The last time I talked to Brian he was working with [p.41] A and K in Reno, Nevada. And he was living in -- I'm going to say it was Fernley -- Fernley, Fallon.

MR. WOODBURY: Thank you.

THE COURT: Redirect.

MR. SCHIECK: No, Your Honor.

THE COURT: You may step down. Thank you very much. Your next witness.

MR. SCHIECK: Stella Brown, Your Honor.

THE COURT: Stella Brown. Ms. Brown, if you would step forward and face the Court Clerk. Raise your right hand and be sworn.

(WHEREUPON the witness was sworn.)

STELLA RAE BROWN

called as a witness on behalf of the Petitioner, after being duly sworn, testified as follows:

THE COURT: And please take the witness stand. And state your full name and spell your last name.

THE WITNESS: Stella Rae Brown. B-R-O-W-N.

THE COURT: Mr. Schieck.

MR. SCHIECK: Thank you, Your Honor.

DIRECT EXAMINATION

Q. (BY MR. SCHIECK) Ms. Brown, are you related to Troy Brown?

A. Yes, sir. I'm his mother.

Q. You'll have to raise your voice so we can hear. You [p.42] indicated that you are his mother?

A. Yes.

Q. And where do you reside?

A. I live in Saint George, Utah at the time. I've been down there three years.

Q. Where were you residing in January of 1994?

A. In Loa, Utah.

Q. And just roughly, how far is that from Carlin?

A. It's about a six-hour drive.

Q. Okay. At some point did you become aware that your son, Troy was a suspect in a sexual assault case in Carlin?

A. Yes, sir.

Q. Do recall when you became aware of that?

A. The first time I became aware of it was when my daughter-in-law called who was living in Carlin at the time and she said that they had come and talked to Troy.

Q. With respect to the date of the incident which was January 28 into the 29th of January, in relation to those times when did you get the call telling you that they had talked to Troy.

A. It was January 29.

Q. And that was a Saturday?

A. Yes.

Q. Do you know if Troy had plans for that Saturday?

A. Yes, he did. He was already on his way home. He [p.43] also had my grandchild with him and they rode the bus.

Q. And did Troy arrive home in Loa?

A. Yes.

Q. About when, what day?

A. He had to get a ride with someone else and they didn't get in until late afternoon.

Q. Did you have the opportunity to observe Troy's arms and his body in general when he arrived?

A. Yes, I did.

Q. Did you observe any injuries, scratches, bite marks, anything of that nature?

A. No, sir.

Q. And Troy eventually was charged with the crime?

A. Yes.

Q. Did you have contacts with his first attorneys?

A. Yes, I did.

Q. And do you recall who they were?

A. He had the two public defenders at first and we had a conflict of personalities. And then we were -- he was assigned to David Lockie.

Q. Do you recall approximately when it was that Mr. Lockie came onto the case?

A. I'm not exactly sure of the time frame, it is been so long. But I know that it was after he came back from the evaluation -- they sent him out to Reno for the mental [p.44] evaluation.

Q. That was the Lakes Crossing trip?

A. Yes.

Q. Did you have contact with Mr. Lockie after he was appointed on the case?

A. Yes, I did.

Q. How often would you say that you talked with Mr. Lockie?

A. I remember calling Mr. Lockie many times to discuss different issues about the case. I'd phone and then we -- my husband and I at that time also came down and visited with him in his office.

Q. Here in Elko?

A. Yes, sir.

Q. Was Troy out of custody while he waiting to go to trial or was he in custody?

A. After the preliminary he was out. He was in our custody.

Q. He bailed out?

A. Yes.

Q. Did he have conversations -- to your knowledge, himself with Mr. Lockie?

A. Yes, he did.

Q. Did he have conversations when you weren't present?

A. Yes.

[p.45] Q. Did you have conversations where he wasn't present?

A. Yes.

Q. Were you aware that there was potential DNA evidence in this case?

A. Yes, I was.

Q. And how did you become aware of that?

A. In the very beginning I was aware of it because they took the stuff from his brother's home where he was living at the time. And then they also -- it was brought up at the preliminary. We had several conversations about that testing.

Q. Conversations with who?

A. Mr. Lockie.

Q. Did you attend the preliminary hearing?

A. Yes, sir.

Q. Were you ever aware of there being someone working or appointed to help the defense with regard to the DNA?

A. Yes, and that was even before David Lockie. That was with the public defender before that.

Q. So you were aware of a stipulation and order had been entered concerning the collection of that evidence?

A. Yes, I was.

Q. Did you discuss the terms and conditions of that stipulation and order with Mr. Lockie?

A. Yes. I did.

Q. When did you discuss that with him, if you recall?

[p.46] A. I remember discussing it with him several times. My concern was about the testing, if our private testing person was present, those kind of things. We talked about it several times.

Q. Did you ever become aware of testing that was done in the absence of the defense expert?

A. Yes, we did.

Q. How did you become aware of that?

A. Well, I was tracking this very carefully and when Ms. Romero had stated the testing she had done I questioned Mr. Lockie at that time. Where was our specialist? Where was she? Because I knew she'd been ordered to be there and I knew that she wasn't there. He didn't seem to be concerned about that at that time. I brought it up numerous times because I was very concerned about it. Be never did say why she wasn't there.

Q. Did you ever ask him about filing motions to exclude the DNA evidence?

A. Yes, we did. Due to the fact that we felt things were not handled properly, contamination, transferring of items, that type of thing. It was a big issue.

Q. What was his response when you brought the possibility of filing motions to exclude the evidence?

A. I don't really remember exactly but I know that he didn't ever indicate that he would do that, that he was going [p.47] to bring up those issues.

Q. Did you attend all the court proceedings?

A. Yes, sir.

Q. You already told us the preliminary hearing. Did you attend the trial?

A. Yes.

Q. Did you attend any proceedings where Troy had to come to court to appear before the Court?

A. Yes, I've been at all the proceedings.

Q. In any of those proceedings did you ever hear a motion heard to exclude the DNA evidence?

A. No, sir.

Q. Did you ever hear any objection voiced to the DNA evidence?

A. There was a little indication. I don't remember the exact things but when something was brought up it was maybe touched on and then it was just like forgotten.

Q. Do you recall when that was?

A. That was when they asked Mike Terry why he transferred evidence from one bag to another.

Q. What proceeding was that, do you remember?

A. That was in the preliminary.

Q. Now you indicated that you had attended the trial. Did you attend every day of the trial?

A. Yes.

[p.48] Q. When you first came to court for the start of the trial, was Troy in custody or out of custody?

A. In the preliminary?

Q. No --

A. -- or the --

Q. -- the trial.

A. The trial. He was in custody.

Q. And when was he placed in custody, do you recall?

A. The very -- when we first got here.

Q. When you arrived in Elko for the trial?

A. Yes.

Q. And how long did he remain in custody?

A. He remained in custody until the evening of when the jury went out to make their decision.

Q. When you came -- did you travel from Utah to Elko with Troy for the trial?

A. For the trial?

Q. Yes.

A. Yes.

Q. The family came together?

A. Yes.

Q. And when you came from Utah, did you expect that Troy was going to be in custody throughout the trial?

A. No, sir, we didn't.

Q. Did Troy bring clothes to wear for trial?

[p.49] A. Yes.

Q. Do you recall what clothes he brought?

A. He had a nice western suit jacket, a nice light blue shirt, dark pants, boots.

Q. And do you recall what he was wearing when he was put into custody when you got here for the trial?

A. He was put into the orange suits that they wear.

Q. Is it the same as it is here today or is it -- was it a different color?

A. It was orange. I'm pretty sure it was orange.

Q. Okay. Today's is kind of red you recall it was orange back in '94?

A. It runs in my mind it was but its been a long time.

Q. It was a bright color?

A. Yeah, it was definitely a bright color.

Q. What happened to the clothes Troy was wearing when he was taken into custody?

A. They gave them to us.

Q. And how would -- how did Troy dress for trial?

A. We would have to bring his clothes here to the Courthouse so that he could change.

Q. Do you recall where you brought the clothes to?

A. We were ordered to bring them in and give them to one of the officers.

Q. And what time would you have to bring the clothes [p.50] down?

A. We would just be like 30 minutes or so early.

Q. Did you ever see Troy arriving at the Courthouse on the mornings of the trial?

A. Yes, I did.

Q. And where did you see him arriving at the Courthouse, do you recall?

A. Through the back -- back alley entrance.

Q. Did you ever see him coming in any entrance other than the back alley?

A. I believe there was on one occasion that he was brought -- they parked the car out in front -- the side of the Courthouse.

Q. Now it's my understanding and correct me if I'm wrong. The Courthouse as it exists today in 2002 is different than when it existed in September of 1994?

A. There has been some change.

Q. What changes have you noticed? What was different in 1994 than now so that I can try to understand?

A. We didn't get here in very much time in order to -- you know really tell. It's been a long time since we've been out here so I don't really know for sure but it's changed somewhat.

Q. What would Troy be wearing when you would see him arriving for court in the morning?

[p.51] A. He would be in his jail clothes and he would be chained and shackled.

Q. When you say chained?

A. He was handcuffed, he had chains on his feet and handcuffs.

Q. So his feet were chained together?

A. Yes.

Q. And how were his hands chained?

A. His hands were chained with the chain to his feet as well. So that he couldn't have access to his hands either.

Q. Do you know what a belly chain is?

A. Yes.

Q. Was he wearing a belly chain?

A. I guess that's what it's called.

(MR. SCHIECK) Troy stand up.

Q. (BY MR. SCHIECK) Troy's got a belt on here today with his hand cuffed -- with handcuffs in the front. Did it appear like this or was it all chains or -- do you recall?

A. It appeared like that.

Q. And his feet were chained together also?

A. Yes.

Q. Did that cause him to walk in any particular fashion?

A. Yes, he has to shuffle in order to walk. He can't really walk he has to just shuffle his feet side to side.

[p.52] Q. And you were aware that there was a jury sitting on the case?

A. Yes, sir.

Q. Did you recognize who the members of the jury were?

A. After a few days, yes I did. I recognized their faces.

Q. Did the jurors wear any particular badges or indications that identified them as jurors?

A. I don't really remember.

Q. On the occasions that you would see Troy arriving at the Courthouse in the morning wearing the jail clothes and the chains that you've described. Did you see any members of the jury around?

A. Yes, I did.

Q. And where did you see members of the jury?

A. They were out in the foyer going from the one side of the room to the other.

Q. Were they ever in a position where they could see Troy arriving?

A. I believe they were.

Q. What about at the end of the day what was the procedure while Troy was in custody with his clothing after trial proceedings concluded for the day?

A. We were given the clothes and we had to bring them back the next day.

[p.53] Q. And do you know where he changed his clothes at?

A. All I remember is that there was like a small room that when they got here with him that they would take the clothes and go in and he would change there.

Q. And how would he leave, where would they put him in the transportation to take him back to the jail?

A. Back through the back alley.

Q. And he would be again wearing his jail clothes and chains?

A. Right.

Q. Did you ever see any jury members around when Troy would be leaving wearing that type of clothing?

A. I did.

Q. Where did you see them at?

A. Just throughout the building and people linger after things are over with and so forth. But we talked about this with Mr. Lockie.

Q. When did you talk about this with Mr. Lockie?

A. I know that we talked to him about it several times about that fact.

Q. Was this during the trial or after the trial?

A. I believe we did mention it a couple of times during the trial and we definitely talked about it a lot after the trial.

Q. To Mr. Lockie or to other people?

[p.54] A. To Mr. Lockie and other people.

Q. During the trial when you mentioned it to Mr. Lockie do you recall what his response was?

A. He didn't seem to think that was much of an issue either. He really didn't even comment on it. It was like you didn't even have the conversation.

Q. Were you concerned by it?

A. I was very concerned about it.

Q. Did you express to Mr. Lockie that you were very concerned about it?

A. Yes, I did.

Q. Were other members of your family or friend present when you had these discussions with Mr. Lockie during the trial?

A. His father, Marion and also Travis.

Q. When you say his Father you are referring to Troy's father?

A. Yes.

Q. After the trial was over and Mr. Brown -- Troy Brown was convicted, there were other things that took place in court. Do you recall?

A. I'm not sure if I understand the question.

Q. Do you recall anything having to do with the DNA after the conviction was over?

A. Oh, yes. I wrote several letters to Mr. Lockie [p.55] expressing why our specialist was not present during the testing. Why there was things that was not investigated into numerous times. Trying to get some kind of logic or sense to why issues and things were not done that we had been so concerned about and that's when -- we started that right immediately asking the questions of why.

Q. To your knowledge was additional testing done after the trial was over?

A. Yes, it was. I had written a letter to the Judge and it was awarded -- I can't remember the amount of money it runs my mind that it was around $5,000, for addition testing done with our own specialist.

Q Was that the same specialist that had been appointed at the beginning of the case?

A. Yes, sir, it was.

Q. So it wasn't a new and different expert, it was the same one?

A. Same one. I did ask him why we couldn't have a different one.

Q. What was his response?

A. His response was that he didn't see a need for that. That she was qualified and she already was

familiar with the testing, and that basically he was saying that that's who we were going to have.

Q. At this point after the trial when you were having [p.56] the discussions did you bring up the fact the defense expert was not present during some of the procedures and testing done by Renee Romero?

A. Yes, sir, I did very strongly.

Q. And what was Mr. Lockie's response to that?

A. His response is that she didn't really have to be there.

THE COURT: All right. We'll take a short recess.

(WHEREUPON a short recess was taken and Court reconvened at 11:21 a.m.)

THE COURT: All right. Please be seated. We have Stella Brown on the stand. Let the record reflect the presence of Mr. Brown and his counsel. And Mr. Woodbury on behalf of the State. And Ms. Brown I'll remind you that you are still under oath. We are on direct examination with Mr. Schieck, you may proceed.

Mr. Schieck: Thank you, Your Honor.

Q. (BY Mr. Schieck) Ms. Brown, we were ending up with your discussions with Mr. Lockie after the trial concerning DNA testing done after trial. Do you recall that after those results were in, Troy's sentencing took place?

A. After the sentencing?

Q. Do you recall that he was sentenced after those results came in?

A. Yes.

[p.57] Q. Okay. And were you aware whether or not a direct appeal was then filed on behalf of Troy?

A. Yes.

Q. Who handled that direct appeal?

A. It was handled by Dorothy Nash-Holmes.

Q. And was she appointed or retained, do you recall?

A. She was retained.

Q. Okay. Who was it that retained her?

A. It was Troy's father and I.

Q. Was she -- did she handle all aspects of the appeal? Let me rephrase that question because I'm probably confusing you and jumping ahead. Do you know whether or not she filed a notice of appeal which is the first thing that happens on the appeal?

A. I'm not exactly sure but I think she did.

Q. To your knowledge did Mr. Lockie have any involvement in that appeal?

A. Just in getting her transcripts and records.

Q. Just involved in transferring the file over to Ms. Holmes?

A. I think so.

Q. Did you have discussion with Ms. Holmes concerning the appeal?

A. Yes.

Q. Did you discuss with her anything that had to do [p.58] with Troy being seen by the jury in shackles during the trial?

A. I don't recollect that we talked much about that, mostly DNA.

Q. At any time when you were attending the court proceedings -- which you told us you attended every thing, did you hear anything said or discussed while court was in session concerning Troy being seen by the jury in shackles?

A. You mean in the courtroom?

Q. Yes.

A. No, sir.

Q. I'm talking about things that would have been told to the Judge or put on the record in court?

A. No, it was never brought up.

Q. So there's nothing -- there would be nothing in the transcripts that would refer to that?

A. No, not that I'm aware of or that I remember.

THE COURT: Mr. Schieck, why don't we hold on for a minute. And Mr. Watson, could you take a look -- is this holding together up here?

THE WITNESS: It's like unscrewed, it's just sitting there.

THE COURT: I think that particular microphone stand is somewhat defective at this point. All right. Good. Okay. Thank you.

MR. SCHIECK: Thank you, Your Honor.

[p.59] Q. (BY MR. SCHIECK) After Troy was convicted, did he go to prison?

A. Yes, he did.

Q. Were you aware of where he went, which prison?

A. Was I aware of it?

Q. Yes.

A. Yes, I was. I'm in contact with Troy almost on a daily basis.

Q. What facility was he at?

A. He was down here at the jail for a little while and then they transferred him over to Carson -- over there. And then from there he went to Ely.

Q. To your knowledge was he in the psychiatric unit in Carson City?

A. No.

Q. Do you know whether he was on any medication while he was in Carson City?

A. No.

Q. Do you know -- let me withdraw that question. Are you familiar with the name of Wayne Henle?

A. Yes, sir.

Q. How did you first become aware of Wayne Henle?

A. When this incident all happened. Wayne Henle was a work associate of my sons' who all worked at the same business. They lived in the same trailer court.

[p.60] Q. And did you know his relationship to Megan?

A. Yes.

Q. And how did you learn his relation to Megan?

A. Just by talking to family members about who he was. He was her step-dad.

Q. Did you know her mother Pam Henle, formerly Pam Allred?

A. I knew who she was, yes.

Q. Did you ever become aware of her in Utah?

A. Yes.

Q. How did you become aware of that?

A. She moved back home after things happened which is only about 35 miles from Loa to Hunnington.

Q. Hunnington?

A. Uh-huh.

Q. Is that yes?

A. Yes.

Q. So you lived in Loa and Pam lived in Hunnington? With her mother, yes.

THE COURT: How do you spell Loa?

THE WITNESS: L-O-A.

THE COURT: Okay. Go ahead.

Q. (BY MR. SCHIECK) Do you know whether Wayne Henle was present in Hunnington?

A. He was there for a short time.

[p.61] Q. Did you ever become aware of any difficulties that Mr. Henle was having with the law?

A. Yes, I did. I was called by some people who live over in that area --

MR. WOODBURY: I'm going to object to anything she received through a phone call, Your Honor. As a matter of fact the defendant has supplied the Court with certified copiers of some documents concerning the trouble that Mr. Henle had in Utah and we're not fighting about whether or not that occurred.

MR. SCHIECK: I'll withdraw the question, Your Honor, and ask a different one.

THE COURT: All right. Go ahead.

Q. (BY MR. SCHIECK) I'm not looking for what someone told you over the telephone.

A. Okay.

Q. I'm just looking, did you become aware of some criminal difficulties of Mr. Henle?

A. Yes, I did.

Q. Did you relay that information to Mr. Lockie?

A. Yes, I did.

Q. Do you recall when you relayed that information to him?

A. It was immediately after I got the information. I called him by phone and I also faxed him copies of the [p.62] information.

Q. What information did you obtain that you faxed to him?

A. I got information from the County Courthouse. The proceedings -- the trial proceedings.

Q. And did you inform Mr. Lockie of the nature of the charges facing Mr. Henle?

A. Yes, sir.

Q. And what were the nature of those charges?

A. It was an assault on a female.

Q. Was it sexual in nature?

A. Yes.

Q. Do you recall whether it was prior to the preliminary hearing or prior to trial that you told Mr. Lockie this information?

A. It was prior to trial.

Q. How is it that you went about getting the documents from the Courthouse?

A. I just -- it's public record.

Q. Did you review those records?

A. Yes.

Q. As a result of reviewing those records did you learn of any other incidents involving Mr. Henle?

A. Not of those records.

Q. Did you learn of another incident?

[p.63] A. There was one indication of an incident in there, as well.

Q. And where did that incident occur?

A. It happened in Carlin.

Q. Did you make Mr. Lockie aware of that incident in Carlin?

A. Yes, I did.

Q. Did you know the name of the individual that was the victim of that incident in Carlin?

A. Yes, I did.

Q. Did you give that information to Mr. Lockie?

A. Yes.

Q. What name did you give him?

A. Debbie Dean.

Q. Did you subsequently speak to Ms. Dean?

A. Yes, I did.

Q. When did you speak to Ms. Dean?

A. I had contacted her and she called me back, and she also wrote me a letter.

Q. Before or after Troy was convicted?

A. That was after.

Q. Were you aware whether or not there was an investigator assigned to Troy's case?

A. Yes, there was.

Q. Did you ever speak with that investigator?

[p.64] A. Very briefly. Just for -- it was only just -- he was at David's office one day when we went there.

Q. When you say at David's office --

A. David Lockie.

Q. How long did the conversation take with the investigator?

A. Oh, it was just we were introduced to him. There was never really an actual conversation.

Q. Was that before the preliminary hearing or before trial?

A. It was before trial.

Q. But after the preliminary hearing?

A. It's all hard to remember; I can't remember if it was before preliminary or during the trial.

Q. Okay. The records show that the preliminary hearing was on July 6, 1994. Do you have any problem with that being an accurate date?

A. No.

Q. And the trial was at the end of September, 1994. Is that correct?

A. That's correct.

Q. By knowing those days and months, does that assist you at all when recalling when you talked to the investigator?

A. I'm going to say it was before the preliminary.

Q. Did the investigator ever come to your house there [p.65] in Loa and talk to you or any of the family?

A. No, he didn't.

Q. Do you know whether he ever went to Hunnington and investigated the information on Mr. Henle?

A. Not that I'm aware of. That was never indicated that he did.

Q. After the trial did you speak to other potential witnesses in the case?

A. Yes, I did.

Q. Do you recall who you spoke to?

A. I spoke Bud Rarick and his wife, Laurie. I spoke to -- there was Lloyd Meyers that we talked to. We talked to the bartender.

Q. Of all the people that you spoke with, did any of them indicate that they had been contacted by an investigator before trial?

A. No, they were --

MR. WOODBURY: Objection, hearsay.

MR. SCHIECK: That's fine, Your Honor.

THE COURT: Sustained. Go ahead.

MR. SCHIECK: He's correct.

Q. (BY MR. SCHIECK) Do you know an individual by the name of Dexter Baker?

A. Yes.

Q. Do you recall when you first were introduced or had [p.66] contact with Mr. Baker?

A. Mr. Baker had called me during his investigation of the accident at the mine to talk to me about Troy.

Q. Do you recall when that was?

A. It was just shortly after the accident. It might have been maybe two or three days after.

Q. After the January 28, 1994 incident did you have further conversations with Mr. Baker?

A. Yes, we did.

Q. Were the conversations concerning the fatality or about Troy's criminal case?

A. It was about both.

Q. How would you describe Mr. Baker's attitude toward the criminal case at the beginning when you first had contact with him?

A. His attitude was that he had a great sense that Troy was innocent and he was just helping us try to put all the pieces together.

Q. Did you stay in contact with him during those months between January of a 94 and the trial in September of '94?

A. Yes, I did.

Q. How often would you say you were in contact with Mr. Baker?

A. I would say probably at least once a week maybe more.

[p.67] Q. Did you ever give him any information concerning Wayne Henle?

A. Yes, I did.

Q. What did you tell him?

A. We conversed about the time sheets, about conversations we had had with other people, incidents, things he'd done -- said, bite marks on his hands, those types of things.

Q. Did you tell him about the criminal case of Mr. Henle?

A. Yes, I did.

Q. Did Mr. Baker provide you with any documents during that period prior to trial?

A. He provided me with the document of the time sheet for Hr. Henle.

Q. And what did you do with the time sheet?

A. What did I do with it? I talked to David about it and I faxed him a copy as well.

Q. And you are talking about Mr. Lockie?

A. Yes.

Q. You faxed a copy to Mr. Lockie?

A. Yes.

Q. What was his attitude toward that information on Wayne Henle?

A. His whole attitude every time we talked about Wayne [p.68] Henle was pretty much ignored. He kept telling us Wayne Henle was not on trial here. That it was not our job to prove who did it, it was our job to

prove that Troy didn't do it. He told me that numerous times.

Q. To your recollection was any of this information that you had about Mr. Henle presented during the course of Troy's trial?

A. No, it wasn't.

Q. Were you aware -- let me rephrase that. Did you discuss potential trial strategies with Mr. Lockie?

A. Yes, many times.

Q. And what trial strategies did you discuss?

A. From the very beginning we were concerned with -- here again as I said before about DNA testing. About how the procedures were done and why, and why certain issues were not brought up.

Q. What about alternative suspects, did you discuss that?

A. Yes, we talked of several. There was four or five other different things that -- when this all happened I came down and stayed with my son and spent a couple of weeks talking to people and trying to figure out everything that -- you know, had happened and who was where, when. Those types of things and trying to figure out -- you know, how it all happened.

[p.69] Q. Did you relay that information of people that you had talked to to Mr. Lockie?

A. Yes, I did.

Q. What was his attitude toward that information?

A. He seemed to be listening but he never did bring anything up or he never looked into anything. Or that I am aware of the private investigator never talked to those people.

Q. Did you ever discuss with him a strategy that included the possibility that one of Troy's brothers was actually the perpetrator of the crime?

A. No, he never indicated that at all. He told us just before we went into trial that he had it all figured out and that he had a strategy and we were not to worry.

Q. Was it ever brought up the possibility that Travis and or -- Travis or Trent was the perpetrator?

A. Not ever.

Q. Was it brought up during the trial?

A. Yes, sir.

Q. And do you recall how it was brought up?

A. During the course of the -- back and forth consultation on the DNA he was asking Renee Romero questions about the testing if two brothers could have the same DNA in the particular test that she did. He was making it look like that a brother could actually have the same testing.

[p.70] Q. And, so the record is clear. Where was Trent living in -- on July 28, 1994?

A. In Carlin. He was two trailers over from Travis and Troy.

Q. So Travis and Troy lived two trailers away from Trent?

A. Right.

Q. Where did the Henles' live?

A. They lived down on the corner which was approximately about nine trailers from Trent.

Q. So Travis and Trent lived approximately the same distance from Megan as did Troy?

A. Right.

Q. You indicated that you had attended the preliminary hearing. Do you recall during the preliminary hearing testimony from one of the State's witnesses that scrapings had been collected from Megan's teeth as part of the sexual assault kit?

A. Yes.

Q. Did you discuss that information with Mr. Lockie?

A. Yes, we talked about it several times.

Q. Can you give us the jest of those conversations that you had with Mr. Lockie concerning those?

A. We just indicated why it wasn't brought up. He did bring it up to one of the -- I don't exactly remember

who was [p.71] on the stand but they indicated that the scraping were taken on -- under oath. And then somehow during the trial they were lost, they were not in the evidence kit. They didn't know where they were, what happened to it.

Q. Did you ever discuss with Mr. Lockie filing of motions to preclude prosecution of the case due to the loss of that evidence?

A. Yes, sir.

Q. And when did you discuss that with Mr. Lockie?

A. During the preliminary hearing.

Q. To your knowledge was such a motion filed?

A. No, sir.

Q. Did you ever ask Mr. Lockie to file such a motion or why he wasn't filing such a motion?

A. We asked him on two incidences about the teeth scraping and also about the finger print that did not match Troy's. Those were two big issues we had.

Q. And where was that finger print recovered?

A. It was found on the little girls night light in her room. She indicated that the perpetrator turned her night light off.

Q. Now after Ms. Holmes was on the case, did you ever discuss with her filing motions for a new trial

based on the information you were finding out after the trial?

A. Yes, we did.

[p.72] Q. To your knowledge did she file such a motion?

A. The way I remember it she said there was really no new evidence that would warrant a new trial.

Q. And did you have any dealings with the attorney that was appointed to represent Troy after that direct appeal was concluded?

A. Yes.

Q. Do you recall who that attorney was?

A. He's had a few State appointed attorneys but another one that we actually retained ourselves --

Q. -- let's see. After Ms. Holmes you hired another attorney for Troy?

A. Yes, we did.

Q. And what was his name?

A. His name was Dennis Widdis.

Q. Did you talk to him about filing motions for a new trial?

A. Yes, sir.

Q. To your knowledge did he file such motions?

A. No, sir.

MR. SCHIECK: Court's indulgence, please for a few seconds. I'd pass the witness, Your Honor.

THE COURT: Cross-examination.

MR. WOODBURY: Thank you, Your Honor.

[p.73] CROSS-EXAMINATION

Q. (BY MR. WOODBURY) When did you hire Dorothy Nash-Holmes to prosecute the appeal?

A. I don't remember the exact time frame. I guess I should of went back through things, it's been too long. It was shortly after we had talked to David Lockie and he said that he did not want anything to do with the appeal process, that he wanted to be released. So it was shortly after his resignation as far as attorney.

Q. Well, as a matter of fact the record indicates that at the time of sentencing Mr. Coppa and Ms. Holmes had requested a -- an extension of time for the sentencing. I assume that you know that he was hired -- they were hired or Ms. Holmes was hired before Troy was sentenced right?

A. I don't how exactly when -- right.

Q. And that you were -- in your estimation you were satisfied with Mr. Lockie and wanted him to continue with the appeal?

A. What was -- could you rephrase -- what --

Q. Were you satisfied with Mr. Lockie's services and wanted him to continue with the appeal?

A. We were not. We kept asking him why there was not certain things done and --

Q. -- well, I understand that. But what you said when I asked you about hiring Dorothy Nash-Holmes was that [p.74] Mr. Lockie apparently was going to go on with the case in your estimation but he told you he didn't want to go on.

A. He told us right after the trial he did not want to do the appeal process.

Q. Okay. In any event, all of the things that you've discussed here today you discussed with Dorothy Nash-Holmes or Mr. Coppa of that firm isn't that correct?

A. Yes.

Q. And that includes the proposition that someone saw Troy in jail clothes?

A. Yes.

Q. Okay. How many pairs of clothes did Troy bring over to trial?

A. We brought two shirts and a suit, one pair of pants and his boots.

Q. Okay. So he had two or three different outfits?

A. Just two shirts.

Q. Okay. And your recollection is that he arrived at the Courthouse in jail clothes?

A. Yes, sir.

Q. Okay. And how many days did that happen do you think?

A. Every day of the trial.

Q. How did you know that?

A. How did I know that?

[p.75] Q. That's the question.

A. Because we were very anxious, we were parked out there. We would wait for them to bring him here.

Q. Where did you park?

A. Just across the street. I'm turned around in here I don't know exactly where.

Q. This is main street out here, right in front.

A. Then it's over that way.

Q. Okay. And are you telling me that the jail people brought him in front of the Courthouse?

A. They brought him in from the back and there is a back alley way.

Q. All right. In the car did you see him arrive at the Courthouse in a car?

A. Did I see him arrive?

Q. Yes.

A. Yes.

Q. And where did he arrive at?

A. Somewhere in the back around the building.

Q. He went back behind the building, right?

A. Yes.

Q. And your testimony is that he was in jail clothes at that time?

A. Yes, he was.

Q. Okay. And that was the entirely throughout the [p.76] trial?

A. Not throughout the trial, he got to change his clothes for the trial.

Q. No, no, no. I mean throughout the trial he arrived at the Courthouse. Every morning when he arrived he was in jail clothes?

A. Yes.

Q. Okay. And where was he taken when he arrived?

A. He was taken to a room here.

Q. Now you are indicating upstairs in the Courthouse?

A. I don't remember exactly where. All I remember is bringing his clothes and I do remember and several family members remember seeing him shackled and chained.

Q. All right.

A. Before he changed --

Q. -- I'm not asking about all of that. All I'm asking about is where did he change his clothes?

A. I don't know exactly where.

Q. Was it in the basement of the Courthouse?

A. I don't know.

Q. How come you don't know or you don't recall, you weren't present for it?

A. I was present but I just don't recall. I don't exactly remember where. I don't know what room they take them into dress them.

[p.77] Q. Excuse me?

A. I don't know what room they take him into dress him.

Q. Right. You weren't allowed to accompany him to be dressed, is that correct?

A. No, we were just to give them his clothes.

Q. And who did you give the clothes to?

A. I don't know if it was a court official here or if it was the jailor.

Q. Okay. Do you remember the Bailiff in this case?

A. Do I remember them?

Q. Do you remember him?

A. I don't remember who it was.

Q. Okay. And why was it that if he had two pair of clothes, why was it necessary for you to keep all the clothes and dish it out -- sort of speak, day after day?

A. I don't know.

Q. There wasn't any idea about you making the request that you wanted to iron the clothes or keep them fresh and soon?

A. No, I did not request that.

Q. There never was any request that you deliver the clothes to the Elko County Jail so he could be dressed down there?

A. We did not.

Q. Okay. You indicated that -- well, where were these [p.78] jurors that you think might have seen him?

A. Out in the foyer.

Q. And by the foyer you mean right out here in front of the court room?

A. Yes.

Q. And your testimony is that Troy Don Brown appeared in the upstairs of this courtroom, this Courthouse, in jail clothes during the trial of this issue?

A. We did see him.

Q. All right. When?

A. Go across the foyer, several times.

Q. Several times he appeared in the upstairs area with jail clothes on with members of jury present?

A. Yes.

Q. Okay. How many times is several -- three, four?

A. Probably at least that many times.

Q. Okay. And you believe that jurors saw him or you think they might have been able to see him?

A. They very well could have been able to see him.

Q. Okay. You don't know that any did see him?

A. I know that they had access to see him.

Q. Who has?

A. The room -- the jury room is right there. The ladies restroom is right there. There was jurors coming and going the whole time.

|p.79| THE COURT: I think she said access.

MR. WOODBURY: Oh, access.

THE WITNESS: Access.

Q. (BY MR. WOODBURY) When he was brought to the upstairs part of the courtroom, Courthouse -- he was in shackles and then it was up here that you gave the clothes?

A. That's what I don't remember exactly where we took the clothes.

Q. Okay. Was Mr. Lockie around when that was happening?

A. No, sir.

Q. All right. With respect to the DNA, I take it that you had a conversation with Ms. Mihalovich?

A. With who?

Q. The DNA expert that was hired by the defense in this case?

A. Did I have a conversation with her?

Q. Did you speak with her?

A. I wrote her several letters.

Q. Did you speak --

A. -- I don't recall actually speaking with her.

Q. Did she write you letters back?

A. No, she wrote letters to David Lockie.

Q. All right. There is an allegation in the Petition for Post-Conviction Relief that Ms. Mihalovich and Ms. Romero [p.80] had been college friends, do you know where that allegation came from?

A. Yes. They actually -- I don't remember exactly. I know that I had a conversation --

Q. -- not what the allegation is but who told you that or how did you find out?

A. During my conversations with Dexter Baker he called and checked on that. He talked to --

Q. -- Dexter Baker.

A. -- their school at their college.

Q. Mr. Baker was instrumental, he was serving as sort of an investigator himself for Troy in this case?

A. Yes, he was.

Q. Now, you talked about contamination discussions with Mr. Lockie on the DNA, is that correct?

A. Yes.

Q. How many times did you have those conversations?

A. Several.

Q. Like four, five?

A. At least.

Q. Why was it necessary to repeat the conversation?

A. Because he wasn't doing what we thought he should be doing?

Q. And when you say we, who do you mean?

A. My husband and I and our family.

[p.81] Q. All right. Do you have some specific expertise in DNA analysis or anything like that?

A. No. I don't.

Q. And so you were essentially relying on him to tell you what was proper and what was improper?

A. Yes, that's what you hire an attorney for.

Q. Well, you didn't hire this attorney he was appointed, isn't that correct -- Mr. Lockie?

A. Well, yes but that's -- they have the knowledge we don't.

Q. Well, I understand that. And now you think he didn't have the knowledge, right? That's what your point is here.

A. I don't think he brought the issues that should have been brought up. No, sir.

Q. What evidence did you have that there had been contamination or why Troy's DNA would have gotten on Megan's vagina and Megan's panties?

A. Through my investigation and what we learned and looked into and read court records, police reports, everything that we could study was totally -- would be considered contamination. They took everything from his room, 12 pairs of underwear, there was four men living in that apartment. Bedding, they just wrapped up his bedding, sheets, blankets, other people's underwear, put it into a big bag. That is [p.82] contamination.

Q. And somehow or another you think you found out or saw someplace, some indication that Megan's panties and vagina had come in contact with his -- the stuff they had taken out of his office?

A. No, but they also put all of those things in a bag together in the beginning as well.

Q. All of those things were separately bagged as the evidence at trial wasn't it?

A. Well, the issue we had with David Lockie was Megan had babysat for my oldest son. She was still in the clothing that she had been in over at his house and babysit his children and they had a small child.

Q. And you think somehow the semen of your son got on Megan's vagina through the process of babysitting?

A. No, I do not. And I don't remember anything in the court records indicating that semen was in there.

Q. Well, you know or you heard evidence that they took a vaginal swab from that child, isn't that right?

A. Yes, and the preliminary tests said there was nothing found on that swab.

Q. The vaginal swab and they found semen on her panties, right?

A. Not on her panties, no.

Q. No? Didn't they test her panties for --

[p.83] A. -- after the preliminary they did.

Q. They found it?

A. After.

Q. As a matter of fact, she made reports at the time of the preliminary -- well, it doesn't matter. Anyway,

we'll let the record speak for itself. The fact is you have no evidence of contamination it's just a bare possibility that contamination might have -- just might have happened, right?

A. We have court record that the DNA was transferred by Mike Terry and re-bagged.

Q. Was transferred from who to who?

A. Re-packaged. Mike Terry.

Q. He took the panties and stuff out a bag before preliminary examination and put it back, right?

A. I don't know exactly what he did but I do know that he transferred things back and forth.

Q. That's what the testimony shows. There is no evidence to show that those panties ever came into contact with your son, is there?

A. I don't recall ever indicating that -- I don't even know where you're coming from. I don't know what you are indicating.

Q. There is no indication that her vagina ever came into contact with your son either at preliminary hearing or after, right?

[p.84] A. No.

Q. Okay. Were you getting separate independent legal advice from someone beside Mr. Lockie?

A. No.

Q. So you were relying exclusively on Mr. Lockie for -- as a matter of fact he wasn't your attorney but you were involved in the case, right? You were relying exclusively on Mr. Lockie for legal advice?

A. Yes, we were.

Q. Okay. How did you know about all these motions that one might file to exclude DNA and so on? I mean, as I understand your testimony, you are listening to him talk about filing motions to exclude DNA.

A. Just from studying and reading articles, and reading up as much as I could on DNA and how the process works.

Q. Now you suggested that you had thought there was an order from this Court requiring Ms. Mihalovich to be present for the DNA testing?

A. There is an order.

Q. More precisely an order allowing her to be present?

A. It says she must be present.

Q. Does it require --

A. -- it indicates that she must be present.

Q. All right. And in your estimate you brought that up to Mr. Lockie?

[p.85] A. Yes, sir.

Q. And Mr. Lockie told you that he had talked to Ms. Mihalovich?

A. Yes, sir.

Q. And he told you that Ms. Mihalovich did not feel that was necessary?

A. That's right.

Q. Okay. And what makes you think it was not necessary -- or was necessary? Let me rephrase that. What makes you think that Lockie was wrong about that?

A. Well, if it was your child would you want only their DNA specialist there?

Q. We are not talking about my child or anything else.

A. That's why I think that she should have been there.

Q. All right. But you don't have any reason to believe, no factual support for the proposition that somehow Renee Romero unsupervised by the defense expert did something wrong?

A. Yes, sir. In the preliminary they said there was not enough there to do testing and then when she done the testing by herself there was more than enough for testing. Now that brings up a big question in my mind.

Q. All right.

A. That is why.

Q. All right, And you have discussed with [p.86] Ms. Mihalovich and Mr. Lockie the fact that Mihalovich told him that, in fact in her opinion there always was enough semen on the panties to do DNA?

A. I am not aware of that.

Q. You forgot that? Okay. Now with respect -- do you still stay in contact with Mr. Baker?

A. Yes, I do.

Q. With respect to Mr. Henle whom you think was convicted of sexual crimes in Utah and did a sexual act -- a wrongful sexual act in Carlin. You told David Lockie all of that stuff, right?

A. Yes.

Q. Okay. And when you told him that who all was present for that conversation?

A. It was over the phone.

Q. Okay. So it was just you and Mr. Lockie?

A. Yes.

Q. And did you converse more or less regularly with Mr. Lockie in those days?

A. Yes, I did. And if I couldn't get a hold of him I would fax him a letter. I faxed him several letters.

Q. And so you would call him almost each and every day?

A. Not every day, no.

Q. Every week?

A. Whenever I had something to talk about.

[p.87] Q. All right. And with respect to Mr. Henle, when you told him all the information you had about that you faxed it or it was in conversation?

A. I called him about it and I also faxed it.

Q. Okay. So there is no question in your mind that Mr. Lockie knew that?

A. No.

Q. Okay. And you suggested an attitude by Mr. Lockie about that?

A. It's just he said it's not our job to prove who did it.

Q. Did he talk to you about the fact that DNA was the problem not an alternative suspect?

A. Not necessarily.

MR. WOODBURY: May I have just a moment, Your Honor. Nothing further.

THE COURT: Redirect.

MR. SCHIECK: Just a few, Your Honor.

REDIRECT EXAMINATION

Q. (BY MR. SCHIECK) Ms. Brown, do you know where the Elko County Jail was located in 1994?

A. Yes, sir.

Q. Is it in the same place it is now?

A. I believe, unless it's changed.

Q. Okay. Do you have any recollection of ever taking [p.88] Troy's clothes to that facility?

A. The only recollection of anything with his clothes is when he was charged and we went and got his clothes after he was charged on the regular jury trial.

Q. When he was originally arrested?

A. No, yes, when he was originally arrested and then also after he was convicted.

Q. When the jury came back into the courtroom with their verdict was Troy in custody that day or out of custody that day?

A. In custody when they did the verdict -- when we came back they took Troy then. He had spent the night with us.

Q. Okay. So the last night of the trial Troy was back out on bail?

A. Yes.

Q. When the jury came back and said guilty they hooked him back up and in the clothes he was wearing took him back to the jail?

A. Right.

Q. And on that occasion you picked up his clothes at the jail?

A. Yes.

Q. Do you recall attorney Fred Leeds?

A. Yes, I do.

Q. Did you ever have any discussion with Fred Leeds [p.89] concerning motions that should be filed on the case?

A. Yes, we did.

Q. And then Mr. Leeds was no longer on the case?

A. Right.

MR. SCHIECK: That's all I have, Your Honor.

THE COURT: Re-cross.

MR. WOODBURY: Nothing.

THE COURT: You may step down. Thank you very much. And we will be in recess until 1:30. Court's in recess.

(WHEREUPON a recess was taken and Court reconvened at 1:36 p.m.)

THE COURT: Please be seated. All right. Let the record reflect the presence of counsel and the defendant. Mr. Schieck, your next witness.

MR. SCHIECK: Thank you, Your Honor. I would call Marion Brown to the stand, please.

THE COURT: Mr. Brown, if you would step forward. And face the Court Clerk. Raise your right hand and be sworn.

(WHEREUPON the witness was sworn.)

MARION BROWN

called as a witness on behalf of the Petitioner, after being duly sworn, testified as follows:

THE COURT: And please take the witness stand. And state your full name and spell your last name.

[p.90] THE WITNESS: Marion J. Brown. B-R-O-W-N.

THE COURT: Mr. Schieck.

MR. SCHIECK: Thank you, Your Honor.

DIRECT EXAMINATION

Q. (BY MR. SCHIECK) Mr. Brown, you are related to Troy?

A. I am.

Q. And what is that relationship?

A. I'm his father.

Q. And where were you residing in January of 1994?

A. Loa, Utah.

Q. And at some point did you become aware that Troy was a suspect and eventually was charged with a sexual assault involving Megan?

A. I did.

Q. Do you recall how you learned of it?

A. Through my wife.

Q. And do you recall Troy coming back to Loa the day after the incident?

A. I do.

Q. Do you know whether that was a preplanned trip of Troys?

A. It was.

Q. You expected him before you ever heard of this?

A. Yes, sir.

[p.91] Q. When Troy got back to Loa did you have the occasion to look to see if he had any bite marks on him?

A. I did.

Q. And why did you do that?

A. Because we'd heard that he'd been accused of this and she had bit the suspect and we proceeded from there and took him to the clinic and he was examined.

Q. Now did you take him or did Ms. Brown take him?

A. Ms. Brown took him.

Q. Did you yourself inspect Troy's body to see if there were any signs of --

A. -- I did.

Q. And did you see anything?

A. Nothing.

Q. Did you attend the various court proceedings?

A. I did.

Q. Did you miss any of the court proceedings?

A. No, sir.

Q. And you recall attending the trial here in this building?

A. I do.

Q. How did you get here to Elko to attend the trial?

A. I drove.

Q. Who drove with you?

A. My wife.

[p.92] Q. Was Troy with you?

A. No, well I can't remember.

Q. Do you know whether or not you brought any clothes on behalf of Troy?

A. What he had was a pair of pants, two shirts, and a suit coat.

Q. Do you recall what he was wearing when he was placed into custody before the trial began?

A. I don't, sir.

Q. Do you recall what became of those clothes?

A. No, sir.

Q. Do you have any recollection of picking them up at the jail?

A. The suit, afterwards. I remember that.

Q. When you say afterwards what are you referring to?

A. When he was sentenced to do time.

Q. After the jury came back?

A. Yeah, after the verdict was issued and they took him back to County Jail.

Q. Do you have any recollection of during the course of the trial seeing Troy arrive for court?

A. Every morning.

Q. Every morning? Where would you be at?

A. We'd be out there on the sidewalk steps.

Q. Can you describe for us which sidewalk you're [p.93] talking about?

A. The one to the north, the entrance into the building here.

Q. Not the front entrance that faces Idaho Street? Do you know the name of the street that you waited on?

A. If I'm sitting here correctly, that way is north.

Q. Okay. You are indicating with your left hand --

A. -- to the north. The entrance to this building, I thought faced north.

Q. And how did Troy arrive to court in the morning?

A. He would arrive in an orange jumpsuit, shackles -- leg shackles and hands.

Q. In what type of vehicle would he be in?

A. A van.

Q. Did the van have any markings on it?

A. I don't recall.

Q. What clothing would Troy have on when he arrived in that van?

A. An orange jumpsuit.

Q. Can you describe the shackles he was wearing?

A. They were with the belt, with the handcuffs, with a chain down to the leg cuffs.

Q. Are you a smoker, sir?

A. I am.

Q. What would you do typically during the trial when [p.94] there would be a break?

A. I would go out and have a cigarette.

Q. Did you come to recognize the members of the jury?

A. I did.

Q. Do you recall if any of them were smokers?

A. Yes, some of them were.

Q. When Troy would arrive in the morning in the orange jumpsuit and shackles, did you ever see any member of the jury around when he got out of the van?

A. Yes, sir.

Q. Did you see where they were at or do have any recollection of where they were?

A. Well, they would just be coming and going, you know. Walking in and getting ready and stuff like that.

Q. Why would you come to court early for the trial?

A. To bring his clothes and be here when he arrived.

Q. Was that a concerted effort on your part?

A. Kind of.

Q. What would happen to the clothes when you arrived here at the Courthouse in the morning before trial started?

A. We just handed them to -- we didn't know whether it was the Bailiff, the deputy, or whoever.

Q. Do you recall where it was that the transaction took place with the clothes?

A. Not really.

[p.95] Q. What about at the lunch break, would Troy stay here for lunch or would he go back to the jail?

A. I don't recollect, sir, what they done with him.

Q. Did you wait for him to come back if he went to the jail for food?

A. At noon, you mean?

Q. Yeah.

A. At lunch break?

Q. At lunch time.

A. We would most generally just be standing out on the sidewalk and they'd go back up.

Q. What about after court, after the days work?

A. Lots of times they would clear everybody out.

Q. Say that again?

A. They would clear the courtroom, everybody out and then he -- I guess, would go undress, whatever. And then we'd pick the clothes up and go home.

Q. You would wait for the clothes?

A. Yeah.

Q. Where would you wait at?

A. Just there in the foyer at the steps.

Q. Do you have any recollection of ever taking those court clothes to the jail to deliver for Troy to change into?

A. No.

Q. Did you ever discuss with Mr. Lockie the fact that [p.96] Troy was arriving in shackles and jumpsuit to be seen by members of the jury?

A. It was brought up.

Q. Were you present when it was brought up?

A. Yes.

Q. And do you recall what Mr. Lockie reaction was?

A. He more or less just shrugged if off.

Q. Did you have much dealings with Mr. Lockie before the actual trial started?

A. Not really.

Q. Who basically handled that?

A. Stella Brown, Troy's mother.

Q. What about Troy, to your knowledge did -- how much dealings did he have with Mr. Lockie?

A. I couldn't tell you that for sure, sir.

Q. After Troy was convicted by the jury did you have very many dealings with Mr. Lockie?

A. No, sir.

Q. What about with Dorothy Nash-Holmes?

A. I talked to her once.

Q. What about any other attorneys on the case?

A. I talked with Fred Leeds, Brad Bittan, Bittan -- whatever his last name was a couple of times.

Q. Those were the first attorneys on the case?

A. Yes, sir.

[p.97] Q. Did you talk -- do you recall what you talked to them about?

A. We just talked about what was going -- you know, how they was going to handle it. They didn't -- they were going to be the lawyers and there was this conflict of interest of personalities that never panned out.

MR. SCHIECK: The Courts indulgence for a minute.

Q. (BY MR. SCHIECK) Who's idea was it to go down to the clinic and have Troy checked over?

A. Probably mine.

MR. SCHIECK: I'd pass the witness, Your Honor.

THE COURT: Cross-examination.

MR. WOODBURY: Thank you, Your Honor.

CROSS-EXAMINATION

Q. (BY MR. WOODBURY) Who had the conflict of personalities with Mr. Leeds?

A. All of us.

Q. And with Mr. Bittan?

A. We didn't really get to talk to Mr. Bittan because it was mostly Mr. Leeds because him and Bittan worked together.

Q. Was there a conflict between Troy that you are aware of with Dorothy Nash-Holmes?

A. No. Not that I'm aware of, sir.

Q. And Mr. Widdis?

[p.98] A. No.

Q. No conflict?

A. I didn't have one personally with him.

Q. But you know Mr. Widdis withdrew?

A. Yes, sir.

Q. And Mr. Stermitz?

A. I can't even say I remember him, sir.

Q. And Mr. Kump.

A. I can't remember him either.

Q. You don't recall him and don't recall him applying to the Supreme Court because of a conflict in personalities with your son?

A. Kump?

Q. Yeah.

A. I thought it was Widdis that done the Supreme Court.

Q. And do you remember Donald York Evans?

A. I didn't have a lot to do with him, sir.

Q. And you never heard that he had a conflict with your son and had to withdraw?

A. Nope.

Q. Okay. Each morning -- first of all, how many mornings, how many days do you think the trial lasted?

A. Four.

Q. And you recall each of the four days your son being brought to the Elko County Courthouse in jail clothes?

[p.99] A. Yes, sir.

Q. And where did he come into the Courthouse at?

A. Well, like I said, if it's the -- I thought it was the north entrance outside and then he would come through the back alley up the back side.

Q. All right. I'm kind of confused about the back alley?

A. Well, whatever they call that back -- there was buildings being built.

Q. All right. There is a parking lot in back of the Courthouse, do you know that, and an entrance to the basement of the Courthouse?

A. No, sir.

Q. You never saw that?

A. No, sir.

Q. Okay. And you think that he came in from the street side?

A. Yes, sir, he did.

Q. All right. And the back alley has what to do with it, I'm not sure I understand?

A. That is where the sidewalk come over and went up the steps and down in -- or up where ever they came.

Q. The sidewalk went down in?

A. Up. Up the stairs and in.

Q. Okay. So you think they van parked on the street --

[p.100] A. -- it did, sir.

Q. Okay. And you think your son was then extracted from the van in jail clothes and brought into the Courthouse?

A. Yes, sir.

Q. Where did the clothes changing take place?

A. We handed them off right out there to the -- in the foyer, right by that door.

Q. And by foyer you mean the upstairs here in the court room?

A. No, sir. On the steps in the -- before the second flight of steps.

Q. So that would be on the main floor of the Courthouse or on the basement?

A. Main floor, main floor.

Q. Okay. And who did you hand them off to?

A. Like I said, it was either the Bailiff or a deputy. I do not recall.

Q. All right. Do you know why you were taking the clothes every night?

A. Pardon me?

Q. Do you know why you were taking the clothes home with you every night?

A. Because he didn't need them down at the jail.

Q. And when he undressed at the conclusion of trial where did he undress?

[p.101] A. I have no idea, sir.

Q. Well, where did you pick the clothes up at?

A. Right there at the same place the steps.

Q. All right. And by the same place you do not mean the upstairs of the Courthouse?

A. No, sir.

Q. You mean on the main floor or below it?

A. Yes, sir.

Q. And how long after the trial was over would that happen for the day?

A. It would be like within 15 to 20 minutes.

Q. So your testimony is that you were present when Mr. Lockie was told that?

A. Yes.

Q. Okay. And that Mr. Lockie just shrugged it off?

A. Yes.

Q. Okay. And you don't recall if you handed the clothes to a Bailiff or to a deputy?

A. Yes, sir.

Q. But it was one or the other?

A. Yes.

Q. Was the Bailiff in uniform?

A. I don't remember.

Q. And you don't remember what the Bailiff looked like or the deputy looked like?

[p.102] A. No.

Q. No?

A. No.

Q. Okay. And is it your testimony that the jurors saw him in jail clothes or that they could of seen him in jail clothes?

A. They seen him.

Q. How do you know that?

A. Because they were no blinder then me, sir, and the was walking around on that sidewalk out there the same as I was.

Q. All right. And by -- are you oriented here in the courtroom now so that you could say which sidewalk -- is it the sidewalk that's along the north side of the Courthouse or the sidewalk --

A. -- where's the bank from right here?

Q. Okay. And that happened all four days?

A. Yes, sir.

MR. WOODBURY: Thank you, we have nothing further.

THE COURT: Redirect.

MR. SCHIECK: No redirect, Your Honor.

THE COURT: You may step down. Thank you very much. Your next witness.

MR. SCHIECK: Trent Brown. Your Honor.

THE COURT: Trent Brown. Mr. Brown, if you would [p.103] face the Court Clerk. Raise your right hand and be sworn.

(WHEREUPON the witness was sworn.)

TRENT MARION BROWN

called as a witness on behalf of the Petitioner, after being duly sworn, testified as follows:

THE COURT: Please take the witness stand. And state your full name and spell your last name.

THE WITNESS: Trent Marion Brown. B-R-O-W-N.

THE COURT: Mr. Schieck.

MR. SCHIECK: Thank you, Your Honor.

DIRECT EXAMINATION

Q. (BY MR. SCHIECK) Mr. Brown, you are related to Troy?

A. Yes, I am.

Q. And what is your relation?

A. Older brother.

Q. You are older or he's older?

A. I'm older.

Q. How much older?

A. A year and four months -- five months.

Q. Where were you working in January of 1994?

A. For Leadcor up at Newmont.

Q. And where were you living?

A. I was living in a trailer court in Carlin.

Q. Do you recall the address?

[p.104] A. I think it was 635.

Q. Are you sure of the address?

A. I'm not. It's been too long.

Q. How long had you worked for Leadcor at that time?

A. I had worked for them for about nine months -- one year.

Q. Did you know the Henle's?

A. I did.

Q. How is it that you knew the Henle's?

A. I worked with Wayne on the job.

Q. Did you work the same shift as Wayne?

A. I did to begin with and then they went to a double shift on the -- this job they had and he got put on the night shift.

Q. Do you recall when that was that you started working different shifts from Mr. Henle?

A. It was only like a month, maybe six-weeks before this all happened.

Q. Were you working the same project during that month to six-week period?

A. Yes, we worked the same project.

Q. Just a different shift?

A. Yeah.

Q. And what project was that?

A. It was stripping the top soil off of the Newmont [p.105] mine where they was going to start to move the berm over.

Q. And did that involve the use of certain equipment?

A. Yes, it did.

Q. What kind of equipment did that involve?

A. That particular project was 992 loaders, dozers pushed all the top soil on the pile and the loaders would put the top soil in the trucks and they'd run it to the top of the mountain.

Q. What type of equipment did you operate?

A. I run the 992 loader.

Q. 9-9-2 loader?

A. 9-9-2.

Q. And what type of equipment did Mr. Henle operate?

A. He run the grader.

Q. Does that have -- is there a size?

A. Yes. It does the roads for the trucks and keeps the rocks off of the haul roads. It pretty much maintains everything for faster travel.

Q. Prior to January 28, 1994, did you socialize with Mr. Henle?

A. I socialized with Wayne quite often. Almost nightly after work.

Q. Was that while you were both working the same shift or did it change after you started working different shifts?

A. It changed after we started doing separate shifts [p.106] because we never seen each other. He was either getting on the van and I was getting off the van and we have very little time to talk.

Q. What van are you talking about?

A. It was the van that picked everybody up at the parking lot down there, they got in and it hauled us to the top of the hill to the mine.

Q. A company van?

A. Yes, a company van. Some of us rode in the company van, some of us road in the company pickup with the foreman.

Q. If you rode in the company van how long would it take you in January of 1994, to get from where the van picked you up to where your work site was at?

A. Between 30 and 35 minutes.

Q. Was there a faster way to get to work?

A. Yeah. You could go in the back way but day shift couldn't go in the back way because of the regulations they had with people being on the mine property. Night shift could go in the back way. Like I say, it was maybe about 15 minutes off of the time.

Q. So it was 15 minutes faster to go the back way?

A. Yeah.

Q. Would the van take you in the back way for the night shift?

A. Night shift would go in the back way, yeah.

[p.107] Q. Could you drive your own vehicle to work if you desired?

A. We weren't supposed to. It was kind of put that you were supposed to leave your vehicle down there but you could drive up if you wanted to, but you couldn't go through the gate. The van would have to pick you up at the gate.

Q. Did you have any contact with Mr. Henle, Mr. Wayne Henle on the afternoon, early evening hours of January 28, 1994?

A. I did.

Q. Could you tell us what that contact was?

A. We had just got our paychecks and we was planning on -- it was my wife's birthday the next day and we were going to go up and have a few drinks and just kind of celebrate her birthday. Running a 992 loader you're -- I don't know how you say, hooked up all day long it just beats you to death. You are just constantly -- and unlike the truck drivers and stuff like that they have a little more energy at night. We went up there and I -- we only stayed for maybe an hour and a half.

Q. At what point did you see Wayne?

A. He was still at the house with his wife. His wife and my wife were friends so we planned this together. And at that point he said that he would like to go with us but he was going in late for work -- I don't remember the reason why, but he was taking his outfit to the mine that day.

[p.108] Q. Outfit, what are you talking about?

A. His pickup.

Q. Does the van that takes the workers up to the mine, does that run at different hours or is there --

A. -- no.

Q. -- only one van up --

A. -- nope. It runs up in the morning and back at night.

Q. So if you're late and you miss the van going up to work, how can you get to work?

A. You drive your own pickup to the top, to the mine, to the gate where there is a parking lot. Then the van or the foreman has to come from the property out to the guard shack to pick you up.

Q. At the time you had the conversation with Wayne on the 28th of January, was it at a point and time where the van would have already left to go to the mine?

A. Yeah, it had already left otherwise I wouldn't of got to talk to him at his house. Most of the time they were waiting at the parking lot for the van when we got off. So we would just get out, they'd get in and swap drivers, the van would go back up.

Q. So the fact that Wayne was still home meant he'd missed the van?

A. Yep.

[p.109] Q. But you don't recall what the reason was?

A. I don't recall but he was going in late and taking his own pickup that day.

Q. When was the next time that you saw Wayne after that?

A. The next time I saw Wayne was the next night probably between seven and 8 o'clock.

Q. And where was that at?

A. That was at his residence.

Q. This is on January 29?

A. Mm-hmm.

Q. Is that yes?

A. Yes.

Q. When you go to work at Leadcor during that period of time, was there certain documentation you had to fill out having to do with you hours and what work you were doing?

A. We all filled out a time card. And when you filled out a time card there was some top soil that had so much seed in it that went to a certain pile. Some top soil that wasn't -- it was called Class 2 , which is used for reclaiming the dumps instead of -- you know, your plusher, greener areas that are not going to be touched

anymore. It's just kind of a cover so it will seed and not erode away.

MR. SCHIECK: May I approach the witness, Your Honor?

[p.110] THE COURT: Go ahead.

Q. (BY MR. SCHIECK) I'm going to hand you what has been admitted and now re-designated as Petitioner's Exhibit 1 instead of Defendant's Exhibit A. It's been reformed to the parties in the case.

A. Okay.

Q. Do you recognize Exhibit 1?

A. Yes, I do.

Q. What is it?

A. It is the foreman's time sheet for all the hands that turned in their time that day.

Q. And do you recognize the names of the individuals that are on that list?

A. I do. This is night shift.

Q. This is night shift?

A. Mm-hmm.

Q. Is that yes?

A. Yes, I'm sorry.

Q. What hours did night shift work?

A. They left the parking lot down here between six and 6:30 whenever we got off, to be to work at seven at the mine.

Q. And how long did their shift last?

A. They worked until 5:30 in the morning.

Q. Five-thirty a.m.?

A. Yes.

[p.111] Q. That's a normal shift?

A. Yes, a 10 hour shift.

Q. In looking at Petitioner's Exhibit 1, do you see the name of Wayne Henle on there?

A. I do.

Q. Does anything about the time that's listed for him stick out to you or seem unusual?

A. Yes, it does.

Q. And why is that?

A. Because there's two five's on here and nobody else on the crew has got two five's anywhere. This time sheet is when we were changing over jobs. We was getting done with the top soil job. Day shift was starting a new job which was canal project so they

were moving the equipment from one project to the other.

Q. Now, the two five's that are listed there for Mr. Henle appear in column's -- one column says one -- Class 1, Activity 5, it says road maintenance flagging. Are you familiar with what that activity would be?

A. Yes, I am.

Q. And what would that be?

A. The class I was a higher pay scale. It was taking care of Barrick's haul road where we had to cross them, maintaining signs, keeping all the rocks knocked of them so their traffic didn't interfere with our traffic, and keeping [p.112] the rocks off so we didn't ruin their tires -- they didn't ruin ours and so forth.

Q. And when it says flagging, is that actually out waving a flag?

A. No. They don't allow anybody on the ground with that big of equipment you can't see them.

Q. What about -- and it shows that he worked five-hours on that project?

A. Yeah, that's what it's showing here.

Q. Now you indicated that he was going to work late that day?

A. Uh-huh. He would of had to be at least an hour late because I talked to him at their house when we

were talking about planning -- making plans to go up and have dinner and a drink. So, he was at least an hour late. I know.

Q. And what about Class 2, Activity 5, road maintenance and flagging. What job would that be?

A. Class 2 is our haul roads for our scrappers, our trucks. We don't get paid. We don't get paid the equipment hour time to build our roads like we do in the Class 1.

Q. So, if I understand it's the same type of work but your working on a different roads?

A. Exactly. It's the time we turn into Newcor or Newmont to get paid for the hourly time on that piece of equipment. In the Class 2, they don't pay us for that time.

[p.113] Q. Then looking at the lower portion of the first page of the Petitioner's Exhibit 1, we see an indication of equipment number 6214 and description 16G. Can you tell us what 16G is?

A. Sixteen-G is the grader that Mr. Henle ran when he was on shift.

Q. Okay. And in that column it shows a four for the one-dash-five and a three on standby. Based on your understanding of the policies and procedures in filling out the time cards, do you have any idea what that stands for?

A. The four-hours would be the four-hours that the 16G was actually working. That Mr. Henle was

operating it for Newmont that we got paid for. The three-hours of standby is possibly the three-hours that he was working on our job that we didn't get paid for.

Q. Do you log it as standby when you working -- when you're grading?

A. I've never seen it logged that way before. So, standby meaning the blade was parked.

Q. If you will turn to the second page of Exhibit -- Petitioner's Exhibit Number 1. What does this time card relate to?

A. This is the oilers and the mechanics that work at night fixing the equipment -- whatever, if it goes down they try to get it up and running for day shift. The maintenance [p.114] on the machines.

Q. There's an indication of job activity of cutting edges. Do you know what that is?

A. Yeah, it's the bottom part of the blade that touches the ground all the time, where all the wear is at. Because as you grade the ground that wears the metal off so instead of replacing the whole morboard on the blade -- that's what they call it. You just replace the edges and that keeps the mechanical part of the blade operate able.

Q. Does the guy that drives the grader get out there and change the blades?

A. No, no. On a 16C one guy can't even -- two guys can't lift one of them let alone one guy.

Q. Okay. So. that's what the maintenance people are responsible for?

A. That's what they do. They've got boom trucks and stuff like that. I've never -- I've seen guys stay and help once in awhile but Leadcor would put you on another piece of equipment or send you somewhere else while they were putting the cutting edges on it.

Q. And then you would reflect that time somewhere else on your time sheet?

A. Yeah. They would show you on a different piece of equipment at that time and how many hours it would be paid for, yes.

[p.115] Q. Okay. Is Mr. Henle shown on spy different piece of equipment here?

A. Not on this time sheet, no.

Q. Were you ever contacted by Dexter Baker concerning these time cards and about the information on Mr. Henle?

A. I think I was probably one of the ones that contacted him first on it. Because I was wondering when, why and how Wayne Henle got off the mountain that day, how he got up on the mountain that day. And I think that's when this article brought up and the whole thing got looked over at the time.

Q. Back in between January of '94 and September of 1994, would you have been available to be interviewed by an investigator or an attorney concerning this information?

A. Yes, I would.

Q. Were you ever contacted by an investigator or an attorney about this information?

A. I was never talked to, no.

Q. Now you did come to court at the trial and testified briefly in rebuttal, is that correct?

A. Yes, I did.

Q. Were you asked any questions about Mr. Henle?

A. None.

Q. Or his activities of that evening?

A. I wasn't asked about anybody's activity. No, {p.116} Wayne's not either.

Q. Were these other people that were working that shift, did they continue to work for Leadcor after this incident?

A. Yeah, until we finished that job, yes. I think they did.

Q. Did you talk to any of these people about Mr. Henle's activities that evening?

A. Yes, I did.

Q. Who did you talk to?

A. I talked to Brian Perry, I talked to Dave Stockton. Dave Stockton was another -- the other foreman. And I talked to him several different times on what time Wayne got to work, how he got to work, what time he left. I was the loader operator, I'd radio in the machine they could talk to me all day and I could talk to them. So, we would ride together with the foreman to get all the knowledge we needed for the day, that we needed to do, what we had to get done that day, what was on the next days agenda so we could keep everybody focused. And I and Brian Perry was pretty good friends and he -- I'd have a beer with him after work after me and Wayne got split up on different shifts. And I was talking to him that morning going to work -- the next morning the 29th was when I found out about Wayne's daughter.

MR. WOODBURY: I'm going to object about anything [p.117] that he was told by Mr. Perry is hearsay.

MR. SCHIECK: That's fine, Your Honor. He went beyond the scope of the question.

THE COURT: All right. Go ahead. Sustained.

THE WITNESS: Sorry.

Q. (BY MR. SCHIECK) So, you had conversations you said with Mr. Perry and with Mr. Stockton?

A. Yes.

Q. Did you pass this information along to anybody?

A. Yes, I did.

Q. And who did you pass it along to?

A. David Lockie.

Q. And how did you pass it on to David Lockie?

A. I passed it on to him when I was told that we had an investigator and so much money allowed for an investigator to investigate other people in this matter or such. And we were just kind of giving him a guidance to maybe which way to look.

Q. And then you said you were never contacted by an investigator?

A. No.

Q. Did you pass the information you had gained onto Mr. Baker?

A. Yes, I did.

Q. And did you pass it on to your mother?

A. Yes.

[p.118] MR. SCHIECK: Court's indulgence, please. Pass the witness, Your Honor.

THE COURT: Cross-examination.

MR. WOODBURY: Thank you, Your Honor.

CROSS-EXAMINATION

Q. (BY MR. WOODBURY) You call this a foreman's time card?

A. Yes, this is the foreman's time card.

Q. Did the employees fill out some other kind of time card?

A. Yes, they did. We all filled out the load card, for what we'd done, how many loads you hauled. They would then transfer on to this and this what got turned into the -- for pay.

Q. The foreman did?

A. Yes.

Q. And then the individual employees initialed it?

A. Yes.

Q. All right. So, on this Petitioner's Exhibit 1, across from where it says Wayne Henle, the W.H. is Mr. Henle's initials presumably, at least that's the way it's supposed to work, right?

A. Knowing Mr. Henle as well aa I do that's not his initials, no.

Q. When is this card filled out?

[p.119] A. When is it?

Q. When is this filled out?

A. At the end of shift.

Q. And so, in order to initial it --

A. -- you'd have to be there.

Q. -- a guy would have to be there at the end of shift, right?

A. Mm-hmm.

Q. And do you see anybody else's signature on there or on there that you think are not appropriate -- or aren't the persons?

A. There is about six of them there that look like there all signed by the same guy.

Q. Is there, which ones are those?

A. C.J. number three, number four, number five, six, seven. One, two, three, four, five, sorry, five of them.

Q. Okay. And so you think four and five are initialed by the same guy?

A. Mm-hmm.

Q. Okay. I want you to look at the H on there and see if the H's for W.H. and C.H. look to be the same to you?

A. Yes, they do.

Q. They do?

A. Yes.

Q. Does it not appear -- well, I'll leave that. All [p.120] right. The time cards, the original time cards about what each person said they did, did you see those?

A. Yeah.

Q. And you don't have those anyplace?

A. No, they were all turned it and the foreman just throws them away after he fills this out.

Q. Oh, he threw them away?

A. Mm-hmm.

Q. How do you know that?

A. Because I rode with him everyday.

Q. Sorry?

A. Because I rode back and forth to work with him everyday.

Q. And during the course of that he told you he'd thrown these time cards away?

A. Mm-hmm. They were just little pieces of paper so that he didn't have to keep track of what everybody did that day. He'd have reference to go back on.

Q. Now, from this time card on the second page, can you tell when the cutting edges were repaired by Mr. Longstad?

A. Can I tell when they were?

Q. Yes.

A. According to this it was the 28th, January '94.

Q. No, what time on the 28th?

A. It doesn't show a time.

[p.121] Q. You don't know that, right? You can't tell that from this time card?

A. It doesn't on this it may have on his time sheets that he got handed in.

Q. Okay. But in any event it doesn't show on here and you can't tell whether he fixed it -- the cutting edges, at two in the morning or four in the morning or eight in the evening, correct?

A. No.

Q. Now, what is being on standby for a piece of equipment mean?

A. Standby means it's sitting on the project ready to go to work.

Q. Okay. And it is not having it's cutting edges repaired?

A. No.

Q. Okay.

A. It can't be on standby when it's getting -- it's down when it's getting them repaired.

Q. So, if this time card is correct and Mr. Henle didn't go to work until eight o'clock in the evening, an hour late?

A. Mm-hmm.

Q. The time -- the four and the three-hours, the seven hours would make it three o'clock in the morning when that [p.122] machine came off standby and was available to have it's cutting edges fixed. Right?

A. Quite possibly, yes.

Q. And if it's on standby that means the operator is on standby, right?

A. Not necessarily.

Q. What does it mean?

A. Because you could have another operator not the operator that's on the top list -- I mean a dozer hand. If the dozer hand is on dozer and the blade needs to go up then they'll -- they could rotate someone else onto it.

Q. They could but they typically wouldn't because the other guys are doing other things, right?

A. Yeah.

Q. All right.

A. If they are available.

Q. And they didn't put nine people on that shift by accident. They put nine people on it because that's what they intended to --

A. -- they needed them.

Q. -- have on.

A. But the five and five on there doesn't run -- if he left early that day and got there late that day. I think it was the foreman's gift of sorry.

Q. All right. But in looking at this time card the [p.123] five and five means he was working on road one for five-hours and road two for five-hours. That's what this time card tells you, right?

A. That's what it tells me here, yes.

Q. That's what it tells you?

A. Mm-hmm.

Q. And what the time card tells you is that he spent four-hours working on that road, and three-hours on standby, correct?

A. The blade was not the operator.

Q. The blade was -- okay. But the blade was.

A. Exactly.

Q. And it seems to follow that if he identified himself as working on that blade that that's what he was doing, right? Strike that question. That probably didn't make any sense. The night shift -- wouldn't you say, it's checked swing shift on this card but you think that's the night shift?

A. Well, I know it was the night shift. We only had two shifts.

Q. Okay. And the night shift identified as swing here, is from 5:30 in evening until 5:30 in the morning?

A. From seven at night until 5:30 in the morning.

Q. You don't get paid for driving up there?

A. No.

Q. Okay. So, you were supposed to be at work by seven. [p.124] Now, you had a conversation with Mr. Henle that evening?

A. Mm-hmm.

Q. Preceding the incidents that your brother got convicted of, right?

A. The 28th or the 29th?

Q. The 28th.

A. Yes.

Q. Preceding the evening?

A. Mm-hmm.

Q. That conversation, you had worked the day shift that day?

A. Yes, I had.

Q. And you'd got off when?

A. I got off -- I got back there at 6:30.

Q. Okay. And you got off of work at what time?

A. Five-thirty.

Q. Okay. So it took you an hour to get off the hill?

A. Sometimes it took a little longer, yes. We got home between six and 6:30. The van had to leave the parking lot by 6:30 in the morning or at evening to be on site by seven.

Q. Okay. So, you got off work at what time did you say?

A. Five-thirty.

Q. You said if you go out the back way it takes you 15 minutes to get home or to the parking lot.

[p.125] A. It takes 20 minutes to get home the back way.

Q. Well, I thought you said 15?

A. I never said 15.

Q. Okay. And if you go the front way it takes a half-hour, 35 minutes?

A. Yes.

Q. And then you had this conversation with Mr. Henle where?

A. At his trailer in the trailer park.

Q. Which was fairly close to your trailer?

A. Nine trailers away, eight or nine.

Q. Okay. And how long did this conversation last?

A. We were there probably an hour.

Q. And who when you say we, who are you talking about?

A. There was me and my wife and him and his wife, and his two girls.

Q. Okay. And then you went -- as far as you know he went to work?

A. Yeah.

Q. Okay. You don't know anything different than that?

A. No, not for sure.

Q. And when you take your own car to work and you're late and you need the van, what do you have to do, call the van?

A. You drive to the top -- the guard shack, there is a [p.126] telephone in there. You can call and they radio to your supervisor.

Q. All right. And then the supervisor can come get you?

A. Come and get you at the gate.

Q. How far away from that guard shack is your supervisor if you're working on these roads?

A. From the backgate there was maybe five minutes away.

Q. Okay. And if you went to the front gate?

A. If you went to the front gate it was 15, depending on the traffic, 15, 16-minutes.

MR. WOODBURY: We have nothing further.

THE COURT: Redirect.

MR. SCHIECK: None, Your Honor.

THE COURT: You may step down. Thank you very much. And your next witness.

MR. SCHIECK: Thank you, Your Honor. We would call Travis Brown.

THE COURT: Travis Brown. And face the Court Clerk. Raise your right hand and be sworn.

(WIIEREUPON the witness was sworn.)

TRAVIS BROWN

called as a witness on behalf of the petitioner, after being duly sworn, testified as follows:

[p.127] THE COURT: And please take the witness stand. And state your full name and spell your last name.

THE WITNESS: Travis J. Brown. B-R-O-W-N.

THE COURT: Mr. Schieck.

MR. SCHIECK: Thank you, Your Honor.

DIRECT EXAMINATION

Q. (BY MR. SCHIECK) Mr. Brown, you're related to Troy?

A. Yes, I am.

Q. And what is the relation?

A. I'm his younger brother.

Q. In January of 1994, where were you living?

A. Carlin, Nevada.

Q. Do you recall the address?

A. I believe it is 1411 Huntley Drive.

Q. And where was Troy living?

A. The same address.

Q. Who else was living there?

A. Jason Nu and -- yeah, Jason Nu.

Q. Did Troy have a girlfriend at that time?

A. There was a girl there in town that he was going out with occasionally.

Q. Do you recall her name?

A. Kerrie Paseetta.

Q. Kerrie or Kelly?

[p.128] A. Kerrie.

Q. And do you know how to spell the last name?

A. I don't.

Q. Do you recall the events of January 28, 29, 1994?

A. I do.

Q. Were you at home when Troy came home on the early morning hours of the 29th?

A. Yes, I was.

Q. And what were you doing?

A. I was asleep on the couch.

Q. And you testified at trial, correct?

A. Yes.

Q. And you testified to the events that transpired when Troy came home that evening, is that correct?

A. Yes.

Q. I want to take you to a little bit later that day. Did Troy stay there at the trailer or did he go somewhere?

A. That earlier evening?

Q. No, Saturday.

A. Saturday. He was gone to head back to Loa.

Q. And that was a planned trip?

A. Yes.

Q. Did you have any further contact with the police that day after Troy had left?

A. On that particular day -- on that Saturday?

[p.129] Q. Yes.

A. I don't recall in particular that particular day. They come over the morning of the 28th after this incident had happened at 5:30 a.m. in the morning.

Q. The incident happened on the night of the 28th, on to the 29th.

A. Uh-huh.

Q. Okay. And so, it would of been the morning of the 29th when they came over at 5 o'clock in the morning.

A. Uh-huh.

Q. Okay. Are you straight on the date?

THE COURT: Try to answer yes or no. It's very difficult if you do the other. Go ahead.

Q. (BY MR. SCHIECK) They came to the trailer at 5 o'clock approximately in the morning, is that yes?

A. Yes.

Q. And was Troy still there?

A. Yes.

Q. And did they talk with Troy?

A. Yes.

Q. What I want to get to is the next time the police came to the trailer. Do you recall when that was?

A. It was the following day. I believe that's when they came with the search warrant.

Q. What were you doing when they came with the search [p.130] warrant?

A. It was in the evening. I would roughly-guess it to be about six, six-ish that evening. They knocked on the door and presented me with a search warrant and explaining what it was for, and I let them proceed with their search warrant. I invited them into the house.

Q. Did you keep a watch on them to see what they were doing?

A. As they proceeded to do the search warrant the wanted me to fill out a written statement of the events of what I knew. And I was sitting at the kitchen table filling out the statement and the kitchen was adjacent to the bedroom that Troy was living in. And so they were in the bedroom and I was in the front room -- I mean the kitchen.

Q. Were you able to see what they were collecting in the bedroom?

A. They would ask me questions and I would be going back and forth from the kitchen table to the back -- where they were to explain something. They were asking me if Troy and Jason both slept in that same back bedroom. It was a two bedroom trailer. Bedrooms on each end of the trailer. Troy and Jason slept in the back bedroom and I slept in the other bedroom.

Q. So you occasionally would go into that bedroom when they asked you questions?

[p.131] A. Right.

Q. What did you observe?

A. They were going over everything. They would take all the bedding and rolled it up into one big ball and then one of the officers took it out to the car. They were gathering towels off the bathroom floor, underwear, clothes, boots -- Troy's boots, and things like that. They were just going over things.

Q. Were they individually bagging items?

A. They were putting different items like the clothes and all that kinds of stuff were just going into brown paper bags.

Q. What about the bedding material?

A. All the bedding, like I said; they just ripped the sheets and everything off in one big bedroll.

Q. Did you see them collect any condoms out of the bedroom?

A. No, sir.

Q. After the police were done with the search and removing the items from Troy's bedroom, did you continue to reside in that trailer?

A. Yes, sir.

Q. And did you ever find any condoms in that bedroom?

A. No, sir.

Q. Did you ever have any discussions with Mr. Lockie [p.132] about Troy's case?

A. Yeah. I was involved with those -- the discussions and stuff along with my parents.

Q. Did you ever discuss condoms with Mr. Lockie?

A. No, sir.

MR. SCHIECK: Thank you. That's all the questions I have.

THE COURT: Cross-examination.

MR. WOODBURY: Nothing.

THE COURT: You may step down. Thank you very much. And your next witness.

MR. SCHIECK: Your Honor, could we take a short recess? Mr. Troy Brown is going to be my next witness and I need to just talk with him for a few minutes before he testifies. If that is acceptable to the Court?

THE COURT: All right. We'll take a short recess.

(WHEREUPON there was a short recess and court reconvened at 2:43 p.m.)

THE COURT: We are back on the record. Let the record reflect the presence of Counsel, and the defendant. Your next witness.

MR. SCHIECK: We call Troy Brown, Your Honor.

THE COURT: Mr. Brown, if you would step right over here, please. And face the Court Clerk. Raise your right hand and be sworn.

[p.133] WHEREUPON the witness was sworn.)

TROY DON BROWN

called as a witness on behalf of the Petitioner, after being duly sworn, testified as follows:

THE COURT: And please take the witness stand. And state your full name and spell your last name.

THE WITNESS: Troy Don Brown. B-R-O-W-N.

THE COURT: Mr. Schieck.

MR. SCHIECK: Thank you, Your Honor.

DIRECT EXAMINATION

Q. (BY MR. SCHIECK) Mr. Brown, I want start at the trial. Were you in custody or out of custody when you came from Loa in order to attend your trial?

A. The Judge at the time revoked my bail when I showed up to pick the jury.

Q. And do you recall what day of the week that was?

A. I think it was the 25th or 26th.

Q. What day of the week, Monday, Tuesday?

A. It was on a Monday.

Q. So when you came to court in the morning were you in custody or out of custody?

A. When we showed up to pick the jury, I was out of custody.

Q. And at the end of the day you were in custody?

A. Yes.

[p.134] Q. So, you came to court dressed in your own clothes?

A. Yes, I did.

Q. What about the next morning when you arrived at court, how were you dressed?

A. Like I am now in jail -- in the jail clothes.

Q. And what happened to the clothes you were wearing when you came to court on Monday?

A. When they took me into custody, in the back holding cell -- I don't know if it's still here; but they took all the clothes I had on and put me in shackles and leg irons and took me out through the back.

Q. You said shackles and leg irons, what kind of clothing did they put on you?

A. Jail clothes, the jumpsuit.

Q. Now when you say they took you out the back. Can you be a little more descriptive of what you recall the back of the Courthouse being like in 1994?

A. In 1994 this part where we come in that says the Old County Jail, it was cornered off. There was scaffolding out front. So, this would be front when we come through the door into the main lobby and the back, to me would be headed straight back out this direction.

Q. Let me clear up the record. You point to the left of the witness stand as being what you call the front of the Courthouse?

[p.135] A. Yes.

Q. That would be out these windows on this side?

A. Yes, it would.

Q. And the Bank of America building is right out there?

A. Yes, it is.

Q. Where would the van park when you came in the morning?

A. Right in front.

Q. Again, you're calling the front over here?

A. By the Bank of America, yes.

Q. Getting back to when they took you out that first day and they took you out the back. Is that the opposite of what you're calling the front or is that is directly --

A. Yes, it's the opposite.

Q. When you arrived here on Tuesday morning in the van wearing -- with your shackles on, how did they get you into the Courthouse building?

A. We went into the basement the first day.

Q. Okay. Which entrance do you use to get into the basement?

A. This -- okay, not the doors where you come into the main lobby but there is another little walkway where the Justice of the Peace area is. Where the Justice Court is I think, if it's still down there. We came in through there in the elevator, up one floor through the same glass partition [p.136] there was a little door there into the holding cell.

Q. So, you went in -- you went down to get into the building, up an elevator?

A. Yeah.

Q. To the first floor and then into the holding cell? Is that yes?

A. We came in the elevator, up to the foyer than down here across there in front of the water fountain, that's where the elevator comes out, right by the water

fountain. It's like 30 or 40 steps over to the -- and into the holding cell.

Q. Had you completed picking your jury on that first day?

A. I don't really recall for sure but I think we did in the afternoon.

Q. Did you recognize or did you see any jurors on that Tuesday morning when you came through the basement entrance and up to the holding cell?

A. Like I say, I wasn't even looking by then I was just wondering why when I showed up to trial that my bail was revoked. I understood that your bail was good until after trial. I was kind of shell shocked about that. But I wasn't looking for -- I seen my dad and my brothers out there.

Q. When you say out there, where did you see them at?

A. They were out front smoking, out by the Bank of America.

[p.137] Q. Where would you change into your court clothes?

A. In the holding cell.

Q. And that's on the first floor?

A. Yeah.

Q. Okay. Try to say yes or no, it's easier for the Court Reporter.

A. Yes.

Q. How would you then get from the holding cell up to the court room?

A. Through a narrow hallway that I think was right over here. I don't know whether they remodeled or not but there used to be a narrow hallway that went down a flight of stairs and through a door. And the holding cell was right there. You come down, take a left going down the stairs you take a left to get to the holding cell.

Q. That's how you'd leave in the evening?

A. Yes.

Q. And you'd take the same path when you came up in the morning?

A. Yes.

Q. Would you then change clothes in that holding cell?

A. Yes, I would.

Q. What would you do with your clothes when you changed?

A. When I took the court clothes off they had a jail [p.138] jumpsuit there and I put that on and I left my court clothes right there on a hanger. And then they'd

take me out the back door from the holding cell there's a door. We went down one set of steel step and the van was usually parked right there in between the two buildings. There was like a dumpster there too, or something.

Q. Did you see any jurors when you would leave in the evening after court was over?

A. No. Their window was the only window -- the jury room was right here and the window they had looks our into the alleyway.

Q. What about on Wednesday morning do you recall specifically how you were brought into the Courthouse on Wednesday morning?

A. Wednesday morning I came right through the front, right up the steps and straight over to the holding cell.

Q. So instead of going down you went up to enter the building?

A. Yeah.

Q. And how were you attired at that time? How were you dressed?

A. Like I am now.

Q. On Wednesday morning did you notice any jurors about?

A. No, my mom was standing by the water fountain with [p.139] clothes on the second day of trial. She

handed them off to I think it was the Bailiff at the time.

Q. Did you see that happen?

A. Yes, I seen her give him the clothes.

Q. How did the clothes then get from the Bailiff in to the holding cell where you changed?

A. He brought them to me.

Q. On the lunch breaks, did you go back to the jail to eat?

A. No, I did not.

Q. Where did you eat at?

A. In the holding cell. They took my shoes, my bolo tie and my belt for the lunch period.

Q. And when you left court on Wednesday was it the same procedure as when you left on Tuesday?

A. Yes, it was.

Q. Did you see any jurors as you left?

A. No, I didn't.

Q. The route you took would that have been visible from the jury room window?

A. Yes, it would.

Q. Did you ever bring this to Mr. Lockie's attention?

A. Yes, I did.

Q. When did you first bring it to his attention?

A. The first day of trial. I asked him why I was being [p.140] brought in front of the media. It wasn't really my concern of the jury, it was my concern that the media and everybody was out front the first morning I came to court.

Q. When you got out of the van?

A. Yes.

Q. Did you ever express any concerns about the fact the jurors could see you in that condition also?

A. Yes. I asked him about when I left the only window that the jurors can see -- the only window that the jurors have is overlooking the alley. So, I told him if any of them was looking out of the window they'd see me leave in jail clothing.

Q. What was his response?

A. He didn't really respond to it at all. He just said, well he'd look in to it.

Q. Was it ever brought up while you were present in court?

A. No, it was never mentioned in court.

Q. During the course of the trial did you have communications while you were in custody with your family members?

A. No, I didn't. Not until they reinstated my bail on the last day of the trial.

Q. Well, let's get to that last day. Let's get to Thursday, how did you get to court on Thursday morning do you [p.141] have a recollection of that?

A. Thursday morning they came in through the front, just like we'd done on Wednesday.

Q. Where were your clothes on Thursday morning?

A. I guess -- my mom still had them because --

Q. Do you have a recollection of seeing her give them to the Bailiff that day?

A. No, I don't. I don't remember. I don't remember seeing her. I remember seeing my dad and my older brother and my little brother out front.

Q. And when you left court on Thursday afternoon, were you still in custody or were you reinstated on Thursday?

A. I was still in custody because they took me with my court clothes, took me down to the holding cell, put handcuffs and shackles on me, took me out the back, drove me to the County Jail where they said they had to do the paperwork to reinstated my bail. After the court was over it took them bout 2 ½ hours to release me.

Q. So Thursday you were -- Thursday evening sometime you got out of jail?

A. Yes. By the time they released me it was about 7:30.

Q. And did you take your clothes with you when you left jail?

A. Yes, I did.

[p.142] Q. Then on Friday you walked into court without the shackles and court clothes?

A. Yes.

Q. And was there a verdict that same day?

A. Yeah, that night. Friday night at about I think it was 7:30, 8 o'clock, when they came back with a verdict.

Q. And you were remanded at that time?

A. Yeah, I was remanded back to custody.

Q. Were you taken to jail in your court clothes or --

A. -- yes, in my court clothes.

Q. Dorothy Nash-Holmes did your direct appeal from your conviction?

A. Yes, she did.

Q. How many conversations did you have with her concerning your appeal?

A. One phone call.

Q. Where were you at while she was working on your appeal?

A. I was at N.N.C.C. up in the mental health ward.

Q. Why were you in the mental health ward?

A. Because awaiting my sentencing they sent me to N.N.C.C. as an S.K. which is a safe keeper. I did 10 months down there. A safe keeper can't go to the yard and they stay in the fish tank where I became quite depressed and they put me in the mental health ward.

[p.143] Q. Did Ms. Holmes come to see you there at N.N.C.C.?

A. No, she did not.

Q. Were you on any medication at N.N.C.C.?

A. Yes, I was.

Q. What medication were you on?

A. Siviclone, Paxil, and I can't remember another one. I was only on it for about two, three weeks.

Q. What effect did these medications have on your mental abilities?

A. Really just made me groggy. You sleep about 16, 17 hours a day.

Q. And do you know why they were prescribed?

A. For depression.

Q. And after N.N.C.C where did you go?

A. After I was sentenced I was sent to Ely.

Q. Were you on medication while you were in Ely?

A. Yes, I was for about six or seven months.

Q. During that period of time did you talk to Ms. Holmes?

A. No, I never.

Q. Did you ever write her any letters about what issues she should raise on the appeal?

A. No, I didn't.

Q. Why not?

A. Well, I was pretty much out of it. I was no help to [p.144] anybody at the time. Mentally I wasn't -- I was not functioning. All I did was eat and sleep, eat and sleep, that's all I did.

Q. Did you ever make an effort to contact her and say Ms. Holmes I want you to raise this issue concerning the jury seeing me wearing shackles and jail clothes?

A. No, I did not.

Q. Why not?

A. Because at the time I was just letting lawyers do what they -- what I figured their job was to do.

Q. To your knowledge was there anything in the record or that was placed on the record to substantiate how you were coming and going from court that she could raise on the appeal?

A. No.

Q. Had you requested Mr. Lockie to put things on the record concerning the situation?

A. I would ask him questions about how -- why they were doing what they were doing and he just usually told me not to worry, he had it under control.

Q. What period of time were you out of custody while waiting to go to trial, do you recall?

A. From around the 9th of May until September 26 or 25th, somewhere around in there.

Q. And do you recall when you were arrested for the [p.145] charge?

A. February 4.

Q. Who were your first attorneys?

A. Brad Bittan and Frederick B. Leeds, I believe.

Q. Do you recall the first contact you had with them?

A. Yes, I do.

Q. And do you recall when that was and where it was?

A. Yes, I do. It was Elko County Jail. It was pretty confrontational.

Q. You say it was pretty confrontational?

A. Yeah. We had a personality conflict, disagreements.

Q. Could you be more specific for me?

A. From day one they wanted me to go to Lake's Crossing and pretty much got what they wanted. They sent me to Lake's Crossing and then when I came back up here they wanted to drag it out for as long as possible. Fred Leeds made the suggestion to leave me at Lake's Crossing for a year and I didn't like that I guess. I didn't know at the time but Fred Leeds has a hearing impaired problem so when he starts to explain things his voice rises and become quite vocal which at the time I took as a physical affront to me where I would start yelling back. Before we knew it all we had was a yelling match.

Q. So you got off really from the get go with Mr. Leeds on the wrong foot?

[p.146] A. Yes, I did.

Q. Did they talk to you about motions that they thought should be filed on your case?

A. Yes we did.

Q. What types of motions did you talk with them about?

A. Mostly all the motions we talked about were motions on DNA, motions to dismiss. I knew they filed the motion to have an independent tester present.

Q. Did you discuss with them the reason for having a motion or a stipulation to have an independent defense expert present during the testing?

A. I didn't discuss it with them they just said that it was just to protect equal rights. If they can have one we can have one is what they were saying.

Q. How long did they remain on your case?

A. From February until I think it was in May, May 9 or 13th, somewhere around in there.

Q. Were you out of custody on bail when they got off the case or did they get --

A. No, they got off the case and David Lockie was appointed. And then after David Lockie was appointed we had a reduce bail hearing the next day where my bail was reduced and I bonded out.

Q. Where did you go when you bonded out?

A. Back home to the farm in Utah.

[p.147] Q. To Farmington? Did you say?

A. Back home on the farm in Utah.

Q. Oh, the farm.

A. In Loa, Utah.

Q. And who did you reside with?

A. With my parents.

Q. Did you discuss your case with them?

A. Yeah, we discussed it quite regularly.

Q. Were they involved in the dealings with your attorney?

A. Yeah. I mean, even more so that I was.

Q. Why was that?

A. Because I was busy being wild, I guess. Running around, staying out all night, just not to much with it.

Q. Weren't you concerned with the charges you were facing?

A. Yeah, but I figured if you're not guilty you don't have nothing to worry about so just let it take its course.

Q. Your preliminary hearing was on July 6, of 1994. How many contacts did you have with Mr. Lockie

between you bailing out on March 9, and you coming to Elko for your preliminary hearing on July 6?

A. One besides that.

Q. One besides what?

A. One besides the preliminary hearing.

[p.148] Q. Was that face to face or over the phone?

A. That was face to face, here in Elko -- it was in Carlin actually -- in his office here in Elko.

Q. Do you recall what was discussed during that meeting?

A. Just discussed the DNA that they had to that point and what he thought about it.

Q. Who was present at that meeting that you had with Mr. Lockie besides yourself and Mr. Lockie?

A. Both my mom and dad.

Q. What did Mr. Lockie tell you about the DNA?

A. Not to worry about it that he had it figured out. He told us that it wouldn't make it into court.

Q. Did he say why it wouldn't make it into court?

A. He just said it wouldn't make it into court. He didn't say why.

Q. Did you discuss any specific motions or testing or anything of that nature concerning the DNA?

A. No, he just said we'd find out more basically at the preliminary hearing.

Q. How long was that meeting before the preliminary hearing took place?

A. How long in between time?

Q. Yes.

A. About a month.

[p.149] Q. Was DNA evidence admitted at your preliminary hearing?

A. Yes, it was.

Q. Do you recall whether or not Mr. Lockie objected to the admission of that DNA evidence?

MR. WOODBURY: I'm going to object to the question, Your Honor. The record speaks for itself at the preliminary hearing.

MR. SCHIECK: I'm just asking if he recalls, Your Honor.

THE WITNESS: If I recall he did not object.

THE COURT: Mr. Woodbury.

MR. WOODBURY: Well, our view is that there is a court record that sets out exactly what happened and

Mr. Brown's perceptions of what happened whether they are contradictory or supportive are cumulative evidence.

MR. SCHIECK: It's leading to my next line of questioning, Your Honor, which is did you have conversations with him about what transpired at the preliminary hearing or what you perceived transpired at the preliminary hearing about the DNA evidence.

THE COURT: All right. Go ahead. Let's move on.

Q. (BY MR. SCHIECK) After the preliminary hearing did you have discussions with Mr. Lockie about what happened at the preliminary hearing with the DNA evidence?

[p.150] A. Do you mean --

Q. Did you discuss with him?

A. Did we discuss what happened at the --

Q. -- preliminary hearing.

A. Yeah.

Q. What were those discussions?

A. We just asked him why he didn't object to anything that Romero was bringing in and he told us that Romero wasn't even certified to testify in court at the time. And not to worry about it, it would all be taken care of at trial.

Q. Did you ask him any questions about the presence or absence of the defense witness -- defense expert at testing procedures?

A. No. We asked him if she was present and he said that she didn't need to be present at that time.

Q. Did you question it?

A. Not a whole lot. Like I say, I was just asking him why one lawyer would figure she should be there and he figured that she shouldn't.

Q. Did there come a point and time when you learned that there was additional DNA testing that had been done?

A. Yeah. I was informed of it three days before my trial.

Q. And who informed you of that?

A. David Lockie.

[p.151] Q. How did he inform you?

A. He made a phone call over to my folks place and told me over the phone that they had done additional DNA testing and it was one in 3 million.

Q. And was that different than what had come out at the preliminary hearing?

A. Extremely different.

Q. Did that cause you concern?

A. Yeah, it did.

Q. Did you express that concern to Mr. Lockie?

A. I did and he said not to worry about it he has it figured out.

Q. Did he explain what it was that he had figured out?

A. No, sir, he didn't.

Q. Did you question what it was he had figured out?

A. Not really.

Q. Did you inquire concerning the fact that you were getting this evidence or these new reports on the eve of your trial?

A. I asked him where the evidence came from and he said we'd find that out at trial. Because I remembered distinctly they said at the preliminary they had no further testable evidence.

Q. Did you ask him to continue your trial so that you could look into where this came from?

[p.152] A. No. In fact, the day we were going to pick the trial David Lockie, the only thing he brought up was whether we had a problem with Macfarlan representing the District Attorneys Office due to the fact that after this case was over Macfarlan and Lockie were going to be partners. They decided that would be

a bad idea anyway and they had another lawyer, Marshall Smith took over the prosecution of my case.

Q. To your knowledge did he file any motions to continue the trial to check into the new DNA testing results that you just learned about three days prior to the trial?

A. To my knowledge, no he never.

Q. Did you inquire when you learned of this new evidence three days before trial, did you inquire whether or not the defense expert had been present when the new evidence -- when the new testing was done with the dramatically different --

A. -- yes I asked him about that.

Q. And what was his explanation of that?

A. He said that she wasn't there and he'd established that at trial. Which I do believe he did.

Q. Say that again?

A. He said he would establish that fact at trial.

Q. That she was not present?

A. Yeah. I do believe he did that.

Q. To your knowledge did he file any motions to exclude [p.153] that new testing evidence on the basis that the defense expert was not present at the time testing was done?

A. To my knowledge, no he never.

Q. Were you aware that the police had executed a search warrant on the residence that you shared with your brother Travis?

A. Yes, I was aware of it the day after they done it.

Q. How did you learn that they'd executed a search warrant?

A. My little brother called.

Q. Did you have a girlfriend at the time by the name of Kerrie?

A. Yes, I did.

Q. Were you and Kerrie intimate?

A. Yeah, about twice a week.

Q. With respect to January 28, 1994, do you recall the last time you had been intimate with her?

A. It'd been Thursday night of that week. The night before.

Q. Where had that occurred?

A. At my residence in the bedroom.

Q. Pardon me? Your residence?

A. In the bedroom.

Q. Okay. Had you used a condom during those relations?

A. Yes, always.

[p.154] Q. That Thursday night, where had you disposed of the condom?

A. Under the foot of the bed.

Q. Did she spend the night that night?

A. Until about 4 o'clock in the morning.

Q. The next day being Friday, did you go to work that day?

A. No, I did not. I was supposed to but I did not.

Q. Why didn't you?

A. Not much sleep at the time. I was still dealing with the accident at the mine site. I wasn't real reliable, you could say. I missed more days than I showed up.

Q. Did you clean up your bedroom that Friday?

A. No, I didn't. Mostly I slept all day.

Q. Did you ever remove that condom from where you had placed it the previous evening?

A. No, I didn't.

Q. Was it still there when you left for Loa on Saturday?

A. I would assume so, I didn't specifically check.

Q. Are you aware of who the officers were that executed the search warrant?

A. I'm not sure but I do believe it was Mike Terry and Chris Murphy.

Q. Had you known Officer Mike Terry prior to this [p.155] incident?

A. Yes, for a number of years.

Q. And where had you known him from?

A. From Loa, growing up.

Q. So, he was from Loa, Utah area also?

A. His family moved in there a few years prior.

Q. How had you gotten along with Mr. Terry while you were in Utah?

A. For awhile we got along --

MR. WOODBURY: I'd object. This is beyond the scope of the petition that's been filed, Your Honor.

THE COURT: Mr. Schieck.

MR. SCHIECK: This has to do with the spoilage of the evidence, Your Honor, and the chain of custody on

the things that were seized from the bedroom. The packing everything up into the sheet and the presence of a possible condom in that material as an explanation or the possible explanation for the presence of Mr. Brown's semen.

THE COURT: Now, we are talking about childhood in Utah.

THE WITNESS: How long had I known him for was the question.

MR. SCHIECK: The next question I was going to --

THE COURT: Go ahead. Go ahead.

MR. SCHIECK: -- ask had to do with their [p.156] relationship.

THE COURT: Go ahead.

Q. (BY MR. SCHIECK) Were there problems between you and Mr. Terry?

A. Yes. Right before he came out here to work.

Q. Had you ever mended those problems out here in Carlin?

A. No, we tried to but that didn't work either.

Q. Was there still animosity between you and Mr. Terry?

A. Yeah, due to the fact that I was calling his girlfriend.

Q. Do you know whether Mr. Terry transported any of the evidence in this case?

A. I believe he transported it all.

Q. Would that include to the Washoe County Crime Lab?

A. Yeah, yes it would.

Q. Do you recall testimony from the preliminary hearing concerning scrapings taken from the teeth of Megan at the hospital?

A. I don't recall whether it was preliminary or trial but I remember -- it was brought up. I think at both of them.

Q. Did you ever ask Mr. Lockie about that chain of evidence having to do with those scrapings?

A. Yes, I did.

Q. Do you recall when it was you asked him?

[p 157] A. At the preliminary and again right after the preliminary.

Q. To your knowledge, did those scrapings ever turn up?

A. To my knowledge, no.

Q. To your knowledge, did Mr. Lockie ever file a motion to present presentation of evidence that you dismiss the charges for loss of that evidence?

A. No, he never.

Q. Those scrapings were part of the sexual assault kit collected at the hospital?

A. Yes, they were.

Q. Do you know who transported that kit to the Washoe Crime Lab?

A. I do believe it was Chris Murphy. No, the kit to the Washoe County Crime Lab?

Q. Yeah.

A. I'm sorry, no that was Mike Terry.

Q. Were you acquainted with Wayne Henle?

A. Yes, I was.

Q. How long had you known Mr. Henle?

A. For about six months.

Q. Did you know the other members of the Henle family?

A. Yes, I did.

Q. Who all did you know?

A. Pam, Wayne and the two kids. I didn't really know [p.158] the two kids they were just always running around with my nephew Skyler over at Trent and Raquel's house.

Q. Had you been over at Trent and Raquel's house that day?

A. I was over at Trent and Raquel's everyday.

Q. Were you there on the 29th of January?

A. Yes, I was.

Q. I mean the 28th of January?

A. Yes, I was.

Q. About what time were you over there?

A. About 7 o'clock.

Q. When you say you were over there almost everyday, why would you be over there everyday?

A. Usually we went over to Trent's and met with him in the morning before we headed to work, me and Jason because the foreman would pick us up out in front of Trent's house. We'd all just congregate at Trent's and then go out from there. And then after work I'd go over, usually sit around and have a beer with Trent and talk about just whatever we was doing at the time.

Q. Now, you didn't work on the 28th?

A. No, I did not.

Q. So when did you go over to his house on the 28th?

A. Like I said, about 7 o'clock, six or seven.

Q. Did you ever come to learn that Wayne Henle had been [p.159] charged with a sexual assault type crime in Utah?

A. Yeah, I did.

Q. And when did you learn about that?

A. I think the first time my mom told me I was -- right after I got out on bail.

Q. Did you ever see the paperwork that your mom went and got from the Courthouse?

A. I seen the arrest report and the victim statement.

Q. Did you ever discuss those with Mr. Lockie?

A. I gave him a copy the day before we came to trial. The day that we came out here and they revoked my bond. It was the last thing I gave Mr. Lockie.

Q. When you gave them to him did you make any requests of him?

A. I told him he might want to bring it up in court to the jury.

Q. Why did you want him to do that?

A. It goes to show character of who he is.

Q. What was Mr. Lockie's response?

A. He said, it is not my job to prove who did do this crime. It was his job to prove I didn't do it.

Q. How did you respond to that?

A. I told him to prove my innocence, we have to do what we have to do. And he said, not to worry about it.

Q. Was any of this information about Mr. Henle brought [p.160] up during the course of the trial?

A. No, it was not.

Q. Did you ask Mr. Lockie why it wasn't brought up?

A. No, I did not.

Q. Why not?

A. I pretty much got tired of fighting with him.

Q. While you were in custody during the trial up to that Thursday night, did he come to see you at the jail after court?

A. No.

Q. Were you able to call him in the evenings to discuss what was going on during the trial?

A. I never spoke to my lawyer until I got to the Courthouse everyday at trial.

Q. When you got to the Courthouse and had a chance to talk to him before court started. Did you talk

to him about Wayne Henle and this information that you wanted brought out?

A. The first day I asked him what he decided to do with it and he said he'd fit it somewhere.

Q. Did you ask him what that meant?

A. No, I did not.

Q. How about after the trial was over and you were convicted and prior to sentencing. Did you have any conversations with him then about why it wasn't brought up?

A. No, I never. In fact, I never spoke with Mr. Lockie [p.161] again until I came up for sentencing.

Q. Did you remain at the Elko County Jail after you were convicted?

A. I was there for a very short period and then, like I said. I was sent to N.N.C.C. as an S.K.

Q. It's that period of time that you talked about earlier while you were waiting for formal sentencing that you didn't have any conversations with Mr. Lockie?

A. Yeah.

Q. Okay. Was there an investigator working on your case?

A. I do believe there was.

Q. And what was his name?

A. I don't remember his name.

Q. How many times did you meet with him?

A. Once.

Q. And where was that?

A. In Carlin at my younger brother's house.

Q. And how long did that meeting last?

A. Twenty-minutes, max.

Q. And approximately when was that meeting?

A. About around the time of the preliminary hearing.

Q. What was discussed when you met with the investigator for about 20 minutes around the time of the preliminary hearing?

[p.162] A. Just discussed people that we figured he should go talk to.

Q. What people did you tell him you thought he should go talk to?

A. A bartender with the name of Essie, and my neighbor Bud Rourke, and the other bartender at the Peacock, Steve -- whatever, Steve Peno or whatever it was. He was a State's witness, he never talked to him.

Q. For the record, the Peacock is a bar in Carlin?

A. Yes. I don't know if it's still there but at the time, yeah.

Q. And it was one of the bars you were at that evening?

A. Yes.

Q. Where was Essie Sally a bartender?

A. At C.J.'s.

Q. Is that also a bar in Carlin?

A. Yes, it's also a bar in Carlin.

Q. Any other witnesses that you can recall that you wanted the investigator to interview?

A. Not that I can recall right now.

Q. You said they interviewed -- or the meeting took place at Travis' house?

A. Yes.

Q. Was Travis present?

A. Yes, he was there.

[p.163] Q. Did he have any input to your recollection into the conversation?

A. I don't recall.

Q. Did you discuss with the investigator during this 20 minute meeting the information concerning your use of a condom on Thursday the 27th?

A. I believe I had told him to go talk to Kerrie.

Q. To your knowledge, did the investigator talk to any of these individuals?

A. To my knowledge, I don't believe he did. No.

Q. What about after the preliminary hearing, any additional meetings with the investigator?

A. No.

Q. Did you tell Mr. Lockie the information concerning the condom?

A. Yes, I did.

Q. Do you recall when you told him?

A. Around the time of the preliminary hearing, when we came out.

Q. Did you tell him about your difficulties with Mike Terry?

A. Yes, I did.

Q. Did Mr. Lockie ever discuss with you any specific strategies that he intended to employ during the course of the trial?

[p.164] A. No, he did not.

Q. Did he ever discuss with you the possibility that one of your brothers could of been the perpetrator of the crime?

A. No, he did not.

Q. Did he tell you what strategy he intended to employ during trial?

A. No, he didn't. The only thing he told me was not to worry he had it figured out.

Q. After your trial was over did -- and you were convicted, did you ever communicate with Mr. Lockie concerning filing a motion for new trial?

A. I don't recall whether I did or not. I don't think so. No, I don't believe so. The only one that did was Dorothy Noah-Holmes.

Q. And that was during the one conversation you had with her?

A. I did not bring up the matter they brought it up at my sentencing here.

Q. Who brought it up?

A. Holmes and Coppa.

Q. Oh, okay. So they were present for your sentencing?

A. Somebody was here representing them and informed the court that they were planning on filing a motion for new trial.

[p.165] Q. Was that ever filed?

A. No, it was not.

Q. Did you at some point file a motion for new trial, yourself?

A. At the time I was in Ely I think I filed several of them.

Q. Do you recall when that was?

A. In between '97 and '98, I do believe.

Q. Were they filed within two years of the date of your conviction?

A. Yes, they were I do believe.

Q. Any other attorneys that you had talked with about filing motions for new trial on your behalf?

A. Dennis Widdis.

Q. Did he file one on your behalf?

A. No, he did not. I also requested Stermitz and Kump, both appointed lawyers to file a motion for new trial.

Q. And did they file them?

A. No, they did not.

Q. The proper person motion for new trial that you filed. Do you recall when that was filed?

A. I don't recall the exact date but I do believe it was in '97.

Q. Did you also file one in '98?

A. Yes, I did.

[p.166] Q. And you filed that yourself?

A. Yes, I did. Well, I had a law clerk. Ely law clerk helped me file.

Q. So, you had some assistance from someone in prison?

A. Yeah.

Q. And that was denied? Was that ever raised -- those issues ever raised on an appeal?

A. It was -- I think I raised those issues at my resentencing.

MR. SCHIECK: Thank you. We pass the witness, Your Honor.

THE COURT: Cross-examination.

MR. WOODBURY: Thank you, Your Honor.

CROSS-EXAMINATION

Q. (BY MR. WOODBURY) At anytime since the time of your arrest initially in this case, has there been a period of time when you were not represented by counsel?

A. Yes, very short periods.

Q. When was that?

A. In between being appointed Kump and Stermitz and Evans.

Q. All right. You got into a fight with Fred Leeds?

A. No, I got into a verbal disagreement.

Q. All right. A verbal disagreement with Fred Leeds. The next attorney, Mr. Lockie you claim is incompetent. Is [p.167] that correct?

A. Yes.

Q. All right. Holmes and Coppa, did you have any problems with them?

A. I have never even spoke with them.

Q. Well, did you have a problem with them? I mean, did you feel they did you a good job?

A. I feel that they done what they wanted to do and therefore --

Q. -- by that you mean, you don't think they did very good job?

A. No, I do not.

Q. You got into a fight with Mr. Stermitz or an argument or an altercation or not?

A. No. Stermitz put in his motion to withdraw because he is related directly to the victim's family.

Q. Oh. And Mr. Kump, did you get into a fight with Mr. Kump?

A. Mr. Kump filed a fast track appeal by leaving out the last three pages of said appeal and without putting his bar code on it so it got sent back to me. Therefore I did have --

Q. -- you didn't feel Mr. Kump did you a good job?

A. No, he didn't.

Q. Then you had Mr. Widdis?

[p.168] A. Yes, I did.

Q. Didn't think he did a good job?

A. Mr. Widdis did what he was hired to do.

Q. All right. Now describe the circumstances for the Court that got you into custody just before the trial started. What happened, do you recall?

A. That got me into custody?

Q. Yeah. What was going on that brought you into custody? As I understand it you were free and you come over for a pretrial hearing and got put into custody?

A. When I showed up for the preliminary?

Q. Not the preliminary hearing --

A. -- okay. The trial?

Q. -- the beginning of the trial?

A. I remember at the preliminary they revoked my bail there because David Lockie failed to inform me that I was supposed to pay X amount of money to the Public Defender's Fund before such a time. He didn't notify me when I got here that there was a warrant for my arrest and I was thereby arrested and had to bond again.

Q. Is this when Judge Stringfield revoked your bail, is that what you're talking about?

A. No. That was in District Court and then it happened again when I came to trial.

Q. Okay. That's the time I'm talking about. The time [p.169] you came to trial. You came over from Utah to start trial and you got your bail revoked, correct?

A. Yes.

Q. Correct?

A. Yes.

Q. Okay. And what were the circumstances that brought that up, if you recall?

A. The circumstance of that was the DNA that came back one in 3 million, I guess a few days before that.

Q. Mm-hmm.

A. The Judge felt that I was risk to run. But I knew that before I ever showed up for trial so why would I show up and then run?

Q. Well, I don't know. But the Judge thought you might.

A. I guess.

Q. What time of day or night was that hearing where the Judge revoked your bail?

A. It was in the afternoon.

Q. Was that the day before trial?

A. I do believe.

Q. That was on a Monday?

A. If I recall correctly.

Q. Was that on a Monday?

A. Yes, it had to of been Monday.

[p.170] Q. Okay. And your testimony is that somehow or another the jail personnel had brought a jumpsuit over here for you to get in?

A. Yes, I firmly believe they knew they was going to revoke my bail before they ever did it.

Q. Is that right? And your testimony is that you changed clothes in the back hallway?

A. In the back holding cell that used to be back here.

Q. All right.

A. In one of these buildings.

Q. Describe this holding cell?

A. It's an all wire cage. There's one wall and there's a bunk and the rest of it is a cage. There is not toilet, no sink in there.

Q. And that's in the Elko County Courthouse?

A. The old Elko County Jail area.

Q. Okay. And who were the deputies involved in that, do you recall?

A. Same one that's sitting over there. Croswell is the one that transported me all during my trial.

Q. Okay. You've seen Mr. Croswell's affidavit in this case?

A. Yes, I briefly glanced at it.

Q. Sorry?

A. Yes, I briefly glanced at it.

[p.171] Q. And by briefly glanced at it you know that Mr. Croswell has said that at no time were you brought to the Elko County Courthouse in anything but civilian clothes?

A. Yes.

Q. And what's the problem with Mr. Croswell? How come he doesn't know that?

A. I don't know why he would he state that.

Q. Then on Tuesday, you came for jury selection?

A. Tuesday was the first day of trial I do believe.

Q. Well, when did jury selection happen?

A. Monday.

Q. And so your bail was revoked on Monday?

A. Yes.

Q. After jury selection was over?

A. Yes.

Q. So, no jurors saw you on Monday in jail clothes you weren't jail clothes?

A. No.

Q. Then before you were transported to jail, you were taken out of your civilian clothes?

A. Yes.

Q. And do you know why that was, did anybody say anything?

A. No. They said I was being taken back into custody when they revoked my bond.

[p.172] Q. Right. But did they tell you why they were taken your civilian clothes off?

A. No.

Q. Did they ever tell you why -- you read Croswell's affidavit that it is not ever done that they bring anybody over from the jail without civilian clothes if they are in trial. I mean, there was no explanation of why this was happening to you?

A. No.

Q. Okay. And you raised questions with Mr. Croswell about that?

A. No, I never. Me and Mr. Croswell did not get along at all, at any time.

Q. Okay.

A. I did not speak with him, he don't --

Q. All right. Who was the Bailiff, do you recall?

A. I don't recall who the Bailiff was.

Q. But you do recall --

A. -- he was a shorter gentlemen. He was only about five-eight.

Q. And it was the same Bailiff day in and day out, right?

A. Yes.

Q. Okay. And you heard your mother testify here today that she informed Dorothy Nash-Holmes of the fact that you had [p.173] -- at least potentially, been seen by jurors in jail clothes?

A. Yes.

Q. Okay. And you don't have any reason to think your mother is not being candid about that?

A. No, I don't.

Q. And was Mr. Lockie guaranteeing you a win in this criminal case? Is that what you understood him to be doing?

A. No. Mr. Lockie in fact was just the opposite. The last thing he told me -- Mr. Lockie told me, this is a skit we are playing out, the parts have already been written and one of two things will happen, you'll either go to prison or you will go home.

Q. But he kept saying to you don't worry about it I've, got it handled?

A. Yep.

Q. I gather. Didn't he say that to you?

A. Yes, he did.

Q. And what were you taking from that, that he was telling you he was going to win the case?

A. I think I'd be found innocent, as I am.

Q. Mm-hmm. Who did you ever tell about this condom on the floor?

A. I told David Lockie, I told my mother and I also told the investigator.

Q. And your theory is -- what is your theory about that [p.174] condom?

A. I had no theory. I'm saying it's missing also.

Q. Sorry?

A. I had no theory. I'm just saying it was never accounted for either after the search of my residence.

Q. It wasn't accounted for?

A. Nope.

Q. Are you under the impression that the police picked it up as a part of their search?

A. Well, the picked up the empty box and labeled it. So, if they picked up the empty box where's the condom?

Q. Well, I don't know. Was the condom in the box, is that what you're saying?

A. No. But if you found one you would have to find the other.

Q. It was laying on the floor, right? Is that your testimony.

A. Yep, all day.

Q. Sir?

A. At the front of the bed.

Q. At the foot of the bed?

A. At the front of the bed. At the headboard.

Q. Okay. And you thought it had some evidentiary value?

A. I don't know. I'm just saying it's missing.

[p.175] Q. It's missing?

A. It's not accounted for. Nobody, nobody -- Travis or nobody else found it later after the search warrant.

Q. Oh, you've questioned a lot of people about that?

A. My brother that lived there, yes.

Q. All right.

MR. WOODBURY: We have nothing further.

THE COURT: Redirect.

REDIRECT EXAMINATION

Q. (BY MR. SCHIECK) You were asked about the affidavit from Mr. Croswell?

A. Yes.

Q. And you said you viewed it briefly?

A. Yes.

Q. Did you recall him stating that he -- in the affidavit, he has no specific memory seven years after the trial?

A. Yeah, I think that's what he said is he doesn't remember after that long ago. In fact, I overheard him saying that again today.

MR. SCHIECK: Thank you. No further questions, Your Honor.

THE COURT: Re-cross.

MR. WOODBURY: Nothing.

THE COURT: All right. You may step down. Thank [p.176] you very much. Mr. Schieck.

MR. SCHIECK: We have no additional witnesses, Your Honor.

THE COURT: Mr. Woodbury, witnesses.

MR. WOODBURY: Yes, we do, Your Honor. First of all we'd call John Croswell.

THE COURT: Mr. Croswell, if you would step forward, please. And face the Court Clerk. Raise your right hand and be sworn.

(WHEREUPON the witness was sworn.)

JOHN CROSWELL

called as a witness on behalf of the Respondent, after being duly sworn, testified as follows:

THE COURT: And please take the witness stand. And state your full name and spell your last name.

THE WITNESS: John S. -- excuse me. John S. Croswell, III. C-R-O-S-W-E-L-L.

THE COURT: Mr. Woodbury.

DIRECT EXAMINATION

Q. (BY MR. WOODBURY) Mr. Croswell, what is your occupation?

A. Deputy Sheriff, rank of Lieutenant, Job Administrator for the Elko County Sheriff's Department.

Q. And what are your duties as a Lieutenant at the jail?

[p.177] A. I'm in charge for basically all the jail functions.

Q. How long have you been employed in that capacity?

A. Coming on nine years in May.

Q. Okay, were you employed in that capacity during the Troy Don Brown trial in 1994?

A. Yes, sir.

Q. Okay. Were you present when Mr. Brown's bail was revoked at the beginning of trial?

A. I don't recall being present.

Q. All right. Can you account for any circumstance under which a person arrested in this Court in this Courthouse would be deprived of his civilian clothes being -- before being taken to the Elko County Jail?

A. Not unless there was an order to seize those clothes. I can't imagine why.

Q. Okay. During the time -- are you responsible for transporting people from the Elko County Jail to the Elko County Courthouse for trial?

A. Not personally but I'll have it done.

Q. Are there certain policies and procedures in place?

A. Yes, sir.

Q. Okay. What is the policy with respect to holding or allowing a person to come to a jury trial prior to conviction in civilian clothes?

A. Well, we take the utmost responsibility to make sure [p.178] that they -- a defendant is brought over is not seen in the presence of the jury in jail attire. We normally dress them down at the jail and bring them over in full shackles. In 1994, we had two entrances; the old JDC -- the old County Jail through the back. They are actually both through the back. Or through the old back door. Both places we'd bring them in, remove all the shackles, then give them off to the Bailiff and the Bailiff escorts them up by themselves. The deputies wait a few moments and then go into the courtroom.

Q. Okay. Would there ever be an occasion when it would be -- according to policy to park a van -- the jail van in front of the Courthouse, the Bank side of the Courthouse and transport a defendant in through the -- those doors facing Sixth Street?

A. No, sir.

Q. Okay. And was that made known to all people responsible for transporting people?

A. Yes, sir.

Q. Okay. Did you at my request conduct interviews of all the people that were employed in the Jail Division that might have transported Mr. Brown during the trial?

A. Yes, sir. I questioned every deputy could think of during that time frame and asked if they remembered or ever remembering taking Troy Don Brown in jail attire or in clothes and allowing him to be in the presence of the jury in jail [p.179] attire. And they all said no.

MR. SCHIECK: I'm objecting to what they told him, Your Honor. That's hearsay.

THE COURT: Mr. Woodbury, exception if any.

MR. WOODBURY: Well, I can't think of an exception, Judge.

THE COURT: Then I will sustain the objection and strike the answer. Go ahead.

Q. (BY MR. WOODBURY) Prior to the allegations of the Petition of Mr. Brown, had you ever heard anything of this sort regarding Mr. Brown before? Just yes or no.

A. No.

Q. Okay. Is there -- well that's fine.

MR. WOODBURY: We don't have anything else of Lieutenant Croswell.

THE COURT: Cross-examination.

MR. SCHIECK: Thank you, Your Honor.

CROSS-EXAMINATION

Q. (BY MR. SCHIECK) Lieutenant Croswell, I have your affidavit the State attached it to their opposition. In there you state that you have no specific memory seven years after trial, is that still an accurate statement?

A. Yes, sir.

Q. You've transported a lot of people or had transported a lot of people from the Elko County Jail to this [p.180] Courthouse?

A. Yes, sir.

Q. And you have a set of policies and procedures in place that are supposed to be followed?

A. Yes, sir.

Q. And you said that normally they are followed?

A. Yes, sir.

Q. It would be an abnormal situation if they weren't followed?

A. Yes, sir.

Q. But your own memory is such that you can't state that this wasn't one of those abnormal circumstances?

A. I can for certain say, I do not recall that I specifically did that.

Q. Do you recall that there was a lot of media attention to this case?

A. What do you consider a lot?

Q. Good question. Do you recall that there was members of the media present for the court proceedings?

A. I couldn't tell you how many.

Q. Do you recall that there were any present at all?

A. At the final but I couldn't tell you during.

Q. And because I don't have the advantage of recalling the Courthouse here from what it looked like in 1994 perhaps you can help me. You said there were two back entrances?

[p.181] A. Basically we had the old JDC or the old County Jail where we pull up in the old exercise room -- pull the van up and come up a set of old stairs leading to this courtroom. Or go through the broiler room leading up to this courtroom. Both were out of the presence of the jury.

Q. Is the boiler room on what would be called the Justice Court level. The same level as where Justice Court is at?

A. Yes. That would be called the basement.

Q. Okay. How would you get into there?

A. That's why you have to coordinate with the Bailiff's, either one. The bailiff's would meet us downstairs where we would remove the shackles. prepare the defendant to hand off to the Bailiff. The Bailiff would take him up and we would stay behind, wait for a moment and then head upstairs.

Q. And that's the normal policy and procedure?

A. Yes, sir.

Q. You were present here while Mr. Brown -- Mr. Troy Brown testified today?

A. Yes.

Q. Did you hear him describe a holding cell that included a cage on three sides and up against a wall. Does that sound familiar to you as a location that was present in this Courthouse in 1994?

A. In '94 the old JDC, during the re-vamp there may [p.182] have been one cell still available to use. But in '94 I couldn't tell you because of the years and the time frame whether it's still there or not.

Q. Okay. Do you recall in January of '94 whether there was construction going on in what I guess is the Annex next door here?

A. Not back then, I couldn't.

Q. It was built sometime but you don't recall exactly when?

A. I couldn't even tell you if it began or finished that project.

Q. Do you have a recollection of whether it was you that transported Mr. Troy Brown to court and away from court everyday of this trial or whether you'd assigned that to other officers?

A. No. I don't know if I did it everyday or not.

Q. Would you have other responsibilities -- let me go back. In 1994, were you the Lieutenant in the Jail Division as you are now?

A. Yes, sir.

Q. Okay. Same responsibilities?

A. Yes, sir.

Q. Would you have had other responsibilities during that period of time in 1994 that would have taken you away from transporting defendant's to court?

[p.183] A. Yes, sir.

Q. I would assume there is a variety of different responsibilities that could acquire your attention at the jail or elsewhere?

A. Yes, sir.

Q. Does your jail transport inmates to outlying locations to attend court also?

A. Yes, sir.

MR. SCHIECK: No further questions, Your Honor.

THE COURT: Redirect.

REDIRECT EXAMINATION

Q. (BY MR. WOODBURY) Did you transport Mr. Brown back and forth to trial on at least one occasion during his trial, or do you know?

A. I can remember doing it for the preliminary hearing but I don't remember any of the trial testimony so that's why I'm going to say no.

Q. Okay. And if you had been the person who when Mr. Brown was arrested just prior -- or on that Monday. If you had been the person as Mr. Brown has said, you had removed his clothes; would that be an abnormal circumstance?

A. Yes.

Q. And would that be something you'd remember?

A. Yes.

Q. Do you remember it?

[p.184] A. No.

MR. WOODBURY: Thank you. Nothing further.

THE COURT: Re-cross.

MR. SCHIECK: No re-cross, Your Honor.

THE COURT: You may step down.

THE WITNESS: Thank you.

THE COURT: All right. We'll take a 10-minute recess.

(WHEREUPON there was a short recess and court reconvened at 4:11 p.m.)

THE COURT: And please be seated. Let the record reflect the presence of the defendant and Counsel. Mr. Woodbury, your next witness.

MR. WOODBURY: Thank you. James Conner, please.

THE COURT: All right. And if you would step forward, please. And face the Court Clerk. Raise your right hand and be sworn.

(WHEREUPON the witness was sworn.)

JAMES CONNER

called as a witness on behalf of the Respondent, after being duly sworn, testified as follows:

THE COURT: And please take the witness stand. And state your full name and spell your last name.

THE WITNESS: James Anthony Conner. C-O-N-N-E-R.

THE COURT: Mr. Woodbury.

[p.185] DIRECT EXAMINATION

Q. (BY MR. WOODBURY) What is your employment, sir?

A. District Court Bailiff for Judge Ames.

Q. All right. How long have you been in that position?

A. For Judge Ames since December of '97.

Q. And prior to that what was your employment?

A. District Court Bailiff for Judge Memeo.

Q. Okay.

A. Prior to that, and Judge Stringfield prior to that.

Q. Were you employed in the position as Judge Stringfield's Bailiff in September of 1994?

A. Yes.

Q. Were you present for the Troy Don Brown trial?

A. Yes, I was.

Q. What were the duties of the Bailiff in connection with that trial, just generally?

A. Well, courtroom security, taking care of the jury, and just keeping -- you know, mostly security.

Q. All right. Are jurors allowed to or were they allowed to at that time to wander around the hallways in the morning before the trial started?

A. No.

Q. What were they --

A. -- if they were you would -- you know, have them go back to the jury room.

[p.186] Q. Okay. During the course of that trial, prior to the time the verdict came in did you ever see the defendant in a jail uniform, a jumpsuit?

A. No.

Q. All right. And specifically you didn't see him upstairs in the foyer in a jumpsuit?

A. No.

Q. All right. If he had been upstairs in a jumpsuit during the jury trial before the verdict came in, would you have seen him?

A. Yes.

Q. All right. Did you ever see him on the second floor -- the middle floor of the Courthouse, in a jumpsuit?

A. Not during the trial.

Q. Okay. And during the -- what was the procedure when Mr. Brown would be brought over from the jail?

Did you have something to do in that -- a the time he was brought over from the jail during the course of trial in the mornings?

A. Yeah. We would usually meet the jail downstairs in the basement and I'm trying to remember, we used to do it through the old juvenile center too. I'm not sure which one we came through. It's been awhile.

Q. Do you ever recall seeing Mr. Brown arrive in a jail jumpsuit during the course of the trial before verdict?

A. Not during the trial.

[p.187] Q. Okay. Were you cognizant that that would be an error?

A. Yeah.

Q. And how cognizant of that were you?

A. Well, I just know that you have to keep -- the jury cannot see an in custody -- make it look like he's in custody.

Q. Okay. Did you go downstairs to pick him up in the basement every morning during that trial?

A. I don't think I did every morning but I did -- you know, quite a few times and after lunch.

Q. All right. And you never recall seeing him in a jumpsuit?

A. No.

MR. WOODBURY: Thank you. I have nothing further.

THE COURT: Cross-examination.

MR. SCHIECK: Thank you, Your Honor.

CROSS-EXAMINATION

Q. (BY MR. SCHIECK) Mr. Conner, back in January of 1991, you were the Bailiff in Judge Stringfield's courtroom?

A. Yeah.

Q. And what time did Judge Stringfield start his court proceedings during that period of time?

A. Usually, I'm pretty sure it was 9:30.

MR. WOODBURY: I'm going to object to the question. I don't know that there was anything going on in January of [p.188] 1994, or at least relevant to this case.

THE COURT: Mr. Schieck.

MR. SCHIECK: I was asking for their standard starting time, Your Honor.

MR. WOODBURY: Oh.

MR. SCHIECK: That's all I'm trying to establish. Not that anything specifically started at 9:30 just a standard time.

THE COURT: All right. Go ahead.

Q. (BY MR. SCHIECK) And did Judge Stringfield hear Law and Motions calendars at 9:30? Was that his standard practice?

A. What he did is usually he had Juvenile Court in the mornings only unless there was a civil case.

Q. And he would do that in the District Court court room?

A. Yes.

Q. Do you recall during Mr. Brown's trial whether Judge Stringfield had any of those mornings where you heard either a juvenile or a Law and Motion calendar?

A. He could of heard a case but Law and Motion is usually on Mondays and trials don't start until Tuesday. So, usually they don't interfere.

Q. What about juvenile proceedings?

A. Usually the same thing on Monday mornings.

[p.189] Q. Okay. Do you have a specific recollection whether on any of the other mornings of the trial the Judge might have had something on calendar that morning before the trial started?

A. No.

Q. You don't recall?

A. That's been too long ago.

Q. If Judge Stringfield did have a matter on calendar that morning before the trial started, as the Bailiff would you be responsible to be here during the court proceedings for court security and the other things you told us about?

A. Yes.

Q. And if there wasn't a Law and Motion calendar or juvenile matter, would the trial then typically start at 9:30 in his courtroom?

A. Yes.

Q. And prior to 9:30, did you have other responsibilities to take care of with respect to your duties as a Bailiff?

A. Yes.

Q. What type of things?

A. Well, getting the water pitchers filled and making sure that -- during a jury trial they have drinks and coffee and doughnuts.

Q. Back in the jury room?

[p.190] A. Yeah.

Q. What about here in the courtroom, would you put out their notebooks for them or have responsibilities getting the courtroom ready for the jury?

A. Well, yeah but they usually had their notebooks.

Q. Now, there is a metal detector outside the courtroom here today, was that the procedure that you had back in 1994?

A. Yes.

Q. And the purpose of that was to screen the spectators as they came into the courtroom for weapons, right?

A. Right.

Q. Would your responsibilities include running the metal detector screening the spectators?

A. Yes. And I would get help from other -- the other Bailiff and other officers that would be in the area.

Q. Would it be fair to say though that the Bailiff for Department 1, would be in charge of the metal detector outside of Department 1?

A. Yes.

Q. You're the head guy responsibility wise but you might get -- call the Bailiff in Department 2 over to assist you at various points?

A. Yeah. If I had something else that I had to go do.

Q. Now you recalled that you had gone down and brought Troy up during trial at least on one occasion?

[p.191] A. Mm-hmm.

Q. Do you have a specific recollection that you did it every morning of the trial?

A. No.

Q. How would you know that -- how do you know, let me start over. It's a typical procedure you use for any in custody defendant?

A. Yes.

Q. How would you know as a normal matter when people from the jail were going to get here that you needed to go down and meet with them?

A. We had radio communication and they would call that they are down there at the back door and we would join them.

Q. So, they would call when they get to the back door?

A. Yeah.

Q. Come let us in?

A. Or else, prior to that we'd say we will meet you down at five to nine or 9 o'clock. That's usually how it's done. They call before and then just sort of know to be down there at that time.

Q. Is that a standard time when you were starting at 9:30 trial on in custody defendant that you'd want the jail to get the guy over here by nine or five to nine, or something like that?

A. Usually about 10-minutes prior to starting unless [p.192] their attorney wanted to speak to them prior.

Q. And so usually for a 9:30 starting they would get here at 9:20?

A. Yeah.

Q. You would sort of know to sort of head that direction if you didn't get a call about 9:20?

A. Yeah, or I'd keep an eye out for them.

Q. Where would you look to watch for them?

A. Usually if I did we'd look out the courtroom window and see them come across Fifth Street, that's about the only way you could tell and then you'd know that they'd be down there.

Q. Is this the courtroom that the trial was held in?

A. This is the one.

Q. This is the one?

A. Yeah. I'd run over to other one to look out, but they were very good about calling.

Q. Was there a lot of media coverage on this case? I mean did you have press people that you had to deal with during the course of the trial?

A. I really don't recall that much -- that many. If there was somebody there, I just don't recall that.

Q. Do you recall there being a holding cell in the back part of the courtroom that had sort of a metal cage that a defendant could be held in before he needed to come upstairs? [p.193] I'm talking back in 1994 if you can recall.

A. I don't remember any cell in the courtroom.

Q. Not in the courtroom, back in the old jail section?

A. Yeah, I'm not sure when they tore all that stuff out. It depends on when they remodeled down there but I do remember cells down there, yes.

Q. In 1994 was this a non-smoking building?

A. Yes.

Q. So, jurors couldn't come inside and smoke while they were waiting for court to start. If they wanted to smoke they would have to go outside?

A. Yeah.

Q. Same for everybody, nobody gets to smoke?

A. Nobody. Unless there was -- there's a designated smoking areas I think still in the Courthouse at different places.

Q. Now, here in the Courthouse?

A. I think there is. I don't know for sure.

Q. You're not a smoker?

A. No.

MR. SCHIECK: No further questions. Your Honor.

THE COURT: Re-direct.

MR. WOODBURY: Nothing further.

THE COURT: You may step down. Mr. Woodbury, your next witness.

[p.194] MR. WOODBURY: Yes, Your Honor, we are going to call Mr. Lockie. He has to come up out of a trial in Justice Court so he will be here momentarily.

And in the meantime we'd ask the Court to take Judicial notice that the official records of the proceeding and of the trial show that on Tuesday, September 27th the jury was selected and the trial that day began at 9:30. That on Wednesday the trial began at 9:00. And that on Thursday, the trial began at 8:10 a.m.

THE COURT: Any objection to that?

MR. SCHIECK: No objection to what the transcripts show, Your Honor.

THE COURT: Okay. So then the Court will take Judicial Notice of those proceedings. And Mr. Lockie is?

THE BAILIFF: He will be here momentarily, Your Honor.

THE COURT: All right. We'll be in recess until Mr. Lockie arrives.

(WHEREUPON there was a short recess and court reconvened at 4:26 p.m.)

THE COURT: And please be seated. We are back on the record. Let the record reflect the presence of the defendant and counsel.

And Mr. Lockie if you would face the Court Clerk. Raise your right hand and be sworn.

[p.195] (WHEREUPON the witness was sworn.)

DAVID LOCKIE

called as a witness on behalf of the Respondent, after being duly sworn, testified as follows:

THE COURT: And please take the witness stand. And state your full name and spell your last name.

THE WITNESS: David B. Lockie. L-O-C-K-I-E.

THE COURT: Mr. Woodbury.

DIRECT EXAMINATION

Q. (BY MR. WOODBURY) What is your employment, Mr. Lockie?

A. I'm an attorney.

Q. How long have you been employed as an attorney?

A. Since 1985.

Q. Do you have a primary field of practice?

A. Criminal defense.

Q. And is that been the case since 1985 or about there?

A. Not quite all that time but probably for the last 12 years.

Q. Were you the person appointed to defend Troy Don Brown in charges of sexual assault brought against him in 1995 -- 1933 and 1994?

A. Correct. Yes.

Q. Mr. Lockie, are you aware of the rules regarding jurors prior to conviction seeing a defendant in jail garb or [p.196] shackles?

A. Jurors absolutely may not see a defendant under such conditions.

Q. Were you aware of that at the time of Mr. Brown's trial in September 1994?

A. Aware of the rule?

Q. Yes.

A. Yes.

Q. You have written an affidavit in this case stating that, Troy Don Brown never told you that it happened that a juror saw him in jail clothes?

A. I recall nothing of anything like that.

Q. And did anyone tell you, including Stella Brown that there was at least that potential?

A. I have no recall of that ever occurring.

Q. And had you heard such a thing would you have merely shrugged it off?

A. No way.

Q. Do you know of any action you took to bring to anybody in the Court's attention that he had been seen in jail garb?

A. I don't recall taking any action along those lines. I don't believe that anyone ever brought it to my attention that such a thing had occurred.

Q. Okay. Are you excluding then the fact that it did [p.197] occur and that somebody brought it to your attention, or are you equivocal about it?

A. I have no recall at all of anyone ever bringing to my attention that anyone saw Mr. Brown particularly from the jury in jail garb. Had I been aware of such a thing I would have brought it to the Court's attention immediately.

Q. Okay. Do you recall at the time of trial making arguments and perhaps through questioning

suggesting that another Brown brother other than Troy Don Brown might have been the perpetrator in this offense?

A. I believe that there was some argument along those lines.

Q. All right. Did you hide that or seek to -- did you disclose your intent in that regard to Troy Don Brown?

A. I met with Troy Don Brown many times. We discussed all of the evidence in the case. One glaring piece of evidence was the fact that Megan, as I recall; had made statements that would tend to indicate that she had identified Trent Brown as being the perpetrator. I'm sure that Troy and I went over that and I'm sure that we did discuss the possibility that he could be a possible included person.

Q. Okay. During and before trial can you tell the Court whether or not you had any knowledge that in a case in which DNA played a part contamination of that -- this DNA evidence might be of some concern to a Lawyer?

[p.198] A. I was not aware of a specific case, no.

Q. Were you aware that DNA for it to be effective it must be essentially cared for so that there is no contamination?

A. I think that there would be a protocol there, yes.

Q. Did you have a DNA expert hired?

A. I did.

Q. Okay. And who was that person?

A. Jennifer Mihalovich, and I believe she was with Forensic Science Associates or Forensic -- I think that's the name of the outfit.

Q. Did you have conversations with Ms. Mihalovich?

A. I had many, several.

Q. Okay. Did you determine what Ms. Mihalovich was to do on behalf of the defendant?

A. She had been previously employed by Mr. Brown's counsel when he was represented by the Elko County Public Defender's Office. So some of her activity had been undertaken prior to the time I was involved in the case. I did become aware of what she had done in the case some of which occurred again before my representation, some afterwards. It was my understanding that through Fred Leeds, who was the prior attorney who had originally engaged her. He had made arrangements for her to physically visit the Washoe Crime Lab where the evidence was being housed to inspect that [p.199] facility. And to determine whether or not it had the capacity for DNA analysis and to, I believe to visit with the State's DNA analyst to determine her qualifications, and also to inspect the evidence for whatever purposes they might have needed.

Q. Okay. And you did discuss with her whether or not she did that?

A. I did.

Q. Okay. Were you satisfied that she had done that?

A. I was.

Q. All right. Did you discuss with her the quality of the kinds of procedures that Washoe County had in place -- Washoe County Crime Lab had in place at that time?

A. Yes. And I can't remember any specifics about it but we did discuss whether or not in her view it was a lab that had the capacity to adequately conduct DNA testing.

Q. Okay. Was she satisfied with the evidence procedures that were in place?

A. She was.

MR. SCHIECK: Objection. Calls for hearsay, Your Honor.

MR. WOODBURY: Your Honor, what they have suggested is that Mr. Lockie did not follow the procedures that would make him an effective counsel. The fact is, that whether or not Jennifer Mihalovich was correct in her assessments and [p.200] what she told him. The only question is whether or not she told him that. So, he was not ineffective, he had made reasonable effort to provide at trial. So, we are not offering it for the truth of the matter asserted, we are offering it simply to show Mr. Lockie's state of mind because that is what is at issue.

MR. SCHIECK: As long as it's not offered for the truth of the matter asserted, Your Honor.

THE COURT: All right. Then, overruled. Go ahead.

Q. (BY MR. WOODBURY) Did you discuss with Ms. Mihalovich the collection procedures that -- or was she made aware of them?

A. Yeah, I'm sure that she was. It's been a long time and I can't tell you word for word what we may have discussed about those collection procedures. Generally in my conversations with her I did make sure that in her view she was satisfied that all the procedures were performed appropriately.

Q. All right. There's been an allegation put forward that she was required by court order to attend all testing done by Ms. Romero of the DNA. Do you recall such an order?

A. No. There was an order but I don't recall that that order required her to be personally present nor do I believe that was the intention.

Q. Okay. Did you talk with her about whether or not [p.201] she should be present at the DNA testing?

A. Yes.

Q. And what was the substance of the discussion?

A. From what I recall, she indicated that it would not be necessary for her to personally observe the DNA testing but she would have an opportunity to examine the results.

Q. Okay. And did she also have an opportunity or was she provided an opportunity to review the notes of the testing procedures?

A. I believe so. I don't think she was restricted in anyway. And I think I did provide her with certain information and also I believe pursuant to the order the various materials were transmitted to her.

Q. Did she ever render you an opinion about whether or not the DNA testing that had been done prior to the preliminary hearing was satisfactory?

A. She did.

Q. Okay. Did she render you an opinion regarding the expertise of Renee Romero to conduct DNA testing?

A. She indicated that Renee Romero possessed sufficient expertise to qualify as an expert.

Q. Did she talk to you about -- do you recall at the preliminary hearing Ms. Romero testified that there was not enough semen on the panties to extract enough DNA to do R.F.L.P testing?

[p.202] A. I recall that.

Q. All right. Did you talk with Ms. Mihalovich about that?

A. I did.

Q. And did she have the same opinion as Ms. Romero?

A. She did not.

Q. Okay, What was her opinion?

A. She felt that there was sufficient material to test.

Q. Okay. Did you subsequently find out that Ms. Romero had changed her mind and did think there was enough to do the R.F.L.P. test?

A. I did.

Q. And in fact was the R.F.L.P. testing was testified to by Ms. Romero at the time of trial?

A. It was.

Q. Okay. Did you consider whether or not to file a motion to exclude the DNA evidence?

A. I did consider that.

Q. Did you finally file such a motion?

A. No.

Q. Why not?

A. If I had filed that motion it would of disclosed to the State the strategic decision I had made in how to deal with that DNA evidence. Specifically, Renee Romero had previously testified and I also her notes to the effect that [p.203] the semen that was discovered on Megan's panties was insufficient for R.F.L.P. testing. I decided and I believed through my

discussions with the prosecutor at the time that he was not 100 percent understanding of the problem that I saw that he had. And I felt that, that would be a very powerful way to impeach the DNA evidence in this case.

That is, that if I could present to the jury the fact that Renee Romero had first identified that sample as being inadequate or insufficient for testing. I could use that as a comparison to the jury in terms of the testing that she actually did. And to that end I actually made overhead thermofaxes transparencies and tried as best as I could to make a big deal of that in the closing argument.

It's a common trial strategy to allow things to transpire at trial that you determine that you're going to save for a closing argument. Specifically for the purposes of not alerting the State or even an expert witness to the fact of what is being sought to accomplish. I did not want to allow her to have an opportunity at trial to explain her rationale for first having seen that evidence as inadequate then later going back and determining that it was. I felt that it was a better open ended question that the jury could be called upon to look at.

Q. Were you aware as well that a vaginal swab or at least some material from the child's vagina was also available [p.204] for DNA testing?

A. Yeah, I believe that that had been collected at the hospital. And I can't recall if it was swab or a slide but I know that there was additional material that had to do with semen that was collected from Megan.

Q. Did consider whether or not you wanted -- did you know at that time whether Ms. Romero had tested that?

A. I don't believe that she had.

Q. All right. Did you want her to test that vaginal fluid for trial?

A. Absolutely not.

Q. Okay. Did you believe that if you raised issues regarding the change in her testimony that she would wind up testing that vaginal slide?

A. I think that would have been a possibility, yes.

Q. Okay.

A. The best information that I had from my DNA expert is that any further DNA testing that would occur would further implicate Mr. Brown.

Q. Okay. Do you recall a person by the name of Wayne Henle?

A. I recall the name.

Q. You never met Mr. Henle?

A. No.

Q. Do you recall being informed whether or not [p.205] Mr. Henle -- first of all, did you know what the relationship of Mr. Henle to the child victim was?

A. Mr. Henle was married to the child victim's mother.

Q. Okay. Did you know approximately how long -- did Mr. Henle live with the child victim and the mother?

A. I think so.

Q. And as a part of your trial strategy did you consider alternative suspects suggesting them or pinning them down?

A. I certainly thought of alternative suspects.

Q. Okay. With respect to those alternative suspects, what did you do?

A. I reviewed all the materials that I had in the file and I looked over the various witness statements and so forth, and prepared my cross examinations.

Q. Okay. Did Mr. Henle testify at trial?

A. No.

Q. Did you take any effort to implicate Mr. Henle as a potential alternative suspect in the case?

A. There was one piece of evidence. I believe there had been a remark that he'd made to Pam Henle and I cross-examined Pam Henle concerning some type of a threat that he had made.

Q. Okay. Did you know or had you been informed by -- first of all, do you know Dexter Baker?

[p.206] A. I don't believe I ever met him. If I'm not mistaken. I know I did talk to him on a few different occasions. I believe it was by telephone.

Q. All right. And you had a number of conversations, not only with Troy Don Brown but with his mother, Stella Brown?

A. Many.

Q. And did you have conversations with his father?

A. Many.

Q. Okay. Did you become aware that Henle had a history of sexual misconduct?

A. I believe that is the case, yes.

Q. And were you aware that Mr. Henle -- did Mr. Baker tell you about Hr. Henle's alibi or his work record the night of January 20 when the assault occurred?

A. I knew that there was a work record that indicated that he had been at work on the night in question. I remember having some discussion, I believe with Dexter about that. I can't recall the full substance of what that was.

Q. Were you informed that work record might not fully suggest or fully establish that he had been at work?

A. There is something in my mind about that. I cannot testify today as to whether that is information that I later gained or that I knew before hand.

Q. Would it have changed your trial strategy to know [p.207] that Mr. Henle was available as a potential suspect or that he would not have an alibi?

A. I would not have wanted to focus any clearer on Mr. Henle, no.

Q. Why is that?

A. Well, one of the greatest assets that a criminal defendant has at trial is the presumption of innocence and that means that it is incumbent on the State to prove that the defendant is guilty beyond a reasonable doubt. It's been my experience if the defendant comes forward and tries to definitively prove that someone else did it, which he can rarely do; then there is an imperceptible shifting of that burden of proof that occurs during the trial.

In other words, the focus of the trial changes from that of requiring the State to prove guilt beyond a reasonable doubt to what I perceive, in terms of the jury as their decision along the lines of the preponderance of evidence. That is, did Troy Brown do it or did Mr. Henle did it -- do it and if the trial becomes that type of a contest, quite frankly I believe that the defendant loses.

Q. Okay. Did you believe or did you know whether or not Mr. Henle could be excluded as a suspect?

A. Well, Mr. Henle was conclusively excluded as a suspect by virtue of the DNA testings. My understanding of DNA testing as it existed at that time the process is one of [p.208] exclusion and not one of inclusion.

Q. Okay. And did you have other concerns if you tried to pin it on Mr. Henle?

A. Absolutely. I was aware that this gentlemen lived in the very house with this girl and she was unable to identify her attacker. And to me to suggest that he was the attacker the very step-father, the very person who lives in the house, in light of the child victim's inability to identify that person would tend to lead anyone to believe that the attacker was not Mr. Henle.

Q. During the course of your conversations with Mr. and Ms. Brown, other than Troy did you ever talk about trial strategy or anything of that nature?

A. Frequently.

Q. All right. Did you suggest to them that you were going to win the case?

A. Did I suggest to them?

Q. Yes.

A. I don't really understand your question.

Q. Well, did you tell them no problem. I've got it handled?

A. No.

Q. Okay. Is that something that you recall specifically or it is part of your general practice?

A. It would be part of my general practice.

[p.209] Q. Why is that?

A. Well, anyone who has any experience doing jury trials understands that the process is uncertain. That is, that the jury may find the defendant guilty, the jury may find the defendant not guilty. There are many, many things that are completely beyond the control of the defense attorney and the defense attorney is not in a position to make those kind of predictions or statements.

Q. Did you afford those folks, including Troy Don Brown an opportunity to tell you what they wanted to tell you?

A. Yes. I met with them very frequently.

Q. All right. Did you ever shine them on by saying -- by simply ignoring what they were telling you?

A. No. No, they had an awful lot to say and a lot of what they had to say would not necessarily have been relevant in court. But it was useful in -- you know, getting to know the family, getting to know the people in order understand Troy a little bit better, step into his shoes a little bit and be able to represent him in front of a jury. But, in terms of just ignoring what they had to say no, I wouldn't do that.

Q. Were you ever informed that -- first of all, do you remember a Carlin Police Officer by the name of Mike Terry?

A. I believe he testified, yes.

Q. And were ever informed that Troy Don Brown and Mike Terry had an ongoing feud of some sort over a girlfriend?

[p.210] A. No. I didn't know about that. I know that they knew each other in Wayne County, I think, in Utah.

Q. Okay. Would you tell the Court how you came at the conclusion, how you came to not represent Mr. Brown on appeal?

A. I was informed through someone, someone being other counsel. I believe it was Dorothy Nash-Holmes. I received some kind of a communication from other counsel that it was the intention to -- it was the intention on the part of Mr. Brown and or his family to have a different attorney begin representing Mr. Brown, but I got some kind of a letter too. I can't recall exactly what it says but I believe it was from Ms. Holmes.

The letter further indicated that they had retained attorney Matt Stermitz, who would also be of local assistance. And then I believe that Mr. Stermitz in fact appeared at the time of sentencing as well, although he didn't make a formal appearance. I carried out the sentencing. But I did speak with Mr. Stermitz as well and it was his indication that there would be other

counsel substituting into represent Mr. Brown from that point forward.

Q. Going back to the question of the DNA, do you recall that the R.F.L.P. testing on the DNA was done fairly soon before trial?

A. I think that the results were relatively soon before trial.

[p.211] Q. Okay.

A. In other words there were other forms of testing that had been done much earlier.

Q. Did your expert Ms. Mihalovich avail herself of the opportunity to review those procedures?

A. Yes.

Q. Even though it was relatively soon before trial?

A. I believe that she did, yes.

Q. Okay. Did you bring that to her attention that had happened?

A. Yeah, I'm sure that she knew about the DNA testing that had taken place.

Q. Given your trial strategy did you feel that you had, that it was necessary for you to attempt to continue the trial date in order to deal with the additional DNA evidence?

A. That would have been devastating for Mr. Brown in my opinion. I think that the District Judge was of such a mind set, which is obvious in hindsight; I mean, he allowed DNA testing to even occur post-verdict. I believe that the District Judge would of been receptive to additional time for additional testing but I specifically discussed with Ms. Mihalovich wether or not additional time would be useful to our defense. And she indicated that any and all further DNA testing would do nothing but further provide devastating in-crematory evidence against my client.

[p.212] Q. Okay.

MR. WOODBURY: I don't have any further questions.

THE COURT: Cross-examination.

MR. SCHIECK: Thank you.

CROSS-EXAMINATION

Q. (BY MR. SCHIECK) Mr. Lockie, I want to talk to you about Jennifer Mihalovich and the DNA testing.

A. Yes.

Q. How many reports did you receive from her?

A. I don't recall.

Q. Written reports?

A. I don't recall.

Q. Do you recall any that you got before trial?

A. I do not recall.

Q. If you would have received any written reports from Jennifer Mihalovich about anything to do with the DNA before trial, would you have turned that over to either Mr. Brown or his family?

A. Probably.

Q. You wouldn't of hidden it from them?

A. No. No, absolutely not.

Q. You would of said, this is our expert and look what she's saying.

A. Probably.

Q. And if she's saying things that -- what you are [p.213] telling us today, saying things that in essence verified Romero's work. Did you ask her for a written report so that you would have verification of that information?

A. Probably not.

Q. So all her reporting to your recollection prior to trial was oral reporting?

A. The vast majority of it was oral reporting.

Q. And she was originally on the case as a result of Mr. Leeds with the Public Defender's Office?

A. Correct.

Q. And you're familiar with the stipulation order that was entered with respect to her appointment and the terms of her appointment?

A. Vaguely.

Q. Would it refresh your recollection to review a copy of it?

A. Probably would.

MR. SCHIECK: May I approach, Your Honor.

Q. (BY MR. SCHIECK) I'm going to show you what -- we are not going to mark it, it's a filed document; and ask you if that refreshes your recollection as to the stipulation order.

A. Yeah, I remember this somewhat. It's been six years so I don't recall the conditions under which this was obtained because it was obtained by the Public Defender's Office, I [p.214] believe.

Q. But does that appear to be the stipulation filed on March 21, 1994 between the Public Defender's Office and Marshall Smith?

A. That's what it says.

Q. And then an order filed it looks like March 30?

A. Looks like it to me.

Q. In that stipulation it states that -- in paragraph number four, the testing is to be done in coordination with Forensic Science Associates of Richmond California. And that a representative of the Forensic Science Association shall be present at all stages deemed critical by Forensic Science Associates. Which is expected to be a period of approximately two days.

A. It says that.

Q. And that prior to the testing certain things would be provided to Jennifer Mihalovich?

A. It says that.

Q. And after R.F.L.P. is completed all bench notes, photographs, auto-radiograms will be sent to her also?

A. It says that.

Q. Did you ever receive any reports from Jennifer Mihalovich concerning the receipt of the items concerning the R.F.L.P. testing prior to trial.

A. I know that I received something -- I believe, well [p.215] I'm not sure. I had some materials, I'm not sure what I had. I certainly talked to her.

Q. The R.F.L.P. testing was the testing that was completed just prior to the trial starting, is that correct?

A. I believe so.

Q. And in fact if you were to look at a copy of that report, would it refresh your recollection as to when the report was generated?

A. Probably not. Whatever the date that the report says would be the date. I wouldn't have a present memory after review that report, no.

Q. Do you recall it being as close to within a few days to a week prior to trial?

A. Pretty close.

Q. And it's that testing that Jennifer Mihalovich was to receive all of these materials on to review and determine if the proper protocols had been filed and things of that nature?

A. Well, if you mean pursuant to the terms of this stipulation?

Q. Yes.

A. That's what this stipulation says. I don't know if that becomes a requirement.

Q. Did you request that be done or ensure that had been done prior to proceeding to trial where that R.F.L.P. evidence [p.216] was going to come in?

A. Did I ensure that what was done?

Q. That all those items were sent to Mihalovich in sufficient time for her to review and report to you as to her findings?

A. I believe that she did review it. I'm not certain.

Q. Do you recall a written report on that review?

A. I don't recall a written report. There is a report I believe that took place afterwards. I remember that report.

Q. Well, let's talk about the report you received afterwards. This is the report that was done after trial?

A. I believe there was a report after trial, correct.

Q. And you had gotten a court order for the release of certain evidence so that she could test it?

A. I think so.

Q. And that related to the remaining 10 percent of the vaginal swabs that had been taken in the sexual assault kit?

A. I'd have to refer to the report. I don't recall specifically what it was.

Q. Do you recall that in the testing that was completed by Renee Romero that she had consumed all of one vaginal swab and 90 percent of the other so that only 10 percent remained?

A. I think so.

Q. And that was all that was left for Jennifer Mihalovich to test after trial?

[p.217] A. I think so.

Q. Did you request that Jennifer Mihalovich be present for the R.F.L.P. testing?

A. I don't believe that I did.

Q. Is it your recollection that the only time she was present for any testing was when Mr. Leeds had made the arrangements for her to go to the crime lab, sometime near March of 1994?

A. That I believe is the case.

Q. And that all additional testing occurring after that time was done in the absence of Jennifer Mihalovich?

A. She was not there, as far as I know.

Q. Did you ever discuss with Mr. Troy Brown of the fact that you weren't going to have the defense DNA expert present for the testing that was being done by Renee Romero?

A. I can't recall whether we had specific discussions about that or not. We talked a lot about the DNA evidence. Mr. Brown knew what the statue of the progress of the DNA evidence was. Both he and his family were following the case very, very closely. So, I'm sure that there was some discussion.

Q. When was it that Jennifer Mihalovich told you that she thought there was more than enough DNA presence on the panties to perform the additional testing?

A. There came a point and time when I was informed that [p.218] -- in fact, the Washoe Crime Lab had indicated that there was enough evidence for R.F.L.P. testing. Which was kind of a dramatic turn around from what had occurred previously. At some point and time after learning of that I did speak with Jennifer Mihalovich because I knew that she had examined the materials herself. And I wanted to get her opinion as to whether or not there was sufficient evidence to test.

Q. Okay. And what materials are you saying that she personally examined?

A. I believe that she examined the materials that had been collected and transmitted to the Washoe Crime Lab.

Q. Did she prepare a written report and submit it to you saying that these findings or are you relying solely on your recollection?

A. I did not have her prepare written reports, no.

Q. Do you recall at the preliminary hearing that Renee Romero testified concerning her testing?

A. Yes.

Q. And the record would reflect that the preliminary hearing happened on July 6, 1994?

A. If you say so.

Q. And then the trial proceeded in the end of September 1994.

A. Very possibly.

Q. Do you recall examining Ms. Romero at the [p.219] preliminary hearing about the presence of sufficient material to do the additional testing, her saying no there was not?

A. I think so.

Q. And you're telling us that it was after that that you asked your expert if she thought there was enough present?

A. No. I was satisfied with Ms. Romero's -- you know, statements there was insufficient material to be tested. It was after that, when I was informed by the District Attorney's Office that the R.F.L.P. testing was going to go forward because it had been determined that there was sufficient evidence to be tested. That I spoke with Ms. Mihalovich because she had indicated that she had reviewed -- she had looked at the panties, I believe and it was her view that there was ample evidence to be tested by the R.F.L.P.

Q. So, the DA's Office informed you, to your recollection, we found enough DNA now we are going to do the more sophisticated tests?

A. That's as I recall it, yes.

Q. And you didn't call your expert and say they've changed their story now they found more, can you please go and see what they are doing in the crime lab?

A. I asked her whether she had looked at the panties. I believe, and she said that she had and she believed that there was enough to test.

Q. Did you ever pass this information on to Mr. Brown [p.220] or to his parents?

A. As I told you before, we discussed the DNA evidence quite a bit and I believe that I did pass it on to them. Can I point to a specific conversation, no. I certainly didn't hold it secret from them.

THE COURT: Mr. Schieck, it's 5 o'clock, how long will you be do you think?

MR. SCHIECK: I've got quite a bit more, Your Honor.

THE COURT: Quite a bit more. And Mr. Woodbury, how long is the State's case going to be?

MR. WOODBURY: Mr. Lockie is the end of it, Your Honor.

THE COURT: Go ahead.

MR. SCHIECK: With that in -- if the Court wanted to adjourn it would probably, number one quicken my remaining cross-examination because I would be able to organize my notes and exhibits. And because we've got today set aside and tomorrow we could accommodate Mr. Lockie's schedule if there was a scheduling problem for him.

THE COURT: Okay.

MR. WOODBURY: My problem, Your Honor, is I have a hearing at the Bankruptcy Court in Reno tomorrow at 10 o'clock and I was hoping we could finish tonight if that were possible.

[p.221] THE COURT: Well, it is possible. I guess, that's why I was asking how much longer we have. Mr. Schieck.

MR. SCHIECK: I would estimate 20, 25 minutes, Your Honor.

THE COURT: All right. Go ahead.

Q. (BY MR. SCHIECK) Mr. Lockie, how would you describe the relationship that you had with Troy Brown?

A. Very good.

Q. You got along at all stages?

A. Yes. Mr. Brown and I got along.

Q. How would you describe the communication that occurred between the two of you?

A. Free-flowing.

Q. Was it in person, over the phone, how would the communication take place?

A. I know we talked in person quite a bit. I believe we talked over the phone as well.

Q. And did Mr. Brown ask you how you were going to handle the DNA evidence?

A. I don't recall if he asked me that specifically but there certainly was discussion about that.

Q. Do you recall what you might have told him about how you were going to handle the DNA evidence?

A. In terms of?

Q. Defending the case.

[p.222] A. Yes.

Q. And what did you tell him?

A. That the indication had been previously from Renee Romero that there was insufficient quantity of material to test, at least as exposed to R.F.L.P. testing. That I would obtain her notes that confirmed that fact where she had labeled that evidence insufficient for testing. And that we would be pointing out the deficiencies to the jury.

Q. So your plan of attack on the DNA was just to focus on the change from the there's not enough, to now suddenly there's enough?

A. Right, and I thought that would be impressive.

Q. Were you ever concerned about the chain of custody of that evidence?

A. I'm sure I was.

Q. What kind of concerns did you have?

A. Well, I think it's a fairly routine process to examine the chain of custody of evidence to determine whether or not the chain is complete.

Q. Were you aware that when the panties were impounded by the Carlin Police Department that they were initially bagged together with other items of evidence? Specifically, a sock and some pajama bottoms.

A. I can't recall right now but it may well be.

Q. And do you recall that Megan had been babysitting [p.223] that very evening at Trent Brown's house?

A. I think that was the case.

Q. Were you aware that she was wearing those same pajama bottoms while she was babysitting?

A. Rings a bell.

Q. Do you recall that Troy Brown was a frequent visitor to that location?

A. Troy visited Trent's, yes.

Q. And had been over there even that evening?

A. I don't recall anything specific about that. If that's the case I'm sure that he would of told me about it.

Q. Do you have a recollection that he did tell you that?

A. I can't, it's been too long.

Q. How about with Ms. Brown, with Stella Brown what was your relationship like with her?

A. We communicated a lot. I thought we had a good relationship.

Q. Did Troy ever complain to you that he didn't feel you were doing enough on his case?

A. No.

Q. What about Stella?

A. Stella was very, very concerned for her son. I thought that she was very heartfelt. I believe that she deeply believed that her son was innocent. I thought that she [p.224] was doing all that she could do to try and protect her son. She was very good about staying in touch. She would communicate very frequently and I tried as best as I could to accommodate and allow her ever opportunity to express her input into the case. And to keep her informed as to what was going on in the case and she appeared to be well satisfied. Of course, that changes after a negative result but during the time that all this was going on we certainly had a good relationship. And there was certainly full communication by all.

Q. At the preliminary hearing do you recall stipulating to the qualifications of Renee Romero to do her testing?

A. I don't recall that specifically. If it's in the record, I'm sure I did.

Q. Would you need to refer to your record to -- the transcript?

A. It's not going to improve my memory at all if that's your question. I'm sure the transcript can speak for itself.

Q. Did you have a strategic reason for stipulating to the expertise of Renee Romero when her crime lab wasn't even certified in DNA at the time?

A. I'm not really sure that is the case. If you say it, it may be. I believe that she had previously qualified as an expert. I certainly had her resume and I had looked into her materials that were provided to me.

[p.225] Q. If the record of your cross-examination at the preliminary hearing showed that she had never been qualified as an expert for the testing she was referring to; and the crime lab was not certified to do that testing, would that surprise you?

A. It might, yeah. I'm sure the record speaks for itself.

Q. I'm going to ask you a general question about the evidence in the case and then come back to the preliminary hearing. Is it fair to say that the DNA evidence was the evidence most damning that the State had?

A. Yes.

Q. And that the absence of the DNA the State had a -- not much of a case?

A. I'm 100 percent convinced that Troy would have been found not guilty without the DNA evidence, yes.

Q. And at the preliminary hearing Megan didn't testify, do you recall that?

A. I don't think she did but I could stand corrected.

Q. If you had been able to -- or if you would have objected and kept out Renee Romero's testimony concerning the DNA at the preliminary hearing, would the State have had any evidence left to bind over?

A. I would have to look back and review the entire preliminary hearing transcript, certainly the State would have [p.226] had an extremely weak case. I will tell you that the evidentiary threshold particularly in this jurisdiction to get through a prelim is virtually nothing. The interpretation that the Elko Justice Court applies to the level of evidence necessary for a bind over is slight or even marginal evidence, and believe me they take it at that. So, would there have been enough evidence for a bind over? Probably. I would have to look at the entire preliminary hearing transcript and then I would be speculating. But at least in the 12 or 13 years that I've been practicing in this jurisdiction virtually every single case goes through a prelim no matter how thin.

Q. With the DNA evidence was there any doubt in your mind that it would be bound over?

A. No.

Q. Did you have any strategic reason then to stipulate to the admission or the expertise of Renee Romero to report those test results at the preliminary hearing?

A. Not that I could think of now. I didn't think necessarily there would be anything gained by exploring it.

Q. Did you have an investigator working on the case?

A. I believe that Mr. Grady assisted some.

Q. Can you say the last name again?

A. G-R-A-D-Y.

Q. Grady? Did he render any reports of his investigation to you?

[p.227] A. I think that there were just a few notes and maybe some billings.

Q. Okay. Do you recall anyone that he interviewed in this case?

A. I'm not specifically -- there are some notes.

Q. Do you recall anyone that you sent him out to interview?

A. I know that he did speak with some people. Who they were, I can't recall right now.

Q. Do you recall Dexter Baker giving you certain information about Wayne Henle's activities at Leadcor on the night in question and the names of people that should be talked to about that information?

A. I had a conversation with Dexter something along those lines. What was said, I can't recall.

Q. You indicated in your affidavit that was attached to the State's opposition that you had directed some investigation; specifically that you cannot remember precisely how I came by that information, talking about Henle's work information, but I do know that an investigation was made. Whether at my instance or that of the State and at that time I saw a copy of Henle's time card.

A. I believe that that's the case, yes.

Q. If I were to show a copy of that time card would you be able to recognize it?

[p.228] A. No.

Q. Well let me show you Petitioner's Exhibit 1, and ask you if you recognize what this is?

A. I don't recognize it beyond what it purports to be on its' face.

Q. Which is a Leadcor time card?

A. Yes.

Q. You don't recall whether or not that's what you were referring to in your affidavit that you saw during the course of the investigation?

A. I don't. I remember seeing something. I can't tell you that that's the document or not.

Q. Do you recall any conversations with Mr. Baker that Mr. Henle's 16G grader was on standby far a three-hour period, meaning it was not being moved it was just idling?

A. I don't recall that conversation. I do recall having a conversation with Dexter but I don't recall that being the substance.

Q. When you state in your affidavit that you believe that Henle had an alibi that he was at work on the night of the attack. Can you tell me what investigation you or your investigator did to verify that?

A. It was my understanding that there existed a time card that reflected that he had been at work, beyond that no.

Q. You don't recall speaking to anyone about the [p.229] interpretation of the time card records?

A. Possibly the conversation with Mr. Dexter Baker and there may have been something else as well.

Q. At some point and time you became aware that Mr. Henle had been charged with a sexual assault in the State of Utah?

A. I knew that there was something in his past along those lines, yes.

Q. And there has been certified court records produced to the District Attorneys Office as part of the Petition to show that incident happened on June 12, 1994, which was prior to Troy's preliminary hearing. Were you aware of that incident prior to Troy's preliminary hearing?

A. I can't recall.

Q. Did you send your investigator to Utah to look into exactly what Mr. Henle was up to?

A. No.

Q. Did you yourself or your investigator obtain records from the police or the court in Utah to see what this was all about?

A. No. I know that there was some record concerning Mr. Henle that I have in my file. And whether that's a conviction or criminal accusation of some kind, I'm not sure. But there is some record -- some court document I believe that addresses Mr. Henle.

[p.230] Q. Do you know whether you saw that before trial?

A. I don't. It's in my file. Wether it was placed in my file before or after the trial, I can't tell you.

Q. If Ms. Brown testified she gave it to you before the trial would you have any reason to quarrel with her?

A. Not necessarily, no.

Q. Were you aware that those police reports also reflected that Mr. Henle had done the same thing in Carlin?

A. I don't know.

Q. Are you aware that those incidents involved sneaking into the residences or sleeping locations of women through the cover of darkness?

A. I don't recall that.

Q. That situation is somewhat similar to the situation with Megan. Would you agree that someone entered the house under cover of darkness to perpetrate this crime?

A. Yes.

Q. Would you have a strategic reason not to present that type of evidence to a jury concerning Mr. Henle as a possible alternative suspect?

A. As I indicated before, I would be very hesitant to try and indicate to the jury that I would be capable of proving to the jury that Mr. Henle committed that of offense.

Q. Would you feel that you would have to prove that to the jury as opposed to being able to argue to the

jury that [p.231] the presence of that additional information created a reasonable doubt as to whether or not Troy was the perpetrator?

A. Yes.

Q. Do you recall any discussions with Troy concerning the use or non-use of Mr. Henle as an alternative suspect?

A. I can't point out anything specific. I'm sure that it did come up during the course of our conversations as to the possibility of Mr. Henle being a suspect, yes.

Q. To your knowledge did either you or your investigator do any background investigation of Mr. Henle prior to trial?

A. Other than the document which I previously indicated, no.

Q. So to your recollection no co-workers, friends, acquaintances were spoken to about Mr. Henle?

A. Not that I know of.

Q. Do you recall that at the preliminary hearing one of the technicians that was present at the hospital during the collection of the sexual assault kit, indicated that scrapings were taken from Megan's teeth and preserved.

A. No. I don't recall.

Q. Do you recall that there was testimony and reports from Megan indicating that she had bitten her assailant?

A. There was something along those lines. I don't [p.232] recall anything specific.

Q. Do you recall that at 5 a.m. on the morning of the 29th, Mike Terry went to Troy's house and specifically noted that he check Troy for scratches and bite marks?

A. Yes.

Q. And that was a result of information he had received from Megan about what had transpired with her assailant?

A. I don't recall the cause of link there but it makes a lot of sense to me as you explain it now.

Q. Do you recall that Troy in Utah even went to the trouble of going to a medical clinic in order to have a report prepared saying I don't have bite marks and scratches?

A. I don't know if it was a medical clinic but I know that he went somewhere and was looked at.

Q. Some type of medical facility?

A. Yes.

Q. But you don't recall that at least one witness at the preliminary hearing testified that they had

collected scrapings from Megan's teeth, had collected debris?

A. I don't recall that.

Q. If that had transpired and the record would speak for itself, would you have any strategic reason for not filing some type of motion dealing with the State's loss of possible exculpatory evidence?

A. If the scrapings were collected but lost?

[p.233] Q. Yes.

A. Possibly.

Q. Possibly?

A. Well, no I wouldn't have any strategic reason to avoid that issue, no.

Q. And as you testify today you can't recall of any?

A. I can't recall either way on that.

Q. Do you recall receiving information that on the night prior to Megan's assault, specifically on Thursday night; that Troy had been with is girlfriend Kerrie?

A. I don't recall that.

Q. Do you recall in your affidavit stating that you had received a note from Stella Brown dated August 30, 1994 stating that Kerrie, Deanne's sister was going

out with Troy when this all happened. They were together the night before Megan --

A. -- I looked back through my file and I think I found a note to that effect.

Q. And that would have been prior to trial that you received that note?

A. When was the trial date again?

Q. September 26.

A. It sounds like it.

Q. Did you or your investigator go out and speak with Kerrie as to what had transpired on Thursday?

[p.234] A. No.

Q. Do you recall speaking with Troy about what had transpired on Thursday night?

A. What was the night that the events was alleged to have occurred?

Q. Friday night and Saturday morning.

A. So this would have been one more night removed?

Q. Yes.

A. I can't recall whether Troy and I talked about that or not.

Q. Do you recall him telling you that they had had sexual relations and he had used a condom?

A. I recall some discussion about a condom and I believe there was some suspicion on the part of the family of a condom maybe existing in Troy's room, somewhere. Beyond that I can't recall anything about a condom.

Q. You recall some conversation about it. Do you recall having your investigator or anyone talk to Kerrie or the other occupants of that residence about the presence or absence of the condom?

A. Did I have an investigator talk to anyone? No.

Q. Were you aware of Dexter Baker's position with Leadcor?

A. Was I aware then? I don't know. I recall that he had some -- I believe he was employed with Leadcor in some [p.235] capacity I don't remember what it was.

Q. Were you aware that Pam Henle had filed for an annulment against Wayne Henle?

A. I don't recall that.

Q. Do you recall doing any investigation into the relationship between Pam and Wayne once they got back to Utah and before this trial occurred?

A. No.

Q. Would you have had any strategic reason, if you had known about it, not to use the fact that Pam had

filed for an annulment and had gotten a restraining order against Wayne?

A. Well, other than what I testified to before that I would not choose to turn the trial into a contest as to whether I can prove that Mr. Henle did it or if the State can prove that Mr. Brown did it.

Q. And just so I'm clear, on direct examination you indicated that you were never made aware that there was an existing animosity between Mike Terry and Troy Brown?

A. I don't recall that now and I -- what I remember of it is that Mike Terry, I think, was from the same community as Mr. Brown. Whether or not there existed any animosity, I can't recall.

Q. If there had been animosity between Mr. Brown and Mr. Terry, would you have any strategic reason not presenting that to the jury at the time of trial?

[p.236] A. Very possibly The dirty cop theory, unless you can make good on it; it's not a very good one to present. And if Mike Terry presented himself as a rather dispassionate observer in the case to try and paint him as a dirty cop without any underlining basis, I think can create a lot of -- can result a real loss of credibility on the part of the defense. So, it depends I guess is the answer to your question.

Q. You don't recall any investigation or checking into the background of Mr. Terry as to whether or not he was a good cop?

A. No, I don't recall either way. I think a lot of his testimony helped us.

MR. SCHIECK: I think I'm done, Your Honor, but if you could give me just one minute.

Q. (BY MR. SCHIECK) Why is it that after the trial was over, you sought to have additional DNA testing done?

A. That's a good question. I think the Court suggested it. I believe. I could be wrong about that but I think the Court suggested it.

Q. You don't recall filing a motion to allow the release of the evidence to Jennifer Mihalovich and that she could consume the last 10 percent of the --

A. -- yeah, there is a motion filed but that may have been on the invitation of the Court to file such a motion. [p.237] There's another -- possibly, I know that I talked to Stella about some further DNA testing and I believe that there was some discussion as to what might or might not be able to be done in terms of further DNA testing. And some inquiring as to whether or not the Court may allow it within the scope of the existing protocol. Now, I easily could be wrong about the Court having come up with this idea. There is something in my mind about that. It may have been a conference in Chambers where the idea was brought up but I'm not sure.

Q. Was there a concern that this independent testing hadn't been done prior to trial?

A. On my part?

Q. Your part, the Court's part, Stella's part?

A. I think there was a concern on Stella's part. As I said before, the more testing the more evidence there is that Tr[illegible] Brown's guilty.

MR. SCHIECK: No further questions, Your Honor.

THE COURT: Redirect.

MR. WOODBURY: Thank you, Your Honor.

REDIRECT EXAMINATION

Q. (BY MR. WOODBURY) I take it that you have not had an opportunity or have not taken an opportunity to go back and fully refresh your recollection regarding the trial?

A. Correct.

Q. Okay. And with respect to the tooth scrapings, if I [p.238] represent to you that that appeared in the trial and there -- and possibly in the preliminary examination. Would there be any particular reason why you wouldn't file a motion to -- if you thought one was justified?

A. Would I have consciously ignored it?

Q. Yeah.

A. No.

Q. And even though you cannot now recall it, do you make a practice of filing motions that have no likelihood of winning?

A. I make a practice of not filing those kind of motions.

Q. All right.

A. Because I want to preserve credibility with the Court.

Q. All right. And assuming that it came to your knowledge that there might be a possible loss of exculpatory evidence, would you have apprized yourself of what the law in that regard is in considering whether or not to file a motion.

A. I would like hope so.

Q. All right. Given all of the things that counsel has informed you or at least suggested through his questions about Mr. Henle, does that change your opinion about the strategic decision you made to not try to prove Mr. Henle guilty?

A. No. I thought that the trial went off extremely [p.239] well in terms of the process of offering alternative suspects.

Q. Okay. Given the information that counsel has given you with respect to the testing of the DNA and what the stipulation would of allowed as to opposed to what actually happened. Does that change your mind about anything that you did with respect to the DNA?

A. Not at all. I'm satisfied that I discussed the DNA matters well enough with Jennifer Mihalovich. I certainly didn't want any reports to be prepared that wherein those reports contained conclusive evidence of my client's guilt.

Q. Okay. And is it your understanding that written reports by experts can and sometimes do become the subject of discovery?

A. They can and that could haunt Troy's file for quite awhile in the future for other proceedings as well. There is no advantage in having experts reports in your file that are extremely damaging to exist. You don't need it other than maybe for C.Y.A.

Q. And C.Y.A. means what exactly?

A. Okay. Insulate yourself against further attacks and post conviction relief.

Q. All right. Is it your practice to conduct your criminal defense practice with an eye toward covering yourself in the event someone come back several years later?

A. Not compulsively so.

[p.240] Q. Okay.

MR. WOODBURY: Thank you. I have nothing further.

THE COURT: Re-cross.

MR. SCHIECK: No re-cross, Your Honor.

THE COURT: You may step down.

THE WITNESS: Thank you.

THE COURT: And thank you for coming.

Mr. Woodbury.

MR. WOODBURY: The State has no additional evidence to offer, Your Honor.

THE COURT: Rebuttal.

MR. SCHIECK: None, Your Honor.

THE COURT: All right. Closing arguments.

Mr. Schieck.

MR. SCHIECK: Your Honor, in our Petition that we have filed in this matter we have raised a number of claims of ineffective assistance of Counsel going into several areas. And while I'm not going to be able to regurgitate exactly what the testimony was as to each individual area, will try to summarize to the best of my ability knowing the Court has its own notes to review before making a decision.

The first issue has to do with Troy coming to court in shackles and in jail garb and being seen by members of the jury. This is an issue where we certainly have conflicting evidence before this Court. We have a Mr. Croswell who really [p.241] can't remember what happened seven years ago; that says our policy is not to do it that way and normally it wouldn't be done that way. We have the Bailiff who

had a specific recollection of one day bringing Mr. Brown up and really can't recall any of the other days, that court typically would start at 9:30 and there would be a set time that they would bring Mr. Brown over from the Jail. Yet the record shows that they started court as early as 8:10 on one day according to the transcript that Mr. Woodbury referred to. And out of the ordinary starting time according to the Bailiff, something that could precipitate the change of the normal policy.

Against that we have the testimony of Troy, quite specifically of how the situation occurred and where he was walked in. That he was able to see and recall his father and his brother outside smoking cigarettes. That there were members of the jury that also were smokers and that they would go outside. Although I'm not familiar with every nook and cranny of the Courthouse, I haven't seen any smoking areas for the jury; perhaps there were in 1994.

We have the testimony from Mr. Brown that in fact jurors did go outside and smoke during breaks. And it can be assumed that they were outside as they said, smoking during the morning hours that the truck -- the van pulled up on what they referred to as the front of the Courthouse; that I always thought was the side, but be that as it may they were all [p.242] referring to the North side of the Courthouse. And that they were walked in easily within the view of these jurors that were outside. Mr. Brown testified -- Marion Brown testified he was there, he could see them. There is no way the jurors could not see as Mr. Brown hobbled up into the Courthouse wearing a brightly colored suit during the course of this trial. Mr. Lockie says if I would have learned of that, I would have done

something. I don't recall that I did anything so I assume therefore nobody ever brought it to my attention. Which flies in the face of the testimony of numerous witnesses that we called on this issue.

The State in their opposition indicates, well this claim should be barred because it was not raised on direct appeal by Mr. Brown's direct appeal attorney. And that the rules state that you can't raise on post conviction claims what could have been raised on direct appeal. This claim couldn't have been raised on direct appeal even if the appellant attorney knew about it there's nothing in the record that any witness can refer to and that I can represent to the Court I've seen in the record in this case. And I don't think Mr. Woodbury is going to say there's anything that he saw in the record that refers to this. There is no way an appellant attorney could raise this issue on direct appeal. And so therefore it is properly raised on post conviction and the proper claim for this Court to consider.

[p.243] We had testimony concerning the DNA evidence, the manner of collection. That we have evidence that goes from being -- you can't sample it, there's not enough to sample to suddenly they find it there. We have the evidence being transported by Mike Terry who according to the testimony had a ongoing dispute with Mr. Brown. We had -- and I can't refer to specific place in the record; but I believe Ms. Brown testified to it on her examination, that at one of the proceedings Mike Terry indicated that he had been directed to open the packages on one occasion and repackage them. We have material being packaged together and then unpacked and put into separate bags, being transported back and forth.

We have DNA evidence being collected at Mr. Brown's house by piling into a bed sheet and being taken out of the house. We have no investigation as to was there another source of semen that could have potentially been available. Mr. Lockie admitted that he did not do any investigation into that area even though he had been told something about a condom. He admits that he got the note from Ms. Brown saying there was this condom. I mean -- excuse me, he was with his girlfriend the night before and that he knew something about the condom.

Two plus two equals four. Something should have been done to verify and present to this jury that there is in fact a smoking gun of DNA evidence that could have found its [p.244] way into the DNA test results. Would we be able to conclusively prove that absent a revelation from the person who did it? Obviously not, no. The question is whether or not that implication could be put before the jury.

Mr. Lockie quite candidly says, this case was dependant on a reasonable doubt defense. My plan was to present to this jury there's a reasonable doubt, they haven't proven their case beyond a reasonable doubt. If you are going to put that defense before a jury, you put every possibility that this jury could find to say something is just not right here. It doesn't add up. There be no corroborating evidence that its Troy Brown. The State in their opposition actually at one point, and I could cite to it with a few minutes to look for it; says we agree without the DNA evidence that there was insufficient evidence to convict in this case. Yet we have no effort to attack the DNA evidence.

No effort to ensure that the expert is present as the Court ordered back in March of '94, be present during all the subsequent testing that takes place. The only testing that is done by the defense is after the horse is already out of the barn and Mr. Brown is already convicted. Then let's have our expert do a test and see what we come up with. That test was given to the Court as part of the record in this case because it was presented to the Court at the time of the sentencing of Mr. Brown and referred to by Judge Stringfield.

[p.245] That report from Jennifer Mihalovich shows that all she did was extract from the swab. And then based on the work already done by Renee Romero; in the absence of her being there to see how it's being done, taking her results and just plugging it in. And corning up with well, it's a match because Renee's work matches what I'm finding. Without any verification that in fact the work was properly done.

Quite candidly to the Court, one of the allegations that we put forward had to do with the relationship between Mihalovich and Romero. There was no evidence presented to show they were college roommates. In fact, the college roommate angle was not accurate information that was obtained and so we are not proceeding with the college roommate part of it. But we do have -- you know, sort of a hand holding here of between Mihalovich and Romero.

Mihalovich renders no reports. Mr. Lockie doesn't even know what she got to review and when she got to review it. Did she review the R.F.L.P. prior to going to trial? Did she even know what tests were done? They say they learned about it about three days before trial. Mr. Lockie is not sure but certainly it was in close

proximity to trial at his recollection. No effort was made to be sure that in fact the independent defense expert had the opportunity to review those results and consult with Mr. Lockie about how to best attack it. Instead he basis his entire attack on the DNA saying, she [p.246] changed her mind between the preliminary hearing and the trial on what was present on the panties.

We didn't have the evidence concerning Mr. Henle. The State acknowledged that we had filed certified court records showing he was charged with burglary and a force able sexual assault in Utah and ultimately was convicted of that. That information was present in those reports as was Pam Henle reporting that he had done this before in Carlin. That the victim in that incident was Debbie Dean. No testimony that Mr. Lockie did anything to look at Mr. Henle as an alternative suspect.

He says, I looked at the time cards but I don't recognize these as the time cards. We've had -- you know, Mr. Baker and Trent Brown come in here and verify these are the time records that are kept. And there are inconsistencies in here that show that Mr. Henle was not at work when he says he was at work, or claims he was at work. That he drove his own truck. There was ample opportunity for him to be absent from work during the relevant period of time when the sexual assault occurred.

You don't have to be able to prove someone else did it in order to get your client acquitted. When you are arguing the presumption of innocence for your client you're creating a doubt in that jury's mind. And what Mr. Lockie did is rejected the evidence that could have

been used to create [p.247] that reasonable doubt and obtain a different result from this jury.

There was an investigator but there's no evidence that he talked to anybody other than Troy and Travis for about 20 minutes, and did absolutely nothing to verify anything in the case. So, we have an absence of investigation on numerous fronts in this case. On evidence that people are calling and saying, you've got to talk to these people. We've got these records. We've gone and done an investigation at the Courthouse. We've gone and done the investigation of Leadcor. We've talked to the people. We know what's going on. None of it is checked out. None of it is presented at trial.

And although Mr. Lockie says he thought the trial went good or smoothly. There was really no evidence presented to create the presumption of innocence. And so, the smoothness of the trial was the smoothness of the State's march to conviction based on the failures of defense counsel to present theories, and issues for the jury to find reasonable doubt.

The same thing with the loss of the teeth scrapings. The record would reflect that one witness, Mary Lou Tognarelli was present and observed the teeth scrapings being collected and stored in the sexual assault kit. And then when they get around to checking it they are not to be found. Nobody knows where they are at. The doctor is not sure whether it was [p.248] collected or not collected. He says there are no notes that say that we collected it, but you don't just reject that as a possibility. An issue to preserve not only for these proceedings but for appellate proceedings, for arguments to be made to an appellate

court or to a jury an accumulation of things that went wrong on this case.

So it's just not this little thing here, this little thing there but a culmination of issues of things that were not done. Things that were wrong with the investigation. That were wrong with the collection of evidence. That were wrong with looking at alternative suspects. All geared to preserving issues for appellate review and creating in the jury the minds -- in their minds the presence of reasonable doubt.

Your Honor, based on the testimony that the Court has heard we would respectfully request that the Court grant Mr. Brown's Petition.

THE COURT: Mr. Woodbury.

MR. WOODBURY: Thank you, Your Honor. The evidence code talks about recent fabrications and the fact is the jail garb argument is made now, seven years after trial. David Lockie, the Counsel, said I did not -- I was not informed that there was any possibility that he was in jail clothes and that the jury was seeing him or in a position to see him. That means that either Lockie forgot it or he is misleading the [p.249] Court. He said, had I known that -- I was aware of the rules, had I known that I would have done something about it. He didn't do anything about it. The record is clear. That substantiates with what Mr. Lockie says. Mr. Lockie has no axe to grind here, only that if he had been told he would have done something about it.

Mr. Conner testified. I was around, he was not upstairs in jail clothing. Ms. Brown testified that he was upstairs in the foyer, outside she said in jail

clothing. That means that Jim Conner is wrong. Neither was he on the second floor in jail clothing according to Jim Conner. That means, Mr. Brown is wrong. Nobody ever brings prisoners who are at trial to the side of the Courthouse. Everybody, according to the policy as explained by John Croswell comes to the back. So, all of a sudden in order to accommodate him now, the Court has to find that the policies and procedures that are in effect and have been since Gromes v. State in Elko County; are all of a sudden avoided to get Troy Don Brown in a pickle. So, that the jury can see him. So, now against that you have the mother and the father of Troy Don Brown and Troy Don Brown himself. The Court can weigh that evidence.

We did not think, and I apologize because it's my mistake. I should have moved based on the Bear Allegation Theory, we did mention in our response that we didn't think it was anything more than a Bear Allegation and adopt that not be [p.250] heard as a part of this. But I did not bring that to the Courts attention because they truly had no justification based on what they gave us before hand to sustain that.

There is conflicting evidence but there is not conflicting evidence that Ms. Brown said she told Dorothy Noah-Holmes that. That matter goes to his right to be presumed innocent. It goes to the protection of his Counsel. It's a constitutional issue and could of been and should of been, if he had it brought before the State Supreme Court on appeal. On the direct appeal, the first direct appeal. And that under the statue is one of the reasons why you can take that issue and say, that's wrong. You had your opportunity to present that and you didn't.

The DNA evidence, first time ever we hear that Michael Terry and he have animosity between them. It's not written any place, no place else, another recent fabrication. Is it in his affidavit in support of the Petition, no. First time. First time we've ever heard it is today. You can search this record, it isn't there. It isn't anyplace. It's a recent fabrication. It's brand new. Because they need in order to sustain their theory they need to have Michael Terry as a potential person who wants to do him harm. And if you look at the record in this case, Michael Terry had an opportunity to say -- if he had wanted to really subvert this guy, he had the opportunity to say, yep I examined him at 5 [p.251] o'clock in the morning and he had a bite mark on him. And you can look at the record and see that Michael Terry did not testify to that effect. Even though if had really wanted to do him some harm he could have done that and then just taken the claim that it went away before anybody else saw it.

The Romero challenge, I mean, if you look at Lockie's strategy it makes sense. There is no surprises about the DNA evidence. Granted the R.F.L.P. testing comes a little bit before hand but what he is faced with is the proposition that his own expert -- and we are entitled to rely on experts on DNA, trial lawyers are at the mercy of them. If they make a mistake then we make a mistake. But in this case there is no evidence that Mihalovich made a mistake. She said, there is enough semen on those panties to test them, R.F.L.P. for -- do the DNA test for R.F.L.P. There is enough.

At the time, Romero is saying there isn't enough but Lockie knew that. That isn't a mistake on Lockie's part. He used that as a part of his trial strategy. That was how he was avoiding -- essentially how he

intended to avoid the devastating effect of that DNA evidence. I mean, you can't hold that against him. That Romero made a mistake. Mihalovich knew that she made a mistake, knew there was enough for DNA for an R.F.L.P. test. So, how is he incompetent there?

Why didn't he move for a continuance when the R.F.L.P. test then came in three or four or five days before [p.252] trial or whatever it was. Did you feel like you needed more time Mr. Lockie, no. He was satisfied that his theory was going to hold together regardless of which way it went. Why didn't you put Ms. Mihalovich on the stand, why didn't he? Because she was telling me the more testing that was done the more Troy Don Brown was getting convicted. That was all that DNA testing was doing was putting a noose around Troy Don Brown's neck. And he made a reasonable, rationale, decision not to put Jennifer Mihalovich on there.

So what they are left with is what they said they didn't prove and that is that Jennifer Mihalovich had some reason to not -- to sustain Renee Romero's finding. Talking about a certification of a Court to do DNA testing. There is no requirement in Nevada for DNA -- or Washoe County Crime Lab be certified to that. You bring your expert up and she tells you what she's done, and what procedure she went through, and what the scientific theory is, and if it's proper the Court admits her as an expert.

Now, I don't know about the threat of it. Maybe they probably have their little group that does little certifications, maybe that's so. But it doesn't make it or prevent it from being admissible in the court of law in Nevada because that isn't the test as whether it's

certified. In some cases they have to be but not in DNA testing.

And Lockie did examine her. He examined her [p.253] considerably down at the preliminary examination on her qualifications to do DNA testing. And at some point as Lockie says in his affidavit. I made a determination Renee Romero is a pretty good witness. She's a compelling witness, I think is what he called her, and I don't want to put her before a jury so she can explain, hammer and tong about how good she really is at this. Particularly when he's got his own expert in the background saying, she's all right, she knows what she's doing.

The contamination evidence, if you look at the record the vaginal swab was done up at the Elko General Hospital -- over there. Troy Don Brown's semen or blood was extracted, from which the DNA tearing was done; was extracted at the Elko General Hospital. How in the world would she ever on that child, that 9-year-old child's vagina ever get his semen on her vagina? His DNA on her vagina based upon pajama bottoms and socks. In a testable amount that's not even realistic. If it were realistic, of course what we would have is we'd have an expert up there saying, oh you know this cross contamination can happen. And if she was around where Troy Don Brown has had -- assuming he had a condom over at Trent's sometime, it could happen. But we don't have that. So, you are asked to assume that somehow off of pajama's or off of socks that may have been in Trent's house she got his DNA on her vagina.

[p.254] On top of that, it isn't like Renee Romero or Jennifer Mihalovich said, look there's a couple of

different kinds of DNA here on this child's vagina or on her panties. That's not the testimony at all. There is one kind of DNA on her panties, his. And leads us into the rest, with respect to Mr. Henle.

I'm not sure -- I wrote down when Mr. Schieck said that reasonable doubt you give them every possibility. That's not a theory that Dave Lockie shares. That is not a theory I suggest to you, that is shared by everybody because you can get so good at raising every possibility that you loose credibility. That you're picking at little, tiny things the jury finally says, if this guy had anything he wouldn't be going after this little, bitty stuff. There are, I suppose in every jury trial, there are things reasonable doubt arguments that counsel can overlook but that doesn't make him ineffective. He only has to provide reasonable defense he doesn't have to provide perfect defense. And in this case I would suggest to you that he did provide reasonable defense.

First of all, Henle's time card shows he was there for 10 hours. I forget who it was, one of the Brown brothers testified that it doesn't look like his signature or his initial at the end. But I suggest you look at it, at the end of the time card. I suggest that he said it looks like four and five are made by the same guy and I suggest that you just [p.255] look at the H. And I think you will find that the person who drew the H in each of those drew them entirely differently although they bare a superficial resemblance because you can see the pen not leaving the paper.

Second of all, even if he's only there for seven hours, he went to work at 7 o'clock as he was supposed to or 8 o'clock as Mr. Baker said -- or I guess Mr.

Brown said that he did. It's 3 o'clock in the morning. This thing has taken place. It's well over by 1 o'clock in the morning, 1:15 no later than that because that's when the call to the police is made. So, it's not like Henle -- that somehow this time card magically says that Henle could have done it.

There is an interesting proposition too about just how much you can assassinate Mr. Henle's character. I mean, Lockie says look I don't want to get in the position of proving Mr. Henle guilty. Principally I would assume because as he says in his affidavit, if I get locked in -- first of all, if I do it early enough they are going to do DNA testing on Henle and exclude him as a possible suspect. Second, the child didn't identify him. And third, what happened -- I can't prove it. I've got DNA, not two DNA's. Just one on the vagina and the panties of that child. Not Henle's DNA, his DNA. So, there I come. I come to a stop and there is no way I can prove it.

So, he did precisely the best thing, he insinuated. [p.256] He wasn't going to get any DNA testing on Henle to exclude him, he simply insinuated it. If you look in the record, he talked to Pam about the threat that Henle had made about going to do some harm -- I don't know if it was harm to the child or something like that. He created a reasonable doubt. And everybody concedes, everybody -- I think, concedes that but for the DNA there was reasonable doubt. How much reasonable doubt does he have to keep piling up when the problem is the DNA?

And while I suppose from a defense counsel point of view it's reprehensible that sometimes you get caught in a spot where you can't escape. It's like having a

fingerprint, the DNA. Everything else can be going your way but if you still have to overcome the fact that his DNA is on that child's vagina. His DNA is on that child's panties. What is he going to do?

I mean, the evidence is insurmountable. In fact, unless you pick on the procedures that the DNA was tested under. Mihalovich an expert is telling him the procedure appears to be okay. She's telling him. I don't have to be there. I can review the procedures afterward. Unless you can show that Romero is not qualified and Mihalovich is telling him she is qualified. Unless you can see that the testing procedure by itself or the collection procedure, I suppose was contaminated. Which he said, Mihalovich told him was alright [p.257] with her. This is an expert and there is nothing to the contrary except to suggest that somehow there's a condom in a trailer someplace that may very well have somehow contaminated. I guess the sheets and blankets. That somehow then came in contact in an unknown way with the vaginal swab that was taken at the hospital. How did that happen, well explain it.

So the fact is that Henle is nothing. He was excluded by the DNA. He would have been a fine guy to invite. I suppose if there would have been an advantage to beating his brains out by showing that he is really a bad guy then he could have done it. No doubt. And he was very vulnerable, but back to what if. Because at the end it was not going to be him and his DNA on that child's vagina.

Teeth scrapings, I would suggest to you that if you would examine the rules with respect to these teeth scrapings, first of all; the doctor didn't remember

taking any teeth scrapings. He thought he might have but wasn't sure. But far more, Mary Lou Tognarelli was -- I was going to say equivocal but she was something more than equivocal. She thought it happened. I think, but in order to successfully file a motion and have a case dismissed the law is pretty clear. I know Lockie didn't testify about this and putting him on the witness stand it's hard for him to pick up on it that fast. Either you've got to show bad faith by the State, and we [p.258] haven't got any allegations of bad faith against the State. Or alternatively, you have to show that it was exculpatory, not some merely a hope for a conclusion. And they don't have that. They don't know whether it would have been exculpatory or not. They can't say that it would of been.

So, our suggestion to you is that for all the reasons we've expressed in our answer and opposition that the jail garb question should of been addressed before. Two, it is not sustained by substantial evidence, even if it should have not -- didn't need to be litigated before. And there is simply nothing there. There is simply no reason to believe that the Brown's version of this is true.

With respect to the DNA evidence, we would suggest that you find as the Supreme Court has held. They looked at this on direct appeal and said there is no plain-error. They looked at every allegation that they've made here today, virtually every allegation they've made here today was reviewed by the Supreme Court in the Opinion. And the Supreme Court said there is no plain-error. And the fact is, that if you attempt to litigate something in a different context, in the context of a ineffective assistance of counsel. While

you raised it as regular appellate issue in the direct appeal, that doesn't matter. It still cannot be re-litigated. It is the law of the case that with respect to the DNA testing in this case there was no plain-error. That is what the Supreme [p.259] Court held.

With respect to Mr. Henle, I don't know why I would say it any further than I've said it. Lockie was aware of most if not all of the problems. He made a conscious decision, a strategic decision that makes sense as to why he did not go forward. It is a reasonable decision, even though other might disagree with it. And with respect to the teeth scrapings, the motion would have failed. There is no way they could have done it. And so for those reasons we ask that the Petition be denied.

THE COURT: Mr. Schieck, final word.

MR. SCHIECK: Just on one issue, Your Honor, and that concerns the Opinion of the Nevada Supreme Court on the DNA issue. And I would just cite the Court to 113 Nevada, Page 284; and specifically they note that Troy argues the District Court erred in not conducting a pretrial hearing to determine whether the DNA results were trustworthy or reliable. However, Troy made no objection to either the lack of the pretrial evidentiary hearing or the qualifying of Romero as an expert witness on DNA evidence. Failure to object in the District Court precludes consideration of the issues on appeal. However, this Court may, again may address plain-error sua sponte because we conclude that the failure to conduct an evidentiary hearing was not plain-error; we will not consider this issue. So, what the Supreme Court said is, [p.260] we

are not considering this issue because sua sponte we are not going to find it's a plain-error.

We would submit it, Your Honor.

THE COURT: All right. With respect to the Motion to Dismiss, the Court is not willing to dismiss the Petition. So the State's Motion to Dismiss is denied.

The Court is going to deny the Petition for Writ for Habeas Corpus. With respect to the jail garb, that is, as far as the Court is concerned we have basic speculation. The DNA evidence there is no grounds presented to the satisfaction of the Court to overturn the verdict of the jury. And with respect to the rest of the issues the Court agrees with the States analysis. So, the Petition for Writ of Habeas Corpus is denied.

Mr. Woodbury, would you please prepare an order?

MR. WOODBURY: I will do so, Your Honor.

THE COURT: Thank you.

MR. SCHIECK: Your Honor, if we can be sure and serve that order on my office so that we will know when the time for the Notice of Appeal starts to run.

THE COURT: All right. Court's in recess.

(WHEREUPON the above proceeding was concluded.)

[p.261] STATE Of NEVADA)
) ss:
COUNTY OF ELKO)

I, TIA H. LANGE, am an electronic Court Reporter of the Fourth Judicial District Court of the State of Nevada, in and for the County of Elko, in Department 1 of the above-entitled Court.

The foregoing transcript is an UNCERTIFIED ROUGH DRAFT TRANSCRIPT of the electronic tape recording of said proceedings. THIS TRANSCRIPT HAS NOT BEEN EDITED, PROOFREAD, FINALIZED, INDEXED OR CERTIFIED. This transcript has been prepared to the best of my ability.

DATED: At Elko, Nevada, this 11th day of June, 2002.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT IN AND FOR THE COUNTY OF ELKO, STATE OF NEVADA

CASE NO. CV-HC-01-0000607
DEPT. NO. I

[Filed March 7, 2002]

TROY DON BROWN,	)
	)
Petitioner,	)
	)
vs.	)
	)
WARREN OF LOVELOCK CORRECTIONAL CENTER, and the STATE OF NEVADA,	)
	)
Respondent.	)
	)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DENYING WRIT OF HABEAS CORPUS

The Petition of Troy Don Brown for Writ of Habeas Corpus and the Motion of the State of Nevada to Dismiss the Writ came on regularly for hearing at 9:30 a.m., February 21, 2002, in the courtroom of Department 1 of the Fourth Judicial District Court. Present were the Petitioner, Troy Don Brown, his Counsel, David Schieck, and Gary D. Woodbury representing the Respondent.

The Court heard argument on the State's Motion to Dismiss and reserved ruling on the Motion until the conclusion of the evidentiary portion of Petitioner's Writ. Petitioner presented the testimony of Derek Baker, Stella Brown and Marion Brown, Petitioner's parents, Travis Brown and Trent Brown, Petitioner's brothers, and Troy Don Brown, the Petitioner. The Respondent presented the testimony of James Conner (Conner), Department 1 Bailiff during Petitioner's trial, John Croswell (Croswell), Lieutenant with the Elko County Sheriff's Office, and Petitioner's trial attorney, David B. Lockie (Lockie).

After having reviewed the Points and Authorities, and hearing the argument of counsel, the Court determined that the Respondent's Motion to Dismiss should be, and it hereby is, denied.

The Court makes the following Findings of Fact and Conclusions of Law. The Court believes that the issues presented in this case are generally mixed questions of law and fact, and therefore some of the Findings of Fact are in part conclusions of law, and some of the Conclusions of Law are in part findings of fact.

FINDINGS OF FACT

1. That Petitioner was represented at trial by Lockie, and that Petitioner hired Dorothy Nash Holmes (Holmes) as Petitioner's legal representative in all matters subsequent to the initial sentencing of the Defendant by this court.

2. That Petitioner's mother may have told appellate counsel Holmes of allegations that trial jurors had seen Petitioner in jail garb and restraints during the trial.

3. That the record of proceedings in this Court and the State Supreme Court discloses that Holmes did not file any pleading with this Court or any other court complaining of Mrs. Brown's allegations.

4. That neither Petitioner, nor any other person, informed Lockie that trial jurors had seen Petitioner in jail garb or shackles. The Court credits the testimony of Lockie that had he been so informed he would have taken some action to remedy the prejudice to the Defendant.

5. That the circumstances described by Petitioner's witnesses regarding Petitioner's claim, and that of his family, that he was seen by trial jurors in jail garb or shackles were substantially inconsistent with each other and with the recollection of Croswell and Conner and the policies of the Elko County Sheriff's Office and those of the bailiff of Department 1 of this Court at the time of Petitioner's trial. The Court does not credit the testimony of either Petitioner or his family in this regard, and therefore finds that Petitioner has failed to establish that he was seen during trial by any trial juror in any circumstance that showed he was in custody.

6. That throughout the legal proceedings before this Court and that of the Elko Justice Court, Petitioner and his Counsel were assisted by Jennifer Mihalovich (Mihalovich) who was hired by the Elko County Public Defender prior to the appointment of Lockie, to serve as an expert on questions involving DNA. Petitioner submitted no evidence suggesting or establishing a lack of qualifications of Mihalovich to serve in this capacity.

7. That trial attorney Lockie was informed by Mihalovich that she had been given access to all necessary information and that she was satisfied with the collection procedures of the DNA evidence, the qualification of the Washoe County Crime Laboratory and its personnel to conduct DNA testing, the actual procedures used in testing the DNA by the Washoe County Crime Lab, and the accuracy of the test results. Petitioner has not established that Mihalovich was unqualified or that information was withheld from her that, if presented, would alter her conclusions. Neither has Petitioner established that the Washoe County Crime Lab or Renee Romero (Romero) were unqualified to perform DNA comparison testing, or that Defense Counsel's reliance on the expertise of Mihalovich was misplaced. Lockie reasonably relied upon the foregoing in preparing his trial strategy.

8. That the testimony and evidence presented at the hearing does not establish that DNA

samples from the panties and vagina of the victim in this case were or could have been contaminated by the Petitioner's DNA through inadvertence or the alleged animosity toward Petitioner of Carlin Police Officer Michael Terry.

9. That Petitioner declined to give evidence in support of his allegation that Mihalovich and Romero were personally acquainted in any way that would bear on the independence of Mihalovich to evaluate the accuracy of Romero's conclusions concerning her DNA findings.

10. That prior to trial, Lockie was aware that the step father of the victim, Wayne Henle (Henle), had been charged and convicted of a felony in Utah of a violent and sexual nature and that Henle was also alleged to have been in the residence of a woman in Carlin, Nevada under circumstances similar to those in Utah.

11. That prior to trial, Lockie had been informed either by Stella Brown or Derek Baker, whether true or not, that Henle did not have a solid work related alibi for his whereabouts at the time of the attack on the victim. That Lockie has no present recollection of having received the alibi information. That at the hearing on Petitioner's writ, Petitioner failed to establish that Henle had been absent from his employment at the time of the attack on

the victim, or that his potential alibi was otherwise unreliable.

12. That Lockie considered placing information regarding Henle's conviction and other activities before the jury, but concluded not to do so on grounds independent of whether Henle had a sufficient alibi.

13. That Lockie's decision not to specifically attempt to prove that Henle committed the crime against the child was based on his conclusion that his effort to inculpate Henle would be unsuccessful and potentially hurtful to the defense of Petitioner, and Lockie would have made the same decision whether or not Henle had a good alibi.

14. That Lockie was aware that scrapings from the teeth of the victim, who possibly bit her attacker, may have been taken by the emergency room doctor, and that if taken, the scrapings had been lost.

15. That Lockie considered filing a motion concerning the loss of such evidence, but concluded that the motion was not justified in law.

16. That at trial the question of whether the victim bit her assailant and whether scrapings had been taken was the subject of testimony, from which it appears to this Court that neither fact was firmly established. No evidence of bad faith on the part of police officers was shown in

connection with the loss of such evidence, and that no evidence was shown that had the evidence been preserved it would have been exculpatory.

17. That Lockie explained to his client that he intended to suggest during closing argument that because of the fraternal relationship between brothers and the possible similarity of their DNA that Petitioner's brother was also a possible suspect in the attack.

18. No evidence different from or in addition to the affidavits supporting the Petition was offered in connection with the question of whether Defense Attorney Lockie failed to investigate and present evidence of alternative suspects or additional alibi evidence. The Court adopts the reasoning of Defense Counsel Lockie and the argument of the State in its Opposition to the Petition to be persuasive that such evidence, if presented to the jury, would have been cumulative, of little value to Petititoner's defense, and in some cases inconsistent with the testimony of the Defendant.

CONCLUSIONS OF LAW

1. In order to prevail, Petitioner must establish not only that his counsel was ineffective, but that because of counsel's ineffectiveness, his defense was prejudiced.

2. To be ineffective, counsel's performance must fall below an objective standard of

reasonableness. The Court finds that the theory of defense propounded by Lockie in his affidavit, at the hearing and as it appears from the trial record was objectively reasonable and was based upon reasonable investigation.

3. To establish prejudice, Petitioner must show that but for counsel's ineffective representation, the result at trial would probably have been different. The Court finds that Petitioner has presented no facts and no errors of law that undermine the confidence of the court in the jury verdict.

4. The Court's determination of fact must be supported by substantial evidence.

5. A tactical decision made by trial counsel is virtually unchallengeable absent extraordinary circumstances. The Court finds that Lockie made reasoned decisions after reasonable investigation concerning whether to specifically attempt to show that Henle was the person who attacked the victim. The Court further finds that Lockie made reasonable decisions after reasonable investigation in the manner in which he conducted the defense concerning the DNA evidence, including the decision not to challenge evidence collection procedures, chain of custody issues, testing procedures and qualifications of Washoe Crime Laboratory personnel by pre-trial motions. The Court further finds that Lockie made a reasonable decision to suggest that the DNA

evidence could implicate the brother of Petitioner.

6. If the State loses evidence and the defendant is prejudiced thereby, or if the State acts in bad faith in losing evidence, a conviction may be reversed. Prejudice requires a showing that it could be reasonably anticipated that the evidence would have been exculpatory and material to the defense. The Court finds as a matter of law that Petitioner has not shown bad faith on the part of the prosecution or police authorities, or that such evidence, if in fact it was collected, would have been exculpatory.

7. Judicial review of a lawyer's representation is highly deferential and a Petitioner must overcome a presumption that a challenged decision by trial counsel might be considered sound strategy.

8. A criminal defendant has the right not to appear before the jury in jail garb or shackles and such error is reversible unless it is shown that the defendant was not prejudiced thereby. The Court finds that Petitioner has not established that he appeared before any juror either in jail garb or in shackles. The Court does not credit the testimony of the Brown family or the Petitioner regarding their claims.

9. That as a result of Petitioner's first appeal and the decision rendered by the Nevada

Supreme Court therein, the law of the case is that no plain error occurred as a result of the Court not conducting an evidentiary hearing concerning the DNA testing in this case. The Court additionally finds, based on the trial testimony of Jennifer Bonaudi, that the State showed a sufficient chain of custody concerning the victim's blood.

10. That a lawyer is prohibited from asserting a legal position not supported by law unless a good faith argument for an extension, modification or reversal of existing law can be made. Lockie testified, and this Court agrees, that a motion to dismiss the charges based on the loss, if there was one, of the scrapings from the victim's teeth could not be made in good faith.

11. That a motion for new trial, if based upon grounds other than newly discovered evidence, must be filed within 7 days after verdict. The Court finds that, given the statements of then District Judge Stringfield at the time of sentencing, that a motion for a new trial based on a request that the trial judge independently resolve conflicting evidence in a manner different from the jury, would not have been successful.

12. The Court further finds that a Motion for New Trial filed after remand by the Supreme Court for sentencing could not have been filed within the time periods set out in NRS 176.515.

13. The Court further finds that Petitioner has not or will not be denied appellate review of any issue he has raised because of any error by his lawyers.

Based upon the foregoing findings of fact and conclusions of law and good cause appearing therefore, the Petition is denied.

DATED this 6th day of March, 2002.

/s/
J. MICHAEL MEMEO
District Judge

[certificate service omitted in printing]

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 39475

[Filed November 21, 2003]

TROY DON BROWN,	)
Appellant,	)
vs.	)
WARREN OF LOVELOCK	)
CORRECTIONAL CENTER,	)
and the STATE OF NEVADA,	)
Respondents.	)
	)

ORDER OF AFFIRMANCE

This is an appeal from the district court's denial of Troy Don Brown's post-conviction petition for a writ of habeas corpus.[1] On appeal, Brown argues that his appellate counsel was ineffective for failing to: (1) object to the jury's observation of Brown in jail garb and shackles; (2) file a motion to exclude the DNA evidence; (3) require the defense DNA expert to be present during the DNA testing; (4) investigate or present evidence of an alternative suspect; (5) investigate possible defenses, interview various witnesses or discuss trial strategy with Brown; and (6) file a motion to dismiss or a motion to suppress evidence based on the loss of the victim's teeth

[1] Brown was convicted, pursuant to a jury verdict, of two counts of sexual assault of a child under fourteen years of age, one count resulting in substantial bodily harm.

scrapings. Because all of Brown's arguments lack merit, we affirm the district court's order dismissing the post-conviction petition for a writ of habeas corpus.

We review a claim of ineffective assistance of counsel independently.[2] To prevail, Brown must show that: (1) counsel's performance was deficient, i.e., it fell below an objective standard of reasonableness and (2) such deficiencies prejudiced Brown and the ultimate outcome of his trial.[3] If Brown fails to establish one of the two prongs, we need not consider the other.[4] Judicial review of a lawyer's representation is highly deferential, and Brown must overcome the presumption that a challenged action might be considered sound strategy.[5]

First, Brown claims that his trial counsel, David Lockie, was ineffective for failing to raise the issue of whether the jurors observed Brown in jail garb and shackles. This court has held that a defendant has the right to appear before the jury "in the apparel of an innocent person."[6] If this right is violated, this court will reverse "unless it is clear that the defendant was

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[2] See State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

[3] See Strickland v. Washington, 466 U.S. 668, 687-88 (1984).

[4] See Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) (citing Strickland, 466 U.S. at 697).

[5] State v. LaPena, 114 Nev. 1159, 1166, 968 P.2d 750, 754 (1998).

[6] Grooms v. State, 96 Nev. 142, 144, 605 P.2d 1145, 1146 (1980).

not prejudiced thereby."[7] When reviewing whether the error was harmless, this court reviews the entire record.[8]

As the district court noted in its findings of fact, the testimony regarding whether the jurors observed Brown in jail garb and shackles was inconsistent. Based on these inconsistencies, the district court found that Brown and his family's testimony was not credible. We defer to the district court's finding that Brown failed to demonstrate that the jurors observed him in jail garb and shackles.[9] We also defer to the district court's finding that Lockie was not informed by Brown or his family that the jurors had seen Brown in jail garb and shackles.[10] Accordingly, we conclude that Lockie's failure to raise the issue to the district court did not fall below an objective standard of reasonableness.

Second, Brown contends that Lockie was ineffective for failing to file a motion to exclude the DNA evidence. More specifically, Brown challenges the collection and testing of the DNA evidence and the fact that Lockie stipulated at the preliminary hearing to Renee Romero's, the State's DNA expert, qualifications despite her lack of expertise. On post-conviction, the

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[7] Id. (emphasis added).

[8] Dickson v. State, 108 Nev. 1, 4, 822 P.2d 1122, 1123-24 (1992).

[9] See Little v. Warden, 117 Nev. 845, 854, 34 P.3d 540, 546 (2001) (noting that this court gives deference to the district court's findings regarding credibility).

[10] See id.

district court found that Brown failed to establish that the DNA evidence was contaminated. Although Brown contends otherwise, Jennifer Mihalovich, Brown's DNA expert, testified that she was satisfied with the collection of the DNA evidence. Additionally, the district court found that Lockie's reliance on Mihalovich's assertion that Romero was qualified as a DNA expert was reasonable. Accordingly, we conclude that Lockie's decision not to file a motion to exclude the DNA evidence was tactical and did not fall below an objective standard of reasonableness.[11]

Third, Brown argues that since Lockie failed to require Mihalovich to be present during the DNA testing, he failed to comply with stipulated DNA procedure, and was thereby ineffective. Although the State and the defense stipulated to certain DNA procedures, the stipulation did not mandate that Mihalovich be present during DNA testing, but only required that she be present at all stages that she deemed critical. Lockie testified that Mihalovich informed him that she did not need to be present during the DNA testing, since she would review the test results. Because Lockie was in full compliance with the stipulation in deferring to Mihalovich's determination that she did not need to be present during the DNA testing, we conclude that Brown has failed to show that Lockie was ineffective for failing to require her presence.

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[11] See Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) ("Tactical decisions are virtually unchallengeable absent extraordinary circumstances."), abrogated on other grounds by Harte v. State, 116 Nev. 1054, 1072, 13 P.3d 420, 432 (2000).

Fourth, Brown contends that Lockie was ineffective for failing to investigate and present evidence that Wayne, the victim's stepfather, was the perpetrator. Brown also argues that Lockie's failure to present evidence of an alternative suspect was unreasonable. Lockie testified that he considered alternative suspects during his trial strategy. He also testified that although he was aware that Wayne was previously charged with sexual assault and that there were discrepancies regarding Wayne's alibi, he decided for tactical reasons not to present evidence that Wayne was the perpetrator. We conclude that Lockie's decision not to investigate and present evidence that Wayne was the perpetrator was a reasonable tactical decision and that he was not ineffective in this regard.[12]

Fifth, Brown contends that Lockie was ineffective when he failed to investigate, interview witnesses, and discuss trial strategies with Brown. Specifically, Brown maintains that Lockie failed to interview Brown's girlfriend and to investigate the animosity between him and Officer Michael Terry, who Brown claims contaminated the evidence. Lockie testified that he had his investigator interview several witnesses. Lockie also testified that he met with Brown several times and discussed the evidence, the arguments, and the trial strategies. Although Lockie admitted that he did not interview Brown's girlfriend, we conclude that Brown did not suffer any prejudice because there was overwhelming DNA evidence connecting Brown to the

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[12] See id.

crime.[13] Finally, aside from Brown's mere allegation, Brown failed to present any evidence regarding any animosity between him and Officer Terry. Thus, we conclude that Brown's argument lacks merit.

Finally, Brown contends that Lockie was ineffective for failing to file a motion to dismiss, or in the alternative, a motion to suppress evidence based on loss of exculpatory evidence - the victim's teeth scrapings. We have stated, "'A conviction may be reversed when the State loses evidence if (1) the defendant is prejudiced by the loss or, (2) the evidence was 'lost' in bad faith by the government.'"[14]

Here, the district court found that Brown failed to establish that the loss of the victim's teeth scrapings was in bad faith or that he was prejudiced by the loss. Indeed, the only evidence Brown presented at the post-conviction hearing was his mother's testimony that she remembered that the victim's teeth scrapings had been lost. Additionally, Lockie testified that he considered filing such a motion, but concluded that it was not justified under the law. Thus, we conclude that Lockie's decision not to a file a motion regarding the loss of evidence did not fall below an objective standard of reasonableness.

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[13] Howard v. State, 106 Nev. 713, 719, 800 P.2d 175, 179, (1990) (observing that overwhelming evidence of guilt is a consideration of whether a client had ineffective counsel).

[14] Leonard v. State, 114 Nev. 1196, 1206, 969 P.2d 288, 294 (1998) (quoting Sparks v. Sparks, 104 Nev. 316, 319, 759 P.2d 180, 182 (1998)).

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

/s/ _____, J.
Rose

/s/ _____, J.
Leavitt

/s/ _____, J.
Maupin

cc: Hon. J. Michael Memeo, District Judge
David M. Schieck
Attorney General Brian Sandoval/Carson City
Elko County District Attorney
Elko County Clerk

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Attorneys for Petitioner

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CV-N-03-0712-HDM(VPC)

[Dated April 15, 2005]

TROY BROWN,	)
	)
Petitioner,	)
	)
vs.	)
	)
CRAIG FARWELL, et al.,	)
	)
Respondents.	)
	)

RESPONSE IN OPPOSITION TO MOTION TO DISMISS

COMES NOW, Petitioner, Troy Brown ("Brown"), by and through his attorney, Paul G. Turner, Assistant

Federal Public Defender, and opposes respondents' Motion to Dismiss [Clerk's Record (CR) 30] his First Amended Petition for Writ of Habeas Corpus By a Person in State Custody Pursuant to 28 U.S.C. § 2254 (CR 19, the "First Amended Petitioner") filed in this case on March 28, 2004.

This response is based upon the attached points and authorities and all pleadings and papers on file herein.

DATED this 15th day of April, 2005.

Respectfully submitted,

/s/
PAUL G. TURNER
Assistant Federal Public Defender

POINTS AND AUTHORITIES

I.

INTRODUCTION

1. On July 20, 1994, the State filed an Information in the Fourth Judicial District Court, Elko County, Nevada, charging Brown with the following crimes: Sexual Assault on a Child Under the Age of 14 Years, Resulting in Substantial Bodily Harm, a felony as defined by NRS 200.366 (Count I), Sexual Assault on a Child Under the Age of 14 Years, a felony as defined by NRS 200.366 (Count II), Attempted Murder, a felony as defined by NRS 193.330, 200.010 and 200.020 (Count III), and Abuse of Neglect of a Child

Less Than Eighteen (18) Years of Age, Resulting in Substantial Mental Harm, a felony as defined by NRS 200.508, 432B.020 and 432B.070 (Count IV). (Ex. 21.)[1]

2. The case proceeded to trial on September 27, 1994, through September 30, 1994 (Exs. 29, 30, 31, & 34.) On September 30, 1994, the jury found Brown guilty of Counts I, II and IV as listed in the Information. (Ex. 35 & 36.) The jury imposed a sentence of the life with the possibility of parole after ten years has been served as to Count I, Sexual Assault on a Child Under the Age of 14 Years, Causing Substantial Bodily Harm. (Ex. 35-36.) Sentencing by the court on Counts II and IV was to be held later. (Ex. 34 at p. 559.) The jury acquitted Brown of the attempted murder charge (Count III). The sentencing hearing on Counts II and IV ultimately took place on June 23, 1995. The court sentenced Brown to life with the possibility of parole after ten years on Count II and twenty years on Count IV, all three sentences to run consecutive to the other. (Ex. 58, p. 20.) The judgment of Conviction was filed on June 28, 1995. (Ex. 60.)

3. Following a timely notice of Appeal (Ex. 62), Brown filed his Opening Brief (Case No. 27426) on November 20, 1995. (Ex. 65.) The Nevada Supreme Court filed its Opinion on February 26, 1997 (Ex. 70)[2], finding in part "that the district judge abused his discretion during the sentencing phase of the trial and the case must be remanded to the district court for a new sentencing hearing on the remaining sexual

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[1] Exhibits 1-195 (Vol. I-V) (CR 20-24) were filed with the First Amended Petition.

[2] The opinion is reported at 113 Nev. 275, 934 P.2d 235 (1997).

assault conviction (Count II)." In addition, it vacated the child abuse/ sexual assault conviction (Count IV) as barred by the Double Jeopardy Clause, was held on March 13, 1998.

4. On March 6, 1998, "Defendant's Motion For A New Trial; And, Motion To Vacate And Continue Sentencing" was filed in the state district court (Ex. 86.) It was denied on March 9, 1998. (Ex. 87.) The resentencing hearing previously ordered by the Nevada Supreme Court was held on March 13, 1998. (Ex. 90.) The district court sentenced Brown to a term of life in prison with the possibility of parole after 10 years on Count II consecutive to the sentence in Count I. (Ex. 90, p. 108.) The Amended Judgment of Conviction was filed on March 18, 1998. (Ex. 92.)

5. On March 20, 1998, Brown filed a timely Notice of Appeal (Ex. 93) with respect to the March 9, 1998, order (Ex. 87) and his amended judgment. A Docketing Statement was duly filed in appeal Case No. 32025. (Ex. 107.)

6. On October 19, 1998, the district court entered on "Order Denying Motion for New Trial" respecting his "Pre-Sentencing Motion For a New Trial" (Ex. 91; Ex. 121.) On November 9, 1998, Brown filed a timely Notice of Appeal of that denial (Ex. 128) which was docketed as appeal Case No. 33325. (Ex. 134.)

7. On January 29, 1999, Brown filed a "Motion to Consolidate Appeals No's. 32035 and 33325" (Ex. 142), which was granted. (Ex. 146.) Following briefing by the parties the Nevada Supreme Court filed its Order Dismissing Appeal in appeal No's. 32025 and 33325 on September 8, 2000. (Ex. 153.)

8. On August 30, 2001, Brown filed a Petition for Writ of Habeas Corpus (Ex. 158) and Points and Authorities in Support of Petition for Writ of Habeas Corpus (Ex. 159) in the Fourth Judicial District Court. Following an evidentiary hearing held February 21, 2002 (Ex. 163) the district court denied Brown's petition. See Findings of Fact, Conclusions of Law, and Order Denying Writ of Habeas Corpus filed on March 7, 2002. (Ex. 164.) Brown filed a timely Notice of Appeal on April 8, 2002 (Ex. 165), which was docketed as appeal No. 39475. On October 10, 2002, Appellant's Opening Brief was filed (Ex. 170) asserting the following assignment of error.

I. THE DISTRICT COURT ERRED IN DENYING BROWN'S WRIT OF HABEAS CORPUS.

The Nevada Supreme Court filed its Order of Affirmance on November 21, 2003. (Ex. 172.)

9. On December 12, 2003, Brown mailed a pro se petition for writ of habeas corpus to this Court pursuant to 28 U.S.C. § 2254. CR 10. Following appointment of the Office of the Federal Public Defender to represent petitioner (CR 6), the First Amended Petition was filed (CR 19) wherein Brown asserts five grounds for relief. Acknowledging that Grounds Two, Three, Four and Five are exhausted (CR 30, p. 6, l. 16), respondents have moved to dismiss Ground One individually as unexhausted and the petition generally as mixed under Rose v. Lundy, 455 U.S. 509 (1982). (CR 30). As addressed below, the claim asserted in Ground One has been exhausted. Consequently, the Motion to Dismiss should be denied and all of Brown's claims heard on their merits.

II.

ARGUMENT

Brown responds as follows to the state's argument that the claim asserted in Ground One of the First Amended Petition is unexhausted because never fairly presented to the Nevada courts. CR 30, pp. 5-6.

A. Fair Presentation of Factual Basis of Ground One.

A petitioner must "present the substance of his claim to the state courts." Vasquez v. Hillery, 474 U.S. 254, 258 (1986). See also Anderson v. Harless, 459 U.S. 4, 6 (1982) (petitioner must "'fairly present [ ]' to the state court the 'substance' of his federal habeas corpus claim."); Humphrey v. Cady, 405 U.S. 504, 516 n. 18 (1972) ("question . . . is whether any of petitioner's claims is so clearly distinct from the claims he has already presented to the state courts that it may fairly be said that the state courts have had no opportunity to pass on the claims"). Although a state prisoner seeking federal habeas relief must first exhaust the remedies available in the courts of the state, "[i]t is the legal issues that are to be exhausted, not the petitioner." Burkett v. Cunningham, 826 F.2d 1208, 1218 (3d Cir. 1987) (emphasis added) (quoting U.S. ex rel. Geisler v. Walthers, 510 F.2d 887, 893 (3d Cir. 1975)); see Watson v. Dugger, 945 F.2d 367, 372 (11th Cir. 1991) ("When a federal habeas petitioner presents what amounts to 'a mere variation in the same claim rather than a different legal theory' . . . he has presented the state courts with the substance of his claims and thus has properly exhausted them.").

In Ground One of the First Amended Petition Brown challenges the sufficiency of the evidence admitted at trial to convict him of the sexual assault, focusing primarily on the deoxyribonucleic acid ("DNA") evidence admitted against him. In doing so Brown addresses (a) the treatment of pertinent crime scene evidence, (b) presentation of the DNA evidence at trial, (c) violation of the court ordered DNA testing protocol and (d) expertise of the Washoe County Crime Lab. CR 19, pp. 15-19. These same subjects are addressed in Brown's Opening and Reply Brief on direct appeal to the Nevada Supreme Court. See, e.g.:

(1) Sufficiency of the evidence.

> "Given the plethora of evidence that the assailant was not Troy Brown, include the hair which did not match, the coat which was different, the lack of watch and zipper, the fact that Megan repeatedly named Trent every time the police brought up Troy to her, the lack of blood on Troy when he first came back home on 1:32 a.m., the absence of scratches or bites from Megan on Troy's body and the total failure of the DNA evidence to be established as trustworthy and reliable in this particular case, Appellant submits that there was sufficient evidence to convict Troy Brown of these crimes. Opening Brief, Ex. 65, p. 33, ll. 11-20 (emphasis added.)

(2) Treatment of pertinent crime scene evidence.

> ". . . Romero testified that she did not think she had enough vaginal stain sample in the panties to do an RFLP type DNA test [citation

omitted], although, by the time of trial, sufficient stain sample had materialized casting suspicion on the entire process [citation omitted]." Opening Brief, Ex. 65, p. 28, ll.

. . . . .

"[Washoe Lab serologist Maria] Fasset also testified that in this case, for Carlin police appeared to lack knowledge on evidence labeling for lab work. She said she was told that the suspect never went back to his own bed after the attack, thus there was no point in examining the bedding taken from Troy's bedroom. Of course, the evidence from Troy, Travis, Dave Prescott and Officer Terry all disproved that statement. There was also testimony about the 'lost' teeth scrapings from Megan, who claimed to have bitten her assailant. Given these kinds of evidentiary problems with this particular case, it is incomprehensible that no pre-trial evidentiary hearings were held to establish the integrity of the evidence gathering, the lab techniques, and the overall scientific process, before the court would allow the jury to hear expert testimony. There was a poor showing of expertise, a total lack of appropriate foundation and virtually a non-existent cross-examination of the experts and evidence custodians in this case. That was prejudicial to Troy Brown, and in the face of the other evidence which strongly indicated Troy was not the assailant and that there were other likely suspects, the effect of these evidentiary failing [sic] was fatal to Troy." Opening Brief, Ex. 65, p. 31, l. 24 - p. 32, l. 17.

. . . . .

"When one criminalist Maria Fassett, expressed concern over the inexperience in evidence collection methods of the Carlin police, Defense counsel failed to delve into that, and its potential effect on the ultimate lab results. Even when Ms. Fassett testified she was mislead about bedding and other evidence and would have investigated and examined it further had she not been, Defense Counsel failed to stress that or capitalize on it in argument or cross-examination of others." Reply Brief, Ex. 67, p. 25, l. 26 - p. 26, l. 7.

(3) Presentation of the DNA evidence at trial.

"She [Renee Romero] further testified that the national technical working group (TWG-DAM) which is working on DNA analysis methods, is trying to set standards for quality control or quality assurance in the area of DNA testing and reporting, but that so far, they've only issued non-mandatory guidelines. [citation omitted]. She further testified that the population database used by her lab was the FBI's Roche Molecular Systems database, which was not yet even published as of the date. ('I have a pre-publication and it will be published in the Journal of Forensic Science in July.') [citation omitted]).

Romero acknowledged that there are several different population databases in the field and that she was using the FBI's and would be looking at additional information at the end of

the month . . . . While some databases have gained acceptance in DNA work, the FBI database has been criticized compared to that of other specialized agencies like Cellmark and Lifecodes, and their DNA results have even been declared inadmissible [citations omitted]. Opening Brief, Ex. 65, p. 27, l. 20 - p. 28, l. 26.

. . . . .

"Even with the myriad scientific and technical errors that occur in DNA analysis, the one thing about which most scientific and legal commentators agree is that experts disagree on the accuracy of the various methods used to determine the reference population databases used to compute the random match probabilities (RMP) once DNA evidence is found and analyzed.

The RMP is the figure which is usually quoted to the jury, by the DNA expert, the prosecutor, and often the judge, in an attempt to give some significance to the DNA findings. The findings are often couched in terms of the 'frequency of the defendant's genetic traits in the reference population' and the 'likelihood or probability that someone other than the defendant has these genetic traits'. For example, in the present case, Renee Romero variously told the Court at Preliminary Hearing that the frequency of Troy Brown's PCR polymarkers was 1 in 22 in the Caucasian race; his DQ Alpha traits was 1 in 18,900 in the Caucasian population; and using the 'interim ceiling method' devised by the NCR, she could

place the RMP that it was someone other than Troy at 1 in 3 million. Reply Brief, Ex. 67, p. 17, l. 8 - p. 18, l. 3.

. . . . .

"When a jury is told that the 'chances that the DNA in the panties and blood is not Troy's is 1 in 3 million' [citation omitted] and that is 3 times the entire population of Nevada, this effectively relieves the jury of its decision-making task by replacing the jury's function of weighing all the evidence with considering instead the probability of guilt." Reply Brief, Ex. 67, p. 22, l. 21 - p. 23, l. 3 (emphasis in original).

. . . . .

"In our case, Romero told the jury that the percent of likelihood that the DNA in the panties is the same as the defendant's DNA is 99.99967% [citation omitted]. That is improper exaggeration and source error, according to the experts. It is also extremely prejudicial to the accused." Reply Brief, Ex. 67., p. 25, ll. 10-15.

(4) Violation of court ordered DNA protocol mandating coordination with outside laboratory.

"Some courts have found that the testimony of a single expert on DNA and population [sic] genetics is insufficient to pass muster for scientific acceptance. [citation omitted]. Romero was the only witness to testify on DNA methods or statistics, and the defense, even though it had been provided with funds for a DNA expert

at trial (ROA 2, 285-295), produced no exert to challenge anything at trial and virtually no cross-examination about population genetics or statistics took place, even though this is the single biggest area of substantial controversy in this field." Opening Brief, Ex. 65, p. 29, l. 20 - p. 21, l. 3.

. . . . .

"The prejudice to Troy from the lack of challenge to the DNA evidence is evident in comparing the earliest DNA testimony at Preliminary Hearing, and the later, more developed theories and results and methods used by the time of trial. Either the lab was incredibly inexpert and deficient in July, 1994, or it drastically changed its methods and databases, and perhaps techniques, by the time of trial. That change alone should have been thoroughly explored but instead was virtually ignored." Opening Brief, Ex. 65, p. 32, ll. 18-25

(5) Expertise of the Washoe County Crime Lab.

"At the preliminary Hearing held July 6, 1994, Washoe County Crime Lab DNA specialist Renee Romero testified that her lab had just begun doing DQ Alpha testing in October, 1993, [citation omitted] and had only started reporting PCR DNA test results two months earlier and they were still evaluating the system and completing proficiency tests [citation omitted]." Opening Brief, Ex. 65, p. 27, ll. 15-20.

. . . . .

"Clearly Romero's Preliminary Hearing testimony alone established the infancy of the Washoe County Crime Lab in conducting DNA work and that, alone, should have prompted the defense counsel to seek, and the trial court to require, a pretrial hearing on DNA before admitting the evidence at trial in this case. But not only was that not done, Romero's own credentials were barely discussed and instead, her curriculum vitae was simply introduced into evidence with little or no discussion." Opening Brief, Ex. 65, p. 29, ll. 12-19.

. . . . .

"In the present case, Renee Romero testified that exclusions occur in about 30% of DNA analysis cases, [citation omitted] but she did not testify to the lab error rate in Washoe County, nor could she have, as they had not completed any proficiency testing yet. [citation omitted] In fact, they had only been doing DQ Alpha testing for less than 9 months [citation omitted] and only started PCR analysis two months earlier [citation omitted]. She had only testified twice, in Elko and Washoe Counties, on DNA before [citation omitted]. Reply Brief, Ex. 67, ll. 14-22.

Brown's First Amended Petition was filed in November, 2004. His direct appeal briefs were filed in late 1995 and early 1996 with the Nevada Supreme Court. As demonstrated above, respondents are wrong in asserting that Brown's current challenge to the sufficiency of the evidence admitted against him,

including the reliability of the DNA evidence, in his First Amended Petition and his previous direct appeal arguments are "very different" (CR 30, p. 5, l. 17). Admittedly, there are some additional facts in the present claim, which is hardly surprising in light of advancements in understanding DNA over the last decade. However, since the substance of the current Ground One federal claim is the same as that of the prior state court claim, the Ground One claim has been exhausted. See Picard v. Connor, 404 U.S. 270, 278 (1971) (fair presentation requires "that the substance of a federal habeas corpus claim must first be presented to the state courts") (emphasis added).

> ". . . [N]ew factual allegations do not render a claim unexhausted unless they 'fundamentally alter the legal claim already considered by the state courts.'"

Weaver v. Thompson, 197 F.3d 359, (9th Cir. 1999), citing Chacon v. Wood, 36 F.3d 1459, 1468 (9th Cir. 1994), quoting from Vasquez v. Hillery, 474 U.S. 254, 260 (1986). Since no additional facts asserted in Ground One "fundamentally alter" the claim presented to the Nevada Supreme Court, this Court should find that the factual basis of Ground One was fairly presented to the Nevada courts and is, therefore, exhausted and order respondents to answer it on its merits.

B. Fair Presentation of Legal Basis of Ground One.

1. Opening Brief On Direct Appeal. In his Opening Brief to the Nevada Supreme, after a detailed analysis of the evidence, including the unreliability of the DNA evidence, Brown "submits that there was insufficient evidence to convict Troy Brown of these crimes." Ex. 65, p. 33, ll. 19-20. In a series of three cases in the early 1980's Nevada confirmed that its test in criminal cases for sufficiency of the evidence is the federal due process test set forth in Jackson v. Virginia, 443 U.S. 307 (1979). First, the Nevada Supreme Court equated its existing test from Edwards v. State, 90 Nev. 255, 524 P.2d 328 (1974), with the Jackson federal constitutional test.

> In reviewing the evidence supporting a jury's verdict, the question is not whether this Court is convinced of the defendant's guilt beyond a reasonable doubt, but whether the jury, acting reasonably, could have been convinced to the certitude by the evidence it had a right to consider. Edwards v. State, 90 Nev. 255, 255-258-59, 524 P.2d 328, 331 (1974); see also Jackson v. Virginia, 443 U.S. 307 . . . (1979)

Wilkins v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980). During the next term it characterized such test as "well established.".

> The applicable standard of review is well established. The issue is not whether this court would have found beyond a reasonable doubt that appellant was guilty of first degree murder, but whether the jury, acting reasonably, could

> have been convinced to that certitude by the evidence it had a right to consider. *See* Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980); *see also* Jackson v. Virginia, 443 U.S. 307 (1979).

Hern v. State, 97 Nev. 529, 531, 635 P.2d 278, 279 (1981). Two terms later, in unmistakably clear language, it confirmed Nevada's test for insufficient evidence is the Jackson v. Virginia test.

> The standard for determining the sufficiency of the evidence in a criminal case is set forth in *Jackson v. Virginia*, 443 U.S. 307 . . . (1979).

Wilson v. State, 99 Nev. 362, 374-75, 664 P.2d 328, 336 (1983). Nevada has never deviated from that standard since then. Instead, as set forth below, Nevada's application of Jackson v. Virginia's Fifth and Fourteenth Amendment due process standard to review insufficiency of evidence claims has been consistently reaffirmed over the last 20 years, See, e.g.,

> (1) Koza v. State, 100 Nev. 245, 250, 681 P.2d 44 (1984).
>
> Koza first contends that the records does not contain sufficient evidence for a rational trier of fact to be convinced beyond a reasonable doubt of this guilt. The relevant inquiry for this Court is 'whether, after reviewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' Jackson v. Virginia, 443 U.S. 307, 319 (1979)(emphasis in original); Hern v.

State, 97 Nev. 529, 531, 635 P.2d 278, 279 (1981).

(2) Kazalyn v. State, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992).

The standard of review for sufficiency of evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt. Edwards v. State, 90 Nev. 255, 258-59, 524 P.2d 328, 331 (1974).

(3) Palmer v. State, 112 Nev. 763, 768, 920 P.2d 112, 115 (1996).

The standard of review for sufficiency of evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt. *Kazalyn v. State*, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992). This court has further state that when sufficiency of the evidence is challenged on appeal, "[t]he relevant inquiry for the court is 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Koza v. State*, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 . . . (1979) (emphasis in original).

(4) Leonard v. State, 114 Nev. 1196, 1209-10, 969 P.2d 288, 297 (1999).

> Appellant contends that his convictions of robbery and first degree murder are not supported by sufficient evidence. 'The standard of review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt.' *Kazalyn v. State*, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992). There is sufficient evidence if the evidence, viewed in the light most favorable to the prosecution, would allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *Davis v. State*, 110 Nev. 1107, 1116, 881 P.2d 657, 663 (1994) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 . . . (1979)).

Because of Nevada's adoption of Jackson v. Virginia's Fifth and Fourteenth Amendment due process based test as its measure of "sufficiency of the evidence," it was unnecessary for either Brown in his appeal documents or the Nevada Supreme Court in its opinion to cite Jackson v. Virginia. In addressing in Sanders v. Ryder, 342 F.3d 991, 1000 (9th Cir. 2003), whether the words "ineffective assistance of counsel" constituted a fair presentation of a claim of denial of the Sixth Amendment right to counsel, the Ninth Circuit found that in the State of Washington "[w]hen faced with ineffective assistance of counsel claims under both the federal and state constitutions, Washington courts analyze them both using the same *Strickland [v. Washington, 466 U.S. 668 (1984)]* test."

> Indeed, it has become common-place for the Washington courts simply to refer to 'ineffective assistance of counsel' claims–and to analyze

> them under the federal *Strickland* test–without specifying whether they are analyzing a state or federal right. [citations omitted]

Sanders, supra. Washington's consistent use of the Strickland test was a principal reason for the court's conclusion that "Sanders presented his federal ineffective assistance of counsel claim to the Washington Supreme Court in such a manner that that court had a "*fair opportunity*" to address his claim." See id. at 1001. Likewise, because of Nevada's equivalent use of the Jackson v. Virginia test to address all insufficient evidence claims, the legal basis of Brown's federal due process sufficiency of the evidence claim presented in Ground One of Brown's First Amended Petition was fairly presented to the Nevada Supreme Court and is now exhausted.

In summary, there is nothing to be gained by requiring a petitioner to cite federal constitutional authority when raising a sufficiency of the evidence claim in Nevada. The Nevada Supreme Court knows what a sufficiency claim is–a federal due process claim grounded in the beyond a reasonable doubt standard articulated in In re Winship, 397 U.S. 358 (1970). When a sufficiency of the evidence issue raised, the court evaluates the claim by systematically applying the standards set forth in Jackson v. Virginia. The State cannot offer any possible purpose for requiring a petitioner to point out the constitutional nature of the claim. None of the comity concerns, respect for the role of state courts in protecting federal constitutional standards, can possibly be implicated by the failure of a petitioner to cite federal law in this particular instance. The Nevada Supreme Court will apply the

exact the same federal constitutional standard regardless.

Brown's sufficiency claim cannot be anything but a federal constitutional claim. There is no need for Brown to point out in pedantic fashion that which the Nevada Supreme Court already knows. In Nevada, there is but one sufficiency of the evidence standard, is the federal constitutional test provided in Jackson v. Virginia. Ground One of Brown's First Amended Petition is fully exhausted.

2. **Motion for New Trial.** Alternatively, after his case was remanded to the state district court for resentencing, Brown renewed his insufficiency of the evidence claim by way of a Motion for New Trial filed March 6, 1998 (Ex. 86, pp. 3-5), citing Jackson v. Virginia, supra, for the proposition that the "Due Process Clause prohibits conviction upon evidence insufficient to establish every element of the charged crime[.]" See Ex. 86, p. 3, ll. 14-18. The Motion To Dismiss was denied by order of March 9, 1998 (Ex. 87, p. 1).

Respondents assert in the Motion To Dismiss that Brown "could not have exhausted this claim because the denial of that motion was not appealed to the Nevada Supreme Court." CR 30, p. 6, ll. 13-15. To the contrary, a Notice Of Appeal containing in part the following language was timely filed March 20, 1998:

> **NOTICE IS HEREBY GIVEN** that TROY DON BROWN, Defendant above named, hereby appeals to the Supreme Court of the State of Nevada: from the 'Order Denying [Defendant's]

> Motions' for a new trial . . . , said Order being filed March 9, 1998 . . . .

Ex. 93, p. 1, ll. 13-18. A Docketing Statement (Ex. 107) for this appeal was subsequently filed in Case No. 32025. In response to paragraph 6 of the Docketing Statement (Nature of the disposition below) Brown checked the blocks for a "Motion for new trial . . . denial." See Ex. 107, p. 2. Under paragraph 13 (Issues on appeal) he first states "Did the trial court err in denying appellant's Motion for New Trial[.]" See Ex. 107, p. 3. Under paragraph 19 ("Date of entry of written judgment or order appealed from") he identifies in part "3/9/98" (Ex. 107, p. 3) which is the order denying the Motion For New Trial. Appeal No. 32025 was later consolidated with Appeal No. 33325. See Exs. 142 & 146.[3]

In its Order Dismissing Appeal (ODA) in consolidated Cases No. 32025 and 33325 the Nevada Supreme Court initially notes that "[t]his is an appeal from an amended judgment of conviction entered after resentencing and from a denial of a motion for a new trial." Ex. 153, p. 1 (emphasis added). Therefore, in addition to Brown's exhaustion of his Ground One claim on direct appeal as set forth above, he exhausted the claim by his appeal of the denial of the Motion For New Trial (Ex. 86) to the Nevada Supreme Court.

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[3] Appeal No. 33325 included the denial of Brown's pro se "Pre-Sentencing Motion For A New Trial, With Alternative Requests" filed on March 16, 1998 (Ex. 91) and denied October 19, 1998 (Ex. 121).

III.

CONCLUSION

Since all grounds in the First Amended Petition have been exhausted by fair presentation to the Nevada Supreme Court the petition is not mixed and the Motion To Dismiss should be denied. Brown further notes that he may have no state remedy for review of his federal claims under Nevada law. See N.R.S. § 34.726(1) (state post-conviction petition must be filed within one year of judgment of conviction based on a plea of guilty absent good cause) and N.R.S § 34.800 (post-conviction relief unavailable if filed five years beyond entry of conviction). If so, then all his claims are now exhausted. See generally 28 U.S.C. § 2254(c)(if petitioner can demonstrate that he cannot present federal claims because no state remedy is available, the claim is exhausted); Tillema v. Long, 253 F.3d 495, 504, n.13 (9th Cir. 2001)(if no state remedy exists, the federal court "shall deem the claim exhausted"). However, if the Court should determine otherwise and find his petition to be mixed, Brown requests that the Court afford him the opportunity to consider abandoning any unexhausted claims, see Rose v. Lundy, 455 U.S. 509, 520 (1982), and if he should then elect to return to state court to exhaust any claims, that the Court:

(1) Dismiss the petition as mixed without prejudice and without entering judgment; and

(2) Upon petitioner's satisfaction of the standards set forth in Rhines v. Weber, 125 S.Ct. 1528 (2005), stay and/or close the case administratively, expressly allowing petitioner

to file a motion to reopen the case, under the same file number, once the state court proceedings have been completed.

DATED this 15th day of April, 2005.

Respectfully Submitted,

/s/
PAUL G. TURNER
Assistant Federal Public Defender

[certificate of service omitted in printing]

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

3:03-CV-0712-PMP(VPC)

[Dated March 1, 2006]

TROY BROWN,	)
	)
Petitioner,	)
	)
vs.	)
	)
CRAIG FARWELL, et al.,	)
	)
Respondents.	)
	)

PETITIONER'S REPLY

Petitioner, Troy Brown ("Brown"), through his attorney, Assistant Federal Public Defender, Paul G. Turner, hereby files this Reply. This Reply is grounded upon the following points and authorities as well as all other pleadings and exhibits on file in this

proceeding and those addressed in the Motion To Expand The Record filed contemporaneously herewith.

Dated this 1st day of March, 2006.

Respectfully Submitted:

/S/ Paul G. Turner
PAUL G. TURNER
Assistant Federal Public Defender

POINTS AND AUTHORITIES

I.

PROCEDURAL BACKGROUND

1. On July 20, 1994, the State filed an Information in the Fourth Judicial District Court, Elko County, Nevada, charging Brown with the following crimes: Sexual Assault on a Child Under the Age of 14 Years, Resulting in Substantial Bodily Harm, a felony as defined by NRS 200.366 (Count I), Sexual Assault on a Child Under the Age of 14 Years, a felony as defined by NRS 200.366 (Count II), Attempted Murder, a felony as defined by NRS 193.330, 200.010 and 200.020 (Count III), and Abuse of Neglect of a Child Less Than Eighteen (18) Years of Age, Resulting in Substantial Mental Harm, a felony as defined by NRS 200.508, 432B.020 and 432B.070 (Count IV). (Ex. 21.)[1]

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[1] Exhibits 1-195 (Vol. I-V) (CR 20-24) were filed with the First Amended Petition. Exhibits 196-98 were filed with the Motion To Expand The Record filed contemporaneously with this Reply.

2. The case proceeded to trial on September 27, 1994, through September 30, 1994 (Exs. 29, 30, 31, & 34.) On September 30, 1994, the jury found Brown guilty of Counts I, II and IV as listed in the Information. (Ex. 35 & 36.) The jury imposed a sentence of life with the possibility of parole after ten years has been served as to Count I, Sexual Assault on a Child Under the Age of 14 Years, Causing Substantial Bodily Harm. (Ex. 35-36.) Sentencing by the court on Counts II and IV was to be held later. (Ex. 34 at p. 559.) The jury acquitted Brown of the attempted murder charge (Count III). The sentencing hearing on Counts II and IV ultimately took place on June 23, 1995. The court sentenced Brown to life with the possibility of parole after ten years on Count II and twenty years on Count IV, all three sentences to run consecutive to the other. (Ex. 58, p. 20.) The Judgment of Conviction was filed on June 28, 1995. (Ex. 60.)

3. Following a timely notice of Appeal (Ex. 62), Brown filed his Opening Brief (Case No. 27426) on November 20, 1995. (Ex. 65.) The Nevada Supreme Court filed its Opinion on February 26, 1997 (Ex. 70)[2], finding in part "that the district judge abused his discretion during the sentencing phase of the trial and the case must be remanded to the district court for a new sentencing hearing on the remaining sexual assault conviction (Count II)." In addition, it vacated the child abuse/ sexual assault conviction (Count IV) as barred by the Double Jeopardy Clause.

4. On March 6, 1998, "Defendant's Motion For A New Trial; And, Motion To Vacate And Continue

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[2] The opinion is reported at 113 Nev. 275, 934 P.2d 235 (1997).

Sentencing" was filed in the state district court (Ex. 86.) It was denied on March 9, 1998. (Ex. 87.) The resentencing hearing previously ordered by the Nevada Supreme Court was held on March 13, 1998. (Ex. 90.) The district court sentenced Brown to a term of life in prison with the possibility of parole after 10 years on Count II consecutive to the sentence in Count I. (Ex. 90, p. 108.) The Amended Judgment of Conviction was filed on March 18, 1998. (Ex. 92.)

5. On March 20, 1998, Brown filed a timely Notice of Appeal (Ex. 93) with respect to the March 9, 1998, order (Ex. 87) and his amended judgment. A Docketing Statement was duly filed in appeal Case No. 32025. (Ex. 107.)

6. On October 19, 1998, the district court entered an "Order Denying Motion for New Trial" respecting his "Pre-Sentencing Motion For a New Trial" (Ex. 91; Ex. 121.) On November 9, 1998, Brown filed a timely Notice of Appeal of that denial (Ex. 128) which was docketed as appeal Case No. 33325. (Ex. 134.)

7. On January 29, 1999, Brown filed a "Motion to Consolidate Appeals No's. 32035 and 33325" (Ex. 142), which was granted. (Ex. 146.) Following briefing by the parties the Nevada Supreme Court filed its Order Dismissing Appeal in appeal No's. 32025 and 33325 on September 8, 2000. (Ex. 153.)

8. On August 30, 2001, Brown filed a Petition for Writ of Habeas Corpus (Ex. 158) and Points and Authorities in Support of Petition for Writ of Habeas Corpus (Ex. 159) in the Fourth Judicial District Court. Following an evidentiary hearing held February 21, 2002 (Ex. 163) the district court denied Brown's

petition. See Findings of Fact, Conclusions of Law, and Order Denying Writ of Habeas Corpus filed on March 7, 2002. (Ex. 164.) Brown filed a timely Notice of Appeal on April 8, 2002 (Ex. 165), which was docketed as appeal No. 39475. On October10, 2002, Appellant's Opening Brief was filed (Ex. 170) asserting the following assignment of error:

I. THE DISTRICT COURT ERRED IN DENYING BROWN'S WRIT OF HABEAS CORPUS.

The Nevada Supreme Court filed its Order of Affirmance on November 21, 2003. (Ex. 172.)

9. On December 12, 2003, Brown mailed a pro se petition for writ of habeas corpus to this Court pursuant to 28 U.S.C. § 2254. CR 10. Following appointment of the Office of the Federal Public Defender to represent petitioner (CR 6), the First Amended Petition was filed (CR 19) wherein Brown asserts five grounds for relief. Respondents moved to dismiss Ground One individually as unexhausted and the petition generally as mixed under Rose v. Lundy, 455 U.S. 509 (1982) (CR 30), which was subsequently denied. CR 33. On October 19, 2005, respondents filed their Answer (CR 42) to which, his time having been enlarged, Brown now replies.

II.

ARGUMENT

For this Court to grant Brown relief, the state court's adjudication of his claims must have either: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established

Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

Both parts of 2254(d)'s first prong, the "contrary to" and "unreasonable application of" clauses have "independent meaning." Bell v. Cone, 122 S.Ct. 1843, 1850 (2002), citing Williams v. Taylor, 529 U.S. 362, 404-605 (2000). A decision is "contrary to" federal law if the state court applied a rule different from the governing law as set forth by the United States Supreme Court or decided a case differently from the way the Supreme Court has despite a set of facts that are materially indistinguishable. Id., citing Williams, 529 U.S. at 405-606. A decision is an "unreasonable application of" federal law when a state court, though citing the correct federal standard, unreasonably applies that standard to the facts of a particular case. Bell, 122 S.Ct. at 1850, citing Williams, 529 U.S. at 407-608. This application must be objectively unreasonable, which should be distinguished from an application that is incorrect or merely different from the one the reviewing court might make. Id., citing Williams, 529 U.S. at 409-610. Brown asserts that the Nevada Supreme Court's decisions denying each of the followings claims were either contrary to or involved an unreasonable application of clearly established federal law.

A. Ground One: Brown Was Denied His Due Process Rights under the Fifth and Fourteenth Amendments to the United States Constitution Because There

Was Insufficient Evidence Presented at Trial to Support a Finding of Guilty of the Sexual Assault Crimes Beyond a Reasonable Doubt.

1. **Misrepresentation Of General Population DNA Random Match Probability: Prosecutor's Fallacy.**

This is a Restriction Fragment Length Polymorphism (RFLP) case with results reported from five loci. A few months before Brown's trial the United States Court of Appeals for the Ninth Circuit approved the admission of RFLP evidence in federal trials. See United States v. Hicks, 103 F.3d 837, 844 n.7 (9th Cir. 1996); United States v. Chischilly, 30 F.3d 1144 (9th Cir. 1994). In doing so it warned against using RFLP DNA evidence for "source probability (i.e., the likelihood that the defendant is the source of the evidentiary sample . . . [,]" 30 F.3d at 1156, which was precisely what the state did in this case.

Based on the chosen genetic population database, Rene Romero of the Washoe County Forensic Science Division opined that there was a 1 in 3,000,000 ratio for finding a random match between the perpetrator's DNA and Brown's. Ex. 31, p. 320. Not satisfied with that calculation, the prosecutor pressed Ms. Romero to convert those figures to mathematical percentages as to whether Brown was the source of the semen found on the victim's panties, a calculation with which Ms. Romero was not comfortable. Ex. 31, p. 335-38. Nevertheless, she grudgingly did so, ultimately accepting a 99.99967 percent "likelihood" that the

perpetrator was Brown (or .000033 percent that he was not the source). Ex. 31, pp. 336, 346; Ex. 184. As the Ninth Circuit found in Chischilly, supra, such mathematical calculations are wrong.

> . . . The [Washoe County Forensic Science Division] matching statistic does not represent source probability. Rather, the test results reflect the statistical probability that a match would occur between a randomly selected member of the database group and either the evidentiary sample or the defendant. To illustrate, suppose the . . . evidence establishes that there is a one in 10,000 chance of a random match. The jury might equate the likelihood with source probability by believing that there is a one in 10,000 chance that the evidentiary sample did not come from the defendant. This equation of random match probability with source probability is known as the prosecutor's fallacy.

30 F.3d at 1157 (emphasis added); accord, United States v. Morrow, 374 F.Supp.2d 51, 66 (D.D.C. 2005)(prosecutor's fallacy characterized as a "very real danger"); United States v. Shea, 957 F. Supp. 331, 345 & n.44 (D.N.H. 1997)("[t]his type of incorrect reasoning is often referred to as the fallacy of the transposed conditional, or the prosecutor's fallacy"); see R. Lempert, "Some Caveats Concerning DNA As Criminal Identification Evidence : With Thanks To The Reverend Bayes," 13 Cardoza L. Rev. 303, 305-06

(1991). See also letter report of Laurence D. Mueller, Ph.D. (Ex. 197, p. 2).[3]

> The 'prosecutor's fallacy' occurs when a prosecutor presents statistical evidence to suggest that the evidence indicates the likelihood of the defendant's guilt rather than the odds of the evidence having been found in a randomly selected sample.

United States v. Shonubi, 895 F. Supp. 460, 516 (E.D.N.Y. 1995), quoting from M. Berger, "Evidentiary Framework," Federal Judicial Center, Reference Manual On Scientific Evidence, pp. 95, 97 (1994), rev'd on other grounds, 103 F.3d 1085 (2d Cir. 1997).

Relying on this mathematically incorrect evidence, at closing the prosecutor told the jury that such calculations meant that they could be "99.999967 percent sure" that Brown committed the crime. Ex. 34, p. 546, l. 18. Such grossly unreliable evidence was insufficient to support the jury's guilty verdict against Brown.

2. Misrepresentation Of Sibling DNA Random Match Probability.

At the time of the incident in question Troy Brown had four brothers, Trent, Travis, Trace and Lance, ages 23, 21, 16 and 13, respectively. Two of them, Trent and Travis, were known to be in Carlin, Nevada, the evening in question in close proximity to the crime

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[3] Petitioner has submitted Exhibits 196-98 with his Motion To Expand The Record filed contemporaneously with this Reply.

scene. See Ex. 198. Only Troy Brown's DNA was analyzed, and the state provided the following inaccurate mathematical calculations at trial to distinguish Troy Brown from his brothers.

a. Use Of Incomplete Assumption Offering Evidence Most Disfavorable To Defendant.

In computing the random match probability of brothers at five loci as "1/6500" Ms. Romero relied solely on the following formula set forth in the National Research Council, DNA Technology in Foresnsic Science (1992)(hereinafter "NRC I"), publication:

> Indeed, two sibs will often have matching genotypes at a locus – they have a 25% chance of inheriting the same pair of alleles from their parents and a 50% chance of inheriting one allele in common (which will result in identical genotypes if their other alleles happen to match by chance).

Ex. 31, p. 343, l. 19 – p. 344, l. 12. As summarized by Ms. Romero at trial,

> [w]ith a brother, there would be some genetic relationship. They have a 25 percent chance of sharing both alleles -- both bands, and 50 percent chance of sharing one band.

Ex. 31, p. 343, ll. 22-24. Such evidence is unreliable since (1) it presents an incomplete picture of DNA among siblings and (2) the 1/6500 random match probability figure grossly understates the probabilities

of matches among siblings. Cf. 3 Mod. Sci. Evidence § 25-2.6.2[2] n.153 (2d ed.)(NRC I formula used by Ms. Romero is "an incorrect formula for siblings").

Since siblings inherit DNA from their parents, their random match probability is extremely high compared to the general population.

> It is well established that relatives, especially siblings, have very similar DNA patterns and can have identical patterns at various sites. Thus, if a defendant has 10 brothers, there is an increased likelihood that more than one brother would match the DNA evidence sample exactly.
>
> D. Filocomo, "Unraveling The DNA Controversy: People V. Wesley, A Step In The Right Direction," 3 J.L. & Pol'y 537, 564 & n.151 (1995).

. . . . .

The jury must be informed about the fact that the probability of two relatives having the same DNA profile for a number of loci is much greater than two randomly chosen people.

Plainly, the best solution is to obtain DNA from the relatives who are plausible suspects and either include or exclude them. If prosecutors do not make adequate efforts to conduct DNA tests on relatives who are plausible suspects, but offer DNA evidence against a defendant, courts should seriously consider instructing the jury, in a fashion similar to a missing witness charge, that it may

> draw a negative inference that the result would not have been favorable to the prosecution.
>
> B. Scheck, "DNA And Daubert," 15 Cardoza L. Rev. 1959, 1974-75 (1994); accord, S. Rosenthal, "My Brother's Keeper: A Challenge To The Probative Value Of DNA Fingerprinting," 23 Am. J. Crim. L. 195, 212-13 (1995).

With respect to the incompleteness of Ms. Romero's sibling calculations, siblings' parents may be homozygotes, i.e. have matching alleles at various loci, or heterozygous, i.e. have different alleles at various loci.

> "The genetics of a human cell . . . is compiled by the owner's parents, each of whom contributes . . . 23 paired sets inside the sacrosanct edifice of the *nucleus*. . . . [Genetic information within the paired sets] are called *alleles*. If . . .at a particular region or locus on the DNA . . . the allele from the mother is A and the corresponding allele from the father is B, the *genotype* at that locus is designated AB. The text of two corresponding alleles at any locus may be identical (a *homozygous* genotype, e.g., AA) or different (a *heterozygous* genotype, e.g., AB)."

People v. Pizarro, 3 Cal.Rptr.3d 21, 49-50 (Cal. App. 2003), quoting from People v. Brown, 110 Cal.Rptr.2d 750 (2001). The 25% figure utilized in this case for sibling random match probability at one loci, and which mistakenly (see discussion below) was used as the foundation for the state's 1/6500 figure, lies at one extreme where "both parents are heterozygotes and

share at most one allele in common[,]" the most unfavorable possible alternative for a criminal defendant sibling. "For other possible parental pairs the probability of two sibs matching could be 50% or 100%." Ex. 197, p. 1, second ¶. The jurors never knew this.

As summarized by Dr. Mueller, "in this portion of Ms. Romero's testimony she has chosen a special case which suggests that sibs have the lowest chance of matching that is biologically possible." Ex. 197, p. 1. Such presentation of scientific evidence based on the most negative assumption possible as to the defendant has been soundly condemned. Cf. People v. Pizarro, Cal.Rptr.3d 21 (Cal. App. 2003), a DNA case where, as here, there was "insufficient evidentiary foundation" for the conviction. Id. at 540.

> If the description of the perpetrator is instead based on evidence of the *defendant's* traits -- which are simply assumed to be the same as the perpetrator's -- the defendant no longer enjoys the presumption of innocence. It is as though the sketch artist sits with the defendant, sketches him as the perpetrator, and the prosecution introduces the sketch at trial as evidence that the defendant looks exactly like the perpetrator. The defendant's traits fill out the perpetrator's description with *facts that are not in evidence*, and the perpetrator's traits are 'proved' by what is in effect a *presumption* that because the defendant possesses certain traits, the perpetrator also possesses those traits. Such a presumption operates as a substitute for proper evidence of the perpetrator's traits, thereby lightening the prosecution's burden of

affirmatively proving the defendant's identity as the perpetrator and undermining the defendant's presumption of innocence.

Id. at 544.

b. Incorrect Probability Figures.

As set forth in Dr. Mueller's report (Ex. 197), even accepting the 25% figure as proper to calculate the chance of a random match of two brothers at a single loci, Ms. Romero's 1/6500 ratio is incorrect and grossly understates the probability of a random match of two siblings at five loci. The correct figure is 1/1024 (Ex. 197, p. 1), which is more than six times the likelihood of a random match than the 1/6500 figure provided the jury by Ms. Romero. As noted previously Brown had four brothers, Trent (23), Travis (21), Trace (16) and Lance (13), at the time of the incident, two of whom (Trent and Travis) were known to be in Carlin, Nevada, the evening of the crime and two of whom resided in the adjacent state of Utah. Dr. Mueller calculates the probability of any one of the brothers matching the DNA profile:

(1) One or more brothers (three were known to be in Carlin the evening in question): 1/512, more than 12 times the likelihood of a random match than the 1/6500 figure provided the jury by Ms. Romero;

(2) Total of five brothers (including the two brothers residing in Utah at the time of the incident): 1/256, more than 25 times the likelihood of a random match of one of the five

brothers than the 1/6500 figure provided by Ms. Romero.[4]

Ms Romero's figure for two brothers was inaccurate; she never considered the fact that a third brother was in Carlin the night in question and that Brown had two other brothers in Utah. Since it was at least six to 12 times more likely that the DNA matched one of Brown's two brothers in Carlin the evening in question than the 1/6500 probability opined by Ms. Romero, materially inaccurate evidence was provided to the jury.

3. Use Of The Unreliable DNA Evidence Rendered The Evidence Insufficient To Prove Brown's Guilt.

In summary, the state's DNA random match probability evidence was grossly inaccurate. The so-called "prosecutor's fallacy" was used to wrongly convert the chance of a random match of DNA from the general population to the chance of Troy Brown being the perpetrator of the crime. Such classic fallacy, recognized by the Ninth Circuit and by numerous other courts and legal authorities, rendered the DNA evidence as presented to the jury unreliable.

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[4] Applying a formula found in National Research Council, "The Evaluation of Forensic DNA Evidence" (1996)("NRC II"), page 113 (4.9a & 4.9b), he finds that the "chance of a single sib matching Brown's profile is 1 and 263. The chance that among two brothers one or more would match is 1 and 132 and the chance that among four brothers one or more would match is 1 and 66." Ex. 197, pp. 1-2. These probabilities of sibling matches are dramatically greater than Ms. Romero's 1/6500 figure presented to the Brown jury.

Moreover, the sibling issue central to this case was mishandled in several particulars:

> (1) The mathematical calculations were based on two brothers, not the three known to be in Carlin that night or the additional two residing in Utah;
>
> (2) A 25% figure for sibling's DNA matching at one loci, based on the most extreme case of heterozygous parents, was used exclusive of other mathematically correct possibilities, i.e. 50% or even 100% for parents' DNA ranging from heterozygous to homozygous. The state unfairly placed its sole reliance on the alternative possibility most disfavorable to the defendant.
>
> (3) Accepting the 25% figure for sibling random match probability at one loci, the state erred by a factor of six in miscalculating the probability at five loci as 1/6500 instead of the 1/1024 figure. This error was compounded by the failure to consider at least the third brother in Carlin the evening in question, which increases the probability to 1/512 from the state's 1/6500, an error by a factor of 12.

In its Answer In Opposition to Brown's state post-conviction petition, the state conceded that, exclusive of the DNA, the evidence presented to the jury was insufficient to convict Brown.

> There was insufficient evidence to convict the Defendant unless the DNA evidence established guilt . . . .

Ex. 161, p. 13, ll. 22-23. Since the DNA evidence was presented in a mathematically incorrect form and was, therefore, highly unreliable, it was insufficient to establish Brown's guilt. The DNA evidence provided "no demonstrable support" for distinguishing Brown form his brothers. See Smith v. Mitchell, ____ F.3d ____, 2006 WL 300 627, *6 (9th Cir. Feb. 9, 2006). Affirming guilt on such evidence constitutes an unreasonable application of the controlling Supreme Court precedent, i.e. Jackson v. Virginia, 443 U.S. 307 (1979). Accordingly, the Nevada Supreme Court decision does not preclude this Court from issuing the writ, as it should do in this case. See 28 U.S.C. § 2254(d)(1).

B. Ground Two: Trial Counsel's Failure To Seek To Enforce The Stipulated DNA RFLP Testing Protocol And Object To The DNA Evidence Admitted At Trial Denied Brown His Right To The Effective Assistance Of Counsel Under The Sixth And Fourteenth Amendments To The United States Constitution.

The state has acknowledged that absent the DNA evidence it presented to the jury Brown would not have been convicted. Ex. 161, p. 13, ll. 22-23. On the virtual eve of trial, the state produced new RFLP test results. Ex. 186. Despite the last minute production of the new testing results trial counsel made no effort to continue the trial. As set forth in the discussion of Ground One supra, the state used the DNA evidence to misrepresent a 99% certainty of guilt. Nevertheless,

counsel did not object to the state's DNA evidence. Counsel also lodged no objection to Ms. Romero as an expert despite the fact that she had never testified before on polymarker testing and had only been doing that test for two months.

When appellate counsel on direct appeal attempted to challenge the DNA evidence, the Nevada Supreme Court refused to consider appellate review of the DNA evidence, finding that the defendant had waived such claim:

> Troy argues that the district judge erred in not conducting a pretrial hearing to determine whether the DNA results were trustworthy and reliable. However, Troy made no objection to either the lack of a pretrial evidentiary hearing or to qualifying Romero as an expert witness on DNA evidence. Failure to object in the district court precludes consideration of the issues on appeal; however, this court may address plain error sua sponte. Sterling v. State, 109 Nev. 391, 394, 834 P2.d 400, 402 (1992). Because we conclude that the failure to conduct an evidentiary hearing was not plain error, we will not consider this issue.

Brown v. State, 113 Nev. 275, 284, 934 P.2d 235 (1997).

The evidentiary and foundational problems with the collection, testing and presentation of the DNA evidence (see Ground One of the First Amended Petition and discussion supra) should have prevented admission of the DNA evidence and/or, if properly challenged, produced an accurate and fair presentation

of the evidence to the jury. Brown was prejudiced by admission of this unreliable DNA evidence acknowledged by the state to be essential to a conviction. In failing to challenge the DNA evidence at trial and preserve valid issues for appeal, trial counsel performed ineffectively and Brown was denied his Sixth and Fourteenth Amendment rights to the effective assistance of counsel. The writ should be granted.

C. Ground Three: Trial Counsel's Failure In General To Properly Investigate The Case And, In Particular, To Present Evidence At Trial That The Victim's Stepfather, Wayne Henle, Was An Alcoholic Prone To Attack Women When Drunk, And Who Had Been Charged With Felony Sexual Assault In Utah And Was Involved In A Similar Matter In Carlin, Nevada, Prior To The Attack On His Stepdaughter, Denied Brown His Sixth And Fourteenth Amendment Rights To The Effective Assistance Of Counsel.

Petitioner submits this issue on the record currently before the Court.

D. Ground Four: Trial Counsel's Failure To Move For A Mistrial Because Brown Was Exposed To Jurors While Wearing Shackles

And Jail Garb Denied Brown His Sixth And Fourteenth Amendment Rights To The Effective Assistance Of Counsel.

Petitioner submits this issue on the record currently before the Court.

E. Ground Five: Trial Counsel's Failure To Move To Dismiss The Case Because Of The State's Loss Of Teeth Scrapings That Would Have Excluded Brown As The Assailant Denied Brown His Sixth And Fourteenth Amendment Rights To The Effective Assistance Of Counsel.

Although blood was identified on the victim's front teeth by a police investigator (Ex. 194), the police did not collect or test such teeth scrapings. Since the failure to collect such evidence constituted at least gross negligence, a challenge to it could have resulted in an instruction to the jury that there was an evidentiary presumption that the teeth scrapings would have produced results unfavorable to the state, cf. Daniels v. State, 956 P.2d 111, 115 (Nev. 1998), i.e., sufficient to support a conclusion that Brown was not the perpetrator of the crime.

Nevertheless, defense counsel sought neither the favorable presumption to which his client might have been entitled under Nevada law nor any other sanction against the state for its omission to collect such teeth scraping evidence. Counsel's failure to so object constituted deficient performance and fell below the

constitutionally required minimum for effective assistance of counsel and could have served no tactical or strategic purpose. Sans the favorable presumption to which he could have been entitled, Brown's ability to present his defense was substantially impaired. Since Brown suffered prejudice from counsel's failure to seek sanctions for the state's failure to collect the teeth scraping evidence, the writ should be granted and his convictions vacated.

III.

BROWN IS ENTITLED TO AN EVIDENTIARY HEARING WITH RESPECT TO THE DNA ISSUE

Petitioner requests an evidentiary hearing to address the mishandling and misrepresentation of the DNA evidence set forth in the First Amended Petition and this Reply and any other issue deemed relevant by the Court. Cf. Buffalo v. Sunn, 854 F.2d 1158,1165 (9th Cir. 1988).

IV.

CONCLUSION

Based on his First Amended Petition, this Reply and the record before the Court, Brown requests that he be granted the writ with respect to his claims or, alternatively, a hearing so his claims can be properly reviewed and determined on their merits.

Dated this 1st day of March, 2006.

Respectfully Submitted:

/S/ Paul G. Turner
PAUL G. TURNER
Assistant Federal Public Defender

[certificate of service omitted in printing]

EXHIBIT 196

Curriculum Vitae
Laurence Dochez Mueller
January 2006

Work Address:

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Irvine, California 92697-2525
Phone: (949) 824-4744
e-mail: LDMUELLE@UCI.EDU
web site: http://darwin.bio.uci.edu/~mueller

Home Address:

6 Russell Court
Irvine, California 92612-4000
Phone: (949) 856-3532

Date and place of birth:

March 30, 1951
Mineola, New York

Education

Applied Biosystems ABI Prism 3100 Series Genetic Analyzers and AmpFLSTR Training

- 18-21 November 2003, Foster City, CA.

University of California, Davis, California

- Attended October 1975 to September 1979
- Ph. D., December 1979 In Ecology

Stanford University, Stanford, California

- Attended October 1969 to June 1974
- B. S. / M. A., June 1974 in Chemistry / Biology

Significant Research/Teaching and Fellowship Positions

Professor

- University of California, Irvine, CA
- July 1996 to present

Associate Professor

- University of California, Irvine, CA
- July 1988 to June 1996

Associate Professor

- Washington State University, Pullman, WA.
- August 1987 to August 1988

Senior Summer Faculty Fellow

- Naval Health Research Center, San Diego, CA.
- July to September 1988, 1989

Assistant Professor

- Washington State University
- September 1983 to July 1987

Postdoctoral Research Affiliate

- Stanford University, Stanford, CA.
- November 1982 to August 1983

NIH Postdoctoral Fellow

- Stanford University
- October 1979 to October 1982

NIH Predoctoral Trainee

- University of California, Davis, CA.
- July 1977 to July 1979

Teaching Assistant

- University of California, Davis
- October 1975 to November 1978

Chemist

- Agriculture Services Lab, Salinas, CA.
- July 1974 to September 1975

Professional Service/Awards/Societies

Professional Societies:

Ecological Society of America, Society for the Study of Evolution.

Academic Awards:

Offered an Earle C. Anthony Fellowship for the year 1977-1978 by the University of California, Davis; NIH Postdoctoral Fellow, October 1979 to October 1982.

Associate Editor:

Population Ecology, 1999-2005.

Outside Referee for:

Aging Cell Review, American Journal of Human Genetics, American Midland Naturalist, The American Naturalist, Bioscience, California Sea Grant, Canadian Journal of Microbiology, Department of Energy, Ecology, Experimental Gerontology, Evolution, Genetica, Genetics, Journal of Animal Ecology, Journal of Biosciences, Journal of Chemical Ecology, Journal of Evolutionary Biology, Journal of Heredity, Journal of Insect Physiology, Journal of Theoretical Biology, Molecular Biology and Evolution, NSF, Oecologia, Oikos, Proceedings of National Academy of Science USA, Proceedings of the Royal Society Series B, Science, Theoretical and Applied Genetics, Theoretical Population Biology, The Wellcome Trust.

Review Panels

April 1999: National Institutes on Aging, Special Emphasis Panel for RFA, "Centers for the Demography of Aging"; June 1999,

National Institutes on Aging, Special Emphasis Panel; 9 March 2000, National Institutes on Aging, Sociology Aging Review Committee; October, 2000, National Institutes on Aging, Sociology Aging Review Committee; October 2000: National Science Foundation, Population Biology Panel; 10 August 2004, National Institute of Diabetes and Digestive and Kidney Diseases, Review Panel of genetic studies of obesity-related traits in model organisms; 4 August 2005, National Institute of Diabetes and Digestive and Kidney Diseases, Special Emphasis Panel, Model Organisms for Obesity.

Invited Seminars:

1983: Department of Biology, University of Idaho, Moscow, Idaho, 28 September;
1985: Symposium on the application of biological models to human behavior, Palma de Mallorca, Spain, 18 December; Department of Genetics, University of Valencia, Valencia, Spain, 20 December;
1986: Department of Zoology, Oregon State University, Corvallis OR., 12 May;
1987: Conference on Theoretical Ecology, Asilomar, CA., 17 May; Institute of Genetics, Universidad de los Andes, Bogota, Colombia, 14 October to 16 October; Department of Ecology and Evolutionary Biology, University of California, Irvine, CA., 19 October;
1988: Department of Biology, University of Idaho, Moscow, Idaho, 27 January; Department of Ecology and Evolutionary

Biology, University of California, Irvine, CA., 29 February;
1989: Southern California Drosophila Research Conference, Irvine, CA., 25 February; Naval Health Research Center, San Diego, CA., July; National Institute of Aging, Development of Long Lived Mouse Populations, Irvine, CA., September; Department of Biology, University of Houston, Houston, Texas, November;
1990: National Criminal Defense Lawyers Association Conference on DNA Typing in Forensics, Washington D.C., March; Briefing of the Committee on DNA Technology in Forensic Sciences, National Academy of Sciences, Washington D.C., April; Symposium on Evolutionary genetics of aging, sponsored by the Society for the Study of Evolution and The National Institute of Aging, held at the Fourth International Congress of Systematic and Evolutionary Biology, College Park, MD., July; Symposium on The evolution of reproductive strategies, organized by The Royal Society, London, U.K., October; Department of Biology, California State University, Los Angeles, CA., November; National Criminal Defense Lawyers Association Conference on DNA Typing in Forensics, Los Angeles, CA., December; Sloan Foundation sponsored symposium on DNA and forensics, University of Southern California, Los Angeles, CA., December.
1991: The Application of DNA Technology to Forensics, University of California, Riverside, CA., March; Washington

Defenders Association, Spokane, WA, April; National Institute of Aging, Workshop on Strategies for identification and characterization of longevity assurance genes, Irvine, CA, 11-13 June; New York State Department of Justice symposium on DNA Typing and Forensics, N.Y.C., November.

1992: Department of Botany, University of California, Riverside, 5 October.

1993: Second International Symposium on Forensic Statistics, Phoenix, Arizona, 18 March.

1994: Briefing of the Committee on DNA Technology in Forensic Sciences, National Academy of Sciences, Washington D.C., November, 18; Science & Engineering Academic Librarians symposium DNA: Witness for the prosecution?, Irvine, CA. 1 December.

1995: Invited speaker, University Forum, U.C. Irvine, DNA testing and evidence, 15 February; Invited speaker, Department of Biology, Arizona State University West, 22 March.

1996: Invited speaker, Missouri Public Defender System, population genetics and DNA typing, May and November.

1997: Invited speaker, Institute for Mathematics and its Applications, Summer Program in Genetics, University of Minnesota, 7 July.

2001: Invited lecturer, DNA Institute, Sacramento, CA., 19 January 2001

2002: Invited speaker, Corpus Christi, Texas, Texas Defender Service, 12 October.

2003: Invited speaker, Forensic Bioinformatics, 2nd Annual Conference, Dayton, Ohio, 29 August.
2004: Invited speaker, International Conference for Mathematics in Biology and Medicine, University of Michigan, 25 July; Invited speaker, Forensic Bioinformatics, 3rd Annual Conference, Dayton, Ohio, 20 August.
2005: Invited speaker, Workshop on Mathematical and Statistical models in the Biodemography of Aging, University of California, Berkeley, 6-8 June; Invited speaker, Forensic Bioinformatics, 4th Annual Conference, Dayton, Ohio, 12-14 August.

Research Grants

Title	Granting Agency	Dates	Direct Costs
The Ecological Genetics of *Tigriopus californicus* (P.I.)	WSU Grant in Aid	7/84-6/85	$5,209
The Ecological Genetics of *Tigriopus californicus* (P.I.)	WSU	6/84-8/84	$3,000
Density dependent natural selection in *Drosophila* (P. I.)	NIH	1/85-6/88	$119,452

Dietary restriction, postponed aging, and trade offs between survival and reproduction (co-PI with M. Rose)	NIH	9/92-8/96	$223,961
Population genetics of postponed aging (P.I., F.J. Ayala and R. Hudson co-PI's)	NIH	9/92-8/96	$392,781
Dietary restriction and trade offs between survival and reproduction (co-PI with M. Rose)	NSF	9/92-9/95	$121,395
Evolution of population stability (P.I.)	NSF	8/94-7/97	$111,037
Urea resistance in *Drosophila* (co-PI with A. Gibbs)	U.C. Irvine	7/96-6/97	$8,001
Density-dependent natural selection & population growth	U.C. Irvine	8/97-7/98	$26,193
Density-dependent natural selection & population growth	U.C. Irvine	3/98-6/99	$2,000

Metapopulation dynamics	U.C. Irvine	2/00-6/01	$2,200
Environmental and genetic control of gene expression in populations resistant to ammonia stress	U.C. Irvine	2/01-6/01	$1,994
Drosophila larval life energy budgets	U.C. Irvine	6/03-6-04	$1,473
Graduate assistance in areas of national need (P.I.)	US Dept. of Education	8/15/03-8/14/06	$491,940
The physiological nature of life-history trade offs	U.C. Irvine	7/1/05-6/30/06	$2,000

Publications

Ph. D. Thesis

Mueller, L. D., 1979. Fitness and density dependence in *Drosophila melanogaster*. University of California, Davis.

Book Reviews

1. Mueller, L. D., 1980. Book review of *Mathematical Population Genetics* by W. J. Ewens. *American Scientist* **68**: 694.

2. Mueller, L. D., 1981. Book review of *Evolution in Age-Structured Populations*

by B. Charlesworth. *Bioscience* **31**: 774-775.

3. Rose, M. R. and L. D. Mueller, 1993. Book review of *The Evolution of Life Histories* by S. C. Stearns. *J. Evolutionary Biology* **6**: 304-306.

4. Mueller, L. D., 2003. Book review of *Longevity* by J. R. Carey. *Science* **301**: 1185.

Books

1. Mueller, L. D. and A. Joshi, 2000. *Stability in Model Populations.* Monographs in Population Biology No. 31, Princeton University Press, Princeton, N.J.

2. Rose, M.R. and L.D. Mueller, 2006. *Evolution and Ecology of the Organism.* Prentice Hall, Upper Saddle River, New Jersey.

Research Articles

1. Mueller, L. D., 1979. A comparison of two methods for making statistical inferences on Nei's measure of genetic distance. *Biometrics* **35**: 757-763.

2. Mueller, L. D. and F. J. Ayala, 1981. Trade-off between r-selection and K-selection in *Drosophila* populations. *Proceedings of the National Academy of Science USA* **78**: 1303-1305.

3. Mueller, L. D. and F. J. Ayala, 1981. Dynamics of single species population growth: stability or chaos? *Ecology* **62**: 1148-1154.

4. Mueller, L. D. and F. J. Ayala, 1981. Fitness and density dependent population growth in *Drosophila melanogaster*. *Genetics* **97**: 667-677.

5. Mueller, L. D. and F. J. Ayala, 1981. Dynamics of single species population growth: experimental and statistical analysis. *Theoretical Population Biology* **20**: 101-117.

6. Uyenoyama, M. K., M. W. Feldman and L. D. Mueller, 1981. Population genetic theory of kin selection: I. Multiple alleles at one locus. *Proceedings of the National Academy of Science USA* **78**: 5036-5040.

7. Mueller, L. D. and F. J. Ayala, 1982. Estimation and interpretation of genetic distance in empirical studies. *Genetical Research* **40**: 127-137.

8. Mueller, L. D. and F. J. Ayala, 1982. Population dynamics in the serial transfer system: comments on Haddon's model. *The American Naturalist* **120**: 548-550.

9. Mueller, L. D. and L. Altenberg, 1985. Statistical inference on measures of niche overlap. *Ecology* **66**: 1204-1210.

10. Mueller, L. D. and M. W. Feldman, 1985. Population genetic theory of kin selection: a two locus model. *The American Naturalist* **125**: 535-549.

11. Mueller, L. D., B. A. Wilcox, P. R. Ehrlich, D. G. Heckel and D. D. Murphy, 1985. A direct assessment of the role of genetic drift in determining allele frequency variation in populations of *Euphydryas editha*. *Genetics* **110**: 495-511.

12. Mueller, L. D., L. G. Barr and F. J. Ayala, 1985. Natural selection versus random genetic drift: evidence from temporal variation in allele frequencies in nature. *Genetics* **111**: 517-554.

13. Mueller, L. D., 1985. The evolutionary ecology of *Drosophila*. *Evolutionary Biology* **19**: 37-98.

14. Mueller, L. D., 1986. Density-dependent rates of population growth: estimation in laboratory populations. *The American Naturalist* **128**: 282-293.

15. Mueller, L. D. and V. F. Sweet, 1986. Density-dependent natural selection in *Drosophila*: evolution of pupation height. *Evolution* **40**: 1354-1356.

16. Mueller, L. D., 1987. Evolution of accelerated senescence in laboratory populations of *Drosophila*. *Proceedings of*

the National Academy of Science USA **84**: 1974-1977.

17. Mueller, L. D., 1988. Evolution of competitive ability in *Drosophila* due to density-dependent natural selection. *Proceedings of the National Academy of Science USA* **85**: 4383- 4386.

18. Mueller, L, D. and M. W. Feldman, 1988. Evolution of altruism by kin selection: new phenomena with strong selection. *Ethology & Sociobiology* **9**: 223-239.

19. Joshi, A. and L. D. Mueller, 1988. Evolution of higher feeding rate in *Drosophila* due to density-dependent natural selection. *Evolution* **42**: 1090-1093.

20. Mueller, L. D., 1988. Population genetic models of sexual selection with pleiotropic effects on fertility. *Evolution Biologica* **2**: 221-227.

21. Mueller, L. D., 1988. Density-dependent population growth and natural selection in food limited environments: the *Drosophila* model. *The American Naturalist* **132**: 786-809.

22. Bierbaum, T. J., L. D. Mueller and F. J. Ayala, 1989. Density-dependent evolution of life history characteristics in *Drosophila melanogaster*. *Evolution* **43**: 382-392.

23. Mueller, L. D. and F. C. Garland, 1989. Parasitic disease in the S. Navy. *NHRC report* No. 89-30.

24. Travis, J. and L. D. Mueller, 1989. Blending ecology and genetics: progress toward a unified population biology. In: *Perspectives in Theoretical Ecology* (Proceedings of a Conference on Theoretical Ecology, Asilomar, CA., 17-20 May 1987), pgs. 101-124, J. Roughgarden, R. M. May and S. Levin, eds. Princeton University Press, Princeton, N. J.

25. Mueller, L. D., 1990. Density-dependent natural selection does not Increase efficiency. *Evolutionary Ecology* 4: 290-297.

26. Mueller, L. D. 1991. Population genetics of hypervariable human DNA. In: *Forensic DNA Technology* (Proceedings of the American Chemical Society, Science and Law Conference, Los Angeles, CA, 1988), pgs. 51-62, M. Farley and J. Harrington (eds), Lewis Publisher, Chelsea, Michigan.

27. Mueller, L. D., F. Gonzalez-Candelas and V. F. Sweet, 1991. Components of density-dependent population dynamics: models and tests with *Drosophila*. *The American Naturalist* **137**: 457-475.

28.Mueller, L. D. 1991. Ecological determinants of life history evolution. *Philosophical Transactions of the Royal Society London B* **332:** 25-30.

29.Mueller, L. D., P. Z. Guo and F. J. Ayala. 1991. Density-dependent natural selection and trade-offs in life history traits. *Science* **253**: 433-435.

30.Guo, P. Z., L. D. Mueller and F. J. Ayala. 1991. Evolution of behavior by density-dependent natural selection. *Proceedings of the National Academy of Science USA* **88**: 10905-10906.

31.Joshi, A. and L. D. Mueller, 1993. Directional and stabilizing density-dependent natural selection for pupation height in *Drosophila melanogaster*. *Evolution* **47**: 176-184.

32.Moody, M. M., L. D. Mueller and D. E. Soltis, 1993. Genetic variation in autotetraploid populations of finite size. *Genetics* **134:** 649-657.

33.T. J. Nusbaurn, J. L. Graves, L. D. Mueller and M. R. Rose, Letter to the Editor: Fruit Fly Aging and Mortality. *Science* **260**: 1567.

34.Mueller, L. D., J. L. Graves Jr. and M. R. Rose, 1993. Interactions between density-dependent and age-specific

selection in *Drosophila melanogaster*. *Functional Ecology* **7**: 469-479.

35. Graves,. J. L. and L. D. Mueller, 1993. Population density effects on longevity. *Genetica* **91**: 99-109.

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37. Mueller, L. D. 1993. The use of DNA typing in forensic science. *Accountability in Research* **3**: 55-67.

38. Mueller, L. D. and P. T. Huynh, 1994. Ecological determinants of stability in model populations. *Ecology* **75**: 430-437.

39. Mueller, L. D. 1995. Adaptation and density-dependent natural selection. In: *Genetics of Natural Populations: The Continuing Importance of Theodosius Dobzhansky*, pp. 222-238, L. Levine (Ed.), Columbia University Press, New York.

40. Graves, J. L. and L. D. Mueller. 1995. Population density effects on longevity revisited. *Genetica* **96**: 183-186.

41. Mueller, L. D., T. J. Nusbaum and M. R. Rose. 1995. The Gompertz equation as a predictive tool in demography. *Experimental Gerontology* **3o**: 553-569.

42.Joshi, A. and L. D. Mueller. 1996. Density-dependent natural selection in *Drosophila*: trade-offs between larval food acquisition and utilization. *Evolutionary Ecology* **10**: 463-474.

43.Joshi, A., C. D. Knight, and L. D. Mueller 1996. Genetics of larval urea tolerance in *Drosophila melanogaster*. *Heredity* **77**: 33-39.

44.Joshi, A., J. Shiotsugu and L. D. Mueller. 1996. Phenotypic enhancement of longevity by dietary urea in *Drosophila melanogaster*. *Experimental Gerontology* **31**: 533-534.

45.Nusbaum, T. J., L. D. Mueller and M. R. Rose.1996. Evolutionary patterns among measures of aging. *Experimental Gerontology* **31**: 507-516.

46.Mueller, L. D. and M. R. Rose. 1996. Evolutionary theory predicts late-life mortality plateaus. *Proceedings of the National Academy of Science USA* **93**:15249-15253.

47.Joshi, A. and L. D. Mueller 1997. Adult crowding effects on longevity in *Drosophila melanogaster*: increase in age-independent mortality. *Current Science* **72**: 255-260.

48.Shiotsugu, J., A. M. Leroi, H. Yashiro, M. R. Rose and L. D. Mueller. 1997. The

symmetry of correlated responses in adaptive evolution: an experimental study using *Drosophila*. *Evolution* **51**: 163-172.

49. Santos, M., Borash, D. J., A. Joshi, N. Bounlutay, and L. D. Mueller. 1997. Density-dependent natural selection in *Drosophila*: evolution of growth rate and body size. *Evolution* **51**: 420-432.

50. Mueller, L. D. 1997. Theoretical and empirical examination of density-dependent selection. *Annual Review of Ecology and Systematics* **28**: 269-288.

51. Joshi, A., W. A. Oshiro, J. Shiotsugu and L. D. Mueller 1997. Within- and among-population variation in oviposition preference of urea-supplemented food in *Dmsophlla melanogaster*, *Journal of Biosciences* **22**: 325-338.

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54. Joshi, A., W. P. Wu and L. D. Mueller 1998. Density-dependent natural

selection in *Drosophila*: adaptation to adult crowding. *Evolutionary Ecology* **12**: 363-376.

55. Rose, M. R. and L. D. Mueller 1998. Evolution of human lifespan: past, future and present. *American Journal Human Biology* **10**: 409-420.

56. Joshi, A,, W. A. Oshiro, J. Shiotsugu and L. D. Mueller. 1998. Short- and long-term effects of environmental urea on fecundity in *Drosophila rnelanogaster. Journal of Bioscierces* **23**: 279-283

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58. Joshi, A., M. H. Do and L. D. Mueller. 1999. Poisson distribution of male mating success in laboratory populations of *Drosophila melanogaster. Genetical Research* **73**: 239-249.

59. Pierce, V.A., L.D. Mueller and A.G. Gibbs. 1999. Osmoregulation in *Drosophila melanogaster* selected for urea tolerance. *Journal of Experimental Biology* **202**: 2349-2358.

60. Mueller, L. D., A. Joshi, and D. J. Borash. 2000. Does population stability evolve? *Ecology* **81**: 1273-1285.

61. Borash, D. J., V. A. Pierce, A. G. Gibbs, and L. D. Mueller. Evolution of ammonia and urea tolerance in *Drosophila melanogaster*: resistance and cross-tolerance. *Journal of Insect Physiology* **46**: 763-769.

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64. Rose, M. R. and L. D. Mueller. 2000. Ageing and Immortallty. *Philosophical Transactions of the Royal Society* **355**: 1657-1662.

65. Mueller, L. D., M. D. Drapeau, and M. R. Rose. 2000. Letter to the editor. *Experimental Gerontology* **35**: 1089-1091.

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68. Rose, M. R., M. D. Drapeau, P. G. Yazdi, K. H. Shah, D. B. Moise, R. R. Thakar, C. L. Rauser, and L. D. Mueller. 2002. The evolution of late-life mortality in *Drosophila melanogaster*. *Evolution* **56**: 1982-1991.

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adaptive evolution. *Journal of Genetics* **82**: 147-162.

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75. Rauser, C.L., L.D. Mueller, and M.R. Rose. 2004. Dietary Restriction in *Drosophila*. *Science* (Letters) **303**: 1610-1611.

76. Mueller, L.D. and M.R. Rose. 2004. Aging, development, and crowding. In: *Methuselah Flies*, M.R. Rose, H.B. Passananti, and M. Matos (Eds), pgs 355-358, World Scientific, Singapore.

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78. Mueller, L.D., C.L. Rauser, and M.R. Rose. 2005 Population dynamics, life history and demography: lessons from *Drosophila*. Pg. 77-99, In *Advances in Ecological Research: Population Dynamics and Laboratory Ecology*, **37**. Academic Press

79. Mueller, L.D., D.G. Folk, N. Nguyen, P. Nguyen, P. Lam, M.R. Rose, and T. Bradley. 2005. Evolution of larval foraging behaviour in *Drosophila* and its

effects on growth and metabolic rate. *Physiological Entomology* **30**: 262-269.

80. Rose, M. R., H.B. Passananti, A.K. Chippindale, J.P. Phelan, M. Matos, H. Teotonio, and L.D. Mueller. (in press). The Effects of Evolution are Local: Evidence from Experimental Evolution in Drosophila. *Integrative & Comparative Biology*

81. Rauser, C. L., J. S. Hong, M. B. Cung, K. M. Pham, L. D. Mueller, and M. R. Rose. 2005. Testing whether male age or high nutrition causes the cessation of reproductive aging in female *Drosophila melanogaster* populations. *Journal of Rejuvenation Research* **8**: 86-95.

82. Rauser, C.L., J. J. Tierney, S. M. Gunion, G. M. Covarrubias, L. D. Mueller, and M. R. Rose. 2006, Evolution of Late-Life Fecundity in *Drosophila melanogaster*. *Journal of Evolutionary Biology* **19**: 289-301.

83. Jafari, M., A.D. Long, L.D. Mueller and M.R. Rose. (in press). The pharmacology of aging in Drosophila. *Current Drug Targets*.

84. Rose, M.R., C.L. Rauser, and L.D. Mueller. 2005. Late life: a new frontier for physiology. *Physiological and Biochemical Zoology* **78**: 869-878.

85. Rauser, C.L., L.D. Mueller, and M.R. Rose. (in press). The evolution of late life. *Aging Research Reviews.*

86. Rauser, C.L., Y. Abdel-Aal, J.A. Shieh, C.W. Suen, L.D. Mueller, and M.R. Rose. 2005 Lifelong heterogeneity in fecundity is insufficient to explain late-life fecundity plateaus in *Drosophila melanogaster. Experimental Gerontology* **40**: 660-670.

87. Rauser, C.L., L.D. Mueller, and M.R. Rose. (submitted). The relationship between fecundity and mortality at late ages in *Drosophila melanogaster. Experimental Gerontology.*

88. Borash, D. J., M. R. Rose, and L. D. Mueller (submitted). Evidence for mutation accumulation in *Drosophila melanogaster.*

Summary of Teaching Experience

Classes taught at Washington State University (1983-1988)

A. EVOLUTION. Level: Junior, senior, first year graduate students. Format: lecture. Text: readings from Gould's Ever Since Darwin and *The Panda's Thumb* and selected readings from the primary literature.

B.GENERAL GENETICS. Level: junior, senior, first year graduate students. Format: lecture and discussion sections with teaching assistants. Text: F. J. Ayala and J. A. Kiger *Modern Genetics.*

C. POPULATION AND QUANTITATIVE GENETICS. Level: graduate students. Format: lecture. Text: P. Hedrick's *Genetics of Populations* and readings from the primary literature.

D. THEORETICAL ECOLOGY. Level: graduate students. Format: lecture and discussions of the primary literature. Text: J. Roughgarden's *Theory of Evolutionary Ecology and Population Genetics* and readings from the primary literature.

E. TOPICS IN SOCIOBIOLOGY. Level: graduate students. Format: lecture, discussions and student presentations. Text: L. L. Cavalli-Sforza and M. W. Feldman's *Cultural Transmission and Evolution* and C. J. Lumsden and E.O. Wilson's Genes, *Mind and Culture*, and readings from the primary literature.

Classes taught at the University of California, Irvine (1989-2005)

1. ECOLOGY. Level: sophomore, junior. Format: lecture. Text: Begon, Harper and Townsend's *Ecology*.

2. QUANTITATIVE METHODS. Level: graduate. Format: lecture, discussion. Text: Sokal and Rolf's *Biometry*.

3. BIOLOGICAL RESEARCH. Level: sophomore-senior. Format: students conduct research in my laboratory either in groups or individually and attend weekly laboratory meetings in which the basic scientific ideas under study are discussed.

4. EVOLUTION. Level: junior, senior. Format: lecture, homework problems. Text: D. Futuyma, *Evolutionary Biology* and Freeman and Herron's, *Evolutionary Analysis*.

5. EVOLUTION LABORATORY. Level: junior, seniors. Format: lectures, computer laboratories and experiments with *Drosophila* to illustrate principles like random genetic drift, age-specific selection and sexual selection.

6. THEORETICAL ECOLOGY. Level: graduate. Format: lecture. Text: readings from J. Roughgarden, *Theory of Population Genetics and Evolutionary Ecology: An Introduction*, B. Charlesworth, *Evolution in Age-Structured Populations* and the primary literature.

7. FORENSIC GENETICS. Level: freshman seminar. Format: lecture and discussion. No text, readings from various sources.

GRADUATE STUDENTS: Amitabh Joshi (Ph. D.) August 1987 to December 1988, Daniel Borash (Ph. D.) September 1993 to June 1999, Mark Drapeau (Ph. D.), 1997-98.

POSTDOCTORAL ASSOCIATES: Fernando González, October 1987 to December 1988, Amitabh Joshi, January 1994-January 1996.

VISITING FACULTY: Mauro Santos, Universitat Autonoma de Barcelona, February 1996-August 1996.

UNDERGRADUATES COMPLETING EXCELLENCE IN RESEARCH and/or RECEIVING AWARDS FOR RESEARCH

1991: Phuc Huynh[§+], Leha Hoang.
1992: Patrick Lam[+], Khanh Nguyen.
1993: Tri Nguyen.
1994: Nira Bounlutay, Robinson B. Castillo[*], Michael H. Do, Christopher D. Knight, Joanne Yashiro[‡].
1995: Wendy A. Oshiro[+‡], Cat Dang[+], Wan-Pin Wu[+].
1996: Giang Ho, Hanh Tran Pham[+].
1997: Anastasia Tran.
2000: Kim-Anh Thi Dinh.
2001: Phi Lam[†], Phuong Nguyen[‡†], Tina Do.
2002: Donna Sir[†§], Nahida Sidey[‡], Ngoc Nguyen[†].
2003: Ngoc Nguyen

(*won the Joseph H. Stephen Award for Outstanding Research in Ecology and Conservation. + award the UC Irvine

President's Fellowship for Undergraduate Research. † Undergraduate Research Opportunities Fellow. ‡ ADRIANA Prize winner for outstanding research with *Drosophila*. § winner of the Gerrard award. $ Summer Undergraduate Research Program Fellow.)

EXHIBIT 197

UNIVERSITY OF CALIFORNIA, IRVINE

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28 February 2006

Mr. Paul Turner
Law Offices of the Federal Public Defender
411 E. Bonneville Ave., Suite 250
Las Vegas, Nevada 89101

RE: Brown v. Farwell

Dear Mr. Turner:

Below I have summarized my opinions about the case material you sent me for review. I have reviewed the preliminary hearing and trial transcripts of Renee Romero, the Washoe County Sheriff's reports of 11 and 14 February, 6 June, and 15 September 1994 as well as their lab notes, the FSA FAX sheet dated 26 September 1994, the FSA report of 31 May 1995 and the curriculum vitae of Renee Romero.

On page 343 of the trial transcript Ms. Romero states that there is a 25% chance of two brothers sharing both alleles at a single locus in common. This conclusion is only correct if both parents are heterozygotes and share at most one allele in common. For other possible parental pairs the probability of two sibs matching could be 50% or 100%. Thus, in this portion of Ms. Romero's testimony she has chosen a special case which suggests that sibs have the lowest chance of matching that is biologically possible.

On page 344 Ms. Romero utilizes the assumption that two siblings have a 25% chance of matching at a single locus to estimate that the chances of two siblings matching at five of the loci used in this case would be 1 in 6500. Even if we assume that 25% is the proper number to use in this calculation the chance of two brothers matching is $(0.25)^5$ = 1 in 1024 not 1 in 6500. As before the error made here by Ms. Romero tends to suggest that the chance of two brothers matching is actually much less than it really is.

I have been told that defendant Brown may in fact have 2 brothers that were living in the near vicinity of the crime and two additional brothers that lived a greater distance away. With these additional facts we can address the more relevant question about siblings which is: what is the chance that any one of the two (four) brothers would match the evidence profile? Even if we use the least likely chance of two brothers matching at one locus, 25%, the chance that one or more brothers would match the evidence is 1 in 512. With four brothers this total goes up to 1 in 256.

The calculations in the preceding two paragraphs used the smallest probability that two sibs will have

matching profiles. As mentioned before this probability could be as high as 100%. The second National Research council report on DNA typing gave a formula for computing the chance of matching profiles when the profiles of the parents are unknown. Using this formula and the FBI Caucasian database the chance of a single sib matching defendant Brown's profile is 1 in 263. The chance that among two brothers one or more would match is 1 in 132 and the chance that among four brothers one or more would match is 1 in 66.

In the course of questioning Ms. Romero about the statistical meaning of the DNA match Prosecutor Smith says (pg. 338) "..the likelihood that it is not Troy Brown would be 0.000033?" The accepted meaning of these statistics is that they represent the chance that a single person chosen at random from the suspect population would match the evidence. The phrase above suggests that the probability is that chance of anyone other than the defendant matching the evidence sample. This is not correct since in the population at large there are very many people not just one and the chance of finding a match to any one of these people is much greater (more likely) than the chance of finding a match to just a single person. This erroneous phraseology is in fact so common it has been given a special name, the prosecutor's fallacy.

The report of FSA has a profile for the vaginal swab, sperm fraction that clearly has DNA from more than one person. Since one of the contributors to this mixture is likely to be the victim, FSA has used information about the victims profile and the intensity of the color dots on the test kits to infer the profile or genotype of the second contributor. The ability of analysts to accurately decompose mixtures like this is

uncertain. At the very least there is no estimate of how likely it is that this inferred profile is wrong.

Sincerely,

/s/
Laurence D. Mueller

JA 1585

EXHIBIT 198

AFFIDAVIT OF ED HEDDY

STATE OF NEVADA)

) :ss

COUNTY OF CLARK)

I, Ed Heddy, being first duly sworn, deposes and says:

That I am an investigator in the office of the Federal Public Defender, District of Nevada and have been so employed since August of 1995. I am currently assigned to the non-death habeas unit investigating federal habeas petitions. From July of 1987 until August of 1995 I was employed as an investigator with the Nevada State Public Defender's Office, Carson City, Nevada. Prior to that I was a fully commissioned Sergeant of the Carson City Sheriff's Department, beginning December of 1973 and continuing until July of 1987. During this time I was assigned to a variety of investigative tasks including but not limited to Sexual Assaults and Child abuse cases. As a defense investigator I am assigned to reinvestigate the case and give an opinion as to what should have been done as a defense investigator to assist the defendant's attorney in preparation of a vigorous defense.

That I have been assigned to assist Paul Turner, AFPD, in the preparation of the case entitled Troy Brown, CV-N-03-0712 HDM(VPC).

That I have determined that Troy Brown had four brothers, two of whom lived in Carlin, Nevada at the time of the alleged crime on January 29, 1994, and two other brothers living in Loa, Utah.

That I have interviewed the two brothers, Trent and Travis Brown, and confirmed that they were living in Carlin, Nevada, on January 28, 1994.

That Travis Brown's birthday is September 29, 1972, and Trent Brown's birthday is April 14, 1970.

That I spoke with Ms. Stella Brown, mother of the Brown brothers. Ms. Brown gave me the names of the two other brothers, Trace and Lance Brown. That Trace 's birthday is March 22, 1977, and Lance's birthday is July 3, 1980 and that they were both residing in Loa, Utah with Ms. Brown on January 28th and 29th, 1994.

DATED this 1st day of March, 2006

/s/
Ed Heddy
Investigator

SUBSCRIBED and SWORN to before me this 1st day of March, 2006

/s/ Liz Bates
NOTARY PUBLIC in and for said
County and State

FRANNY A. FORSMAN
Federal Public Defender
Nevada State Bar No. 00014
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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CV-N-03-0712-PMP(VPC)

[Filed May 30, 2006]

TROY BROWN,	)
	)
Petitioner,	)
	)
vs.	)
	)
CRAIG FARWELL, et al.,	)
	)
Respondents.	)
	)

REPLY TO OPPOSITION TO MOTION TO EXPAND THE RECORD AND MOTION TO STRIKE

Petitioner, Troy Brown (hereinafter "Brown"), through his attorney Paul G. Turner, Assistant Federal Public Defender, hereby replies to

Respondents' Opposition to Motion To Expand Record And Motion to Strike (Clerk's Record (CR) 51). This reply is made and based upon the attached memorandum of points and authorities, the exhibits filed herein and all pleadings on file.

Dated this 30th day of May, 2006.

LAW OFFICES OF THE
FEDERAL PUBLIC DEFENDER

/s/ Paul G. Turner
PAUL G. TURNER
Assistant Federal Public Defender

POINTS AND AUTHORITIES

I.

Introduction

On December 12, 2003, Brown mailed a *pro se* petition for writ of habeas corpus to this Court pursuant to 28 U.S.C. § 2254. (CR 10.) Following appointment of the Office of the Federal Public Defender to represent petitioner (CR 6), the First Amended Petition was filed (CR 19) wherein Brown asserted five grounds for relief. Respondents moved to dismiss Ground One individually as unexhausted and the petition generally as mixed under Rose v. Lundy, 455 U.S. 509 (1982) (CR 30), which was subsequently denied. (CR 33.) On October 19, 2005, respondents filed their Answer (CR 17) to the amended petition. Brown filed a reply and a contemporaneous Motion to Expand the Record (CR 47), seeking leave to expand

the record with three exhibits pertaining to DNA evidence presented at his trial.[1] Respondents oppose expansion of the record and simultaneously move to strike, in part, Brown's reply to the extent that he refers to the additional exhibits. Brown now replies to their opposition.

II.

Argument

A. Expansion Of The Record To Include Exhibits 196-98 Is Not Barred By 28 U.S.C. 2254(e)(2).

In Cooper-Smith v. Palmateer, 397 F.3d 1236, 1241 (9th Cir. 2005), the United States Court of Appeals for the Ninth Circuit held that to expand the record under Rule 7 of the "Rules Governing Section 2254 Cases In The United States District Court" (hereinafter the "Habeas Rules") a petitioner must satisfy 28 U.S.C. § 2254(e)(2), which respondents assert Brown cannot do.

In Williams v. Taylor, 529 U.S. 420 (2000), the Supreme Court identified two tests under 28 U.S.C. § 2254(e)(2).[2] Under the first test, as set forth in the

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[1] Exhibits 1-195 (Vol. I-V) (CR 20-24) were filed with the First Amended Petition. Proposed Exhibits 196-98 were filed with the Motion To Expand The Record (CR 48) filed contemporaneously with petitioner's Reply (CR 47).

[2] If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that-

opening clause, the statute applies only "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings . . . ." The second § 2254(e)(2) test precludes expanding the record unless (1) "the claim relies on a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court that was previously unavailable" or (2) the petitioner is pursuing "a factual predicate that could not have been previously discovered through the exercise of due diligence . . . ." See § 2254(e)(2)(A)(i) and (ii). In mistakenly relying on this latter test respondents ignore the fact that Brown did not fail to develop the facts under section 2254(e)(2)'s opening clause and is, therefore, excused from showing compliance with the remainder of the subsection's requirements. See Williams, supra, at 437.

In his Response In Opposition To Motion To Dismiss Brown set forth in detail the previous presentations of his DNA claims to the Nevada courts, including references to various random match probability (RMP) statistics such as the 99.99967% chance it was Brown's DNA (0.000033% chance it was not) addressed in the motion to expand the record.

(A) the claim relies on-

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

Section 2254(e)(2)(emphasis added)

Compare CR 31, pp. 6-7, with proposed Exhibit 197, p. 2. Brown also argued in state court, as he does now, that

> [t]he impact of brothers in the suspect population is an important consideration that bears on the Random Match Probabilities (RMP). 'But the probability that the suspect and his biological brother will share a set of alleles on each of the three probe sites is approximately (1/4)3 = 1/64.' See - Jonathan J. Koehler, DNA Matches and Statistics: Important Questions, Surprising Answers. 76 Judicature 222 (1993). In the present case, that factor is critically important, not only because the victim constantly referred to Trent' instead of 'Troy', but also because Renee Romero, the State's DNA 'expert' quoted the odds of two brothers sharing the same alleles as **1 in 6500!**

Ex. 67, pp. 11-12 and n.1 (emphasis in original). This Court previously found that Brown's state court "discussion of the DNA evidence was so in-depth and expansive that it cannot be said that the Nevada Supreme Court did not have an opportunity to address the claim." CR 33, p. 7, ll. 16-19. Therefore, since Brown has not failed to develop the factual basis of his DNA claims, Grounds One and Two of the First Amended Petition, in state court, the second § 2254(e)(2) test is inapplicable and the statute is no bar to expanding the record with proposed Exhibits 196-98. See Morris v. Dretke, 413 F.3d 484, 498 (5th cir. 2005)(petitioner "having met the § 2254(b)(1)(A) exhaustion requirement on the IQ evidence presented for the first time on federal habeas, need not additionally overcome the obstacles of § 2254(e)(2)").

B. The Facts Set Forth In Proposed Exhibits 196-98 Have Been Exhausted.

The statistical analysis set forth in proposed Exhibits 196-98 Brown now seeks to admit merely supplements and clarifies the DNA claims previously raised in the state-court proceedings. In Vasquez v. Hillary, 474 U.S. 254 (1986), the Supreme Court analyzed the issue of whether expansion of the state court record to include statistical figures related to an equal protection claim altered the petitioner's claim. In his state court proceedings Vasquez had raised an equal protection challenge to the discriminatory selection of the grand jury. Seeing a need to "supplement and clarify" the state court record, the district court ordered the state to provide statistical figures regarding juror eligibility at the time of Vasquez' trial and directed the parties to present their views regarding the application of statistical probability analysis to the facts of the case. The Supreme Court rejected the argument that the district court's order had drastically altered Vasquez' claim, thereby rendering it unsuitable for review without prior consideration before the state courts, explaining that the statistical estimates added "nothing new to the case" that was not already intrinsic to the consideration of the grand jury discrimination claim. Id. at 259. The Court further noted that the district court's request for further information was "evidently motivated by a responsible concern that [the court] provide the meaningful federal review of constitutional claims that the writ of habeas corpus has contemplated throughout its history." Id. at 259-60; accord, Landrigan v. Schriro, 441 F.3d 638, 648 (9th Cir. 2006) ("additional information offered by Landrigan in support of the federal habeas claim does

not 'fundamentally alter' the ineffective assistance claim presented to the state court [but] simply provides additional evidentiary support for the claim . . .").

Proposed Exhibits 196-98 likewise merely supplement Brown's claims that he was convicted by the state's presentation of unreliable and untrustworthy DNA evidence to the jury. As set forth in Dr. Mueller's report (Ex. 197), Renee Romero's 1/6500 ratio was incorrect and grossly understated the probability of a random match of two siblings at five loci. The correct figure is 1/1024 (Ex. 197, p. 1), more than six times the likelihood of a random match than the 1/6500 figure provided to the jury by Romero. Furthermore, Romero's calculation for two brothers was inaccurate because she never considered the fact that a third brother was in Carlin, Nevada, the night in question and that Brown had two other brothers in Utah. Since it was at least 6 to 12 times more likely that the DNA matched one of the two brothers living in Carlin the evening in question than the 1/6500 probability opined by Ms. Romero, materially inaccurate evidence was provided to the jury. Dr. Mueller's report merely supports and clarifies Brown's claim that the DNA evidence, which included the mathematical calculations and testimony presented at trial through Romero, was unreliable.[3]

Accordingly, respondents' argument that if Brown's motion to expand the record is granted he must

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[3] The same is true for the scientific commentary cited in the reply and which respondents say should be struck. See CR 51, p. 10 and n.2.

further exhaust his DNA claims in state court should be rejected since the proposed exhibits do not fundamentally alter the legal claim already considered by the state courts in this case. Since the requested expansion of the record will not alter Brown's claims, they are suitable for habeas review on the merits which may include an evidentiary hearing as previously requested by Brown.

C. Conclusion.

Proposed Exhibits 196-98 satisfy Habeas Rule 7 since "relat[ed] to" Grounds One and Two of Brown's petition and are not barred by 28 U.S.C.§ 2254(e)(2). Therefore, Brown's request for leave to expand the record should be granted and respondents' opposition and motion to strike portions of Brown's reply denied. Since Brown's DNA claims have been exhausted, they should now be considered on their merits along with his remaining claims which review may include an evidentiary hearing as previously requested by Brown.

Dated this 30th day of May, 2006.

LAW OFFICES OF THE
FEDERAL PUBLIC DEFENDER

/s/ Paul G. Turner
PAUL G. TURNER
Assistant Federal Public Defender

[certificate of service omitted in printing]

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Case No. 3:03-cv-0712-PMP-VPC

[Filed July 31, 2006]

TROY BROWN,

Petitioner,

vs.

CRAIG FARWELL, *et al.*,

Respondents.

ORDER

This action is a petition for a writ of habeas corpus, pursuant to 28 U.S.C. §2254, by Troy Brown, a prisoner at the Lovelock Correctional Center. The matter is before the court on petitioner's motion to expand the record (docket #48). Respondents have opposed the motion and petitioner has replied.

In his amended petition, Brown claims that his conviction was based upon insufficient evidence, arguing that the DNA evidence offered at his trial was fatally flawed. In support of his reply to the answer to his amended petition, he seeks to supplement the record with the curriculum vitea and report of Laurence Dochez Mueller, Ph.D., a chemist, university professor, and DNA expert (proposed Exhibits 196 and 197), and the affidavit of Ed Heddy, a private

investigator, retained by the Federal Public Defender in this action (proposed Exhibit 198). Petitioner bases his motion to supplement on Rule 7 of the Rules Governing 2254 Cases and the fact that the exhibits are pertinent to the issues raised in his First Amended Petition. *See* Motion to Expand Record (docket #48).

Respondents oppose the motion, contending that petition must, but has not, complied with the conditions imposed by 28 U.S.C. § 2254(e)(2) and that the new facts presented in the supplemental exhibits would render his claims unexhausted.

In his reply, petitioner argues that he did not fail to develop the facts in state court, thereby making the statutes conditions inapplicable to him. Reply (docket #54). He contends that he provided the substance of this information to the state court in his appellant's reply brief on direct appeal, referring the court to Exhibit 67, pp. 11-12. He contends that the statistical analysis provided in the new exhibits "merely supplements and clarifies the DNA claims presented in his state court proceedings. *Id.*, p. 4.

The Antiterrorist and Effective Death Penalty Act (AEDPA) provides that:

> [i]f an applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –
>
> (A) the claim relies on –
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review

> by the Supreme Court, that was previously unavailable; or
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2).

Moreover, these restrictions apply to motions to supplement the record even though an evidentiary hearing is not requested or conducted. *Cooper-Smith v. Palmateer,* 397 F.3d 1236, 1241 (9th Cir. 2005). This restriction, on its face, only applies to those petitioner's who fail to develop the facts in state court. § 2254(e)(2); *Landrigan v. Schriro,* 441 F.3d 638, 642-643 (9th Cir.2006). If a petition attempts through diligent efforts to develop the facts, or develops the facts and seeks merely to supplement the information previously developed, the conditions imposed by the AEDPA do not apply and do not render the claim unexhausted. *See, Vasquez v. Hillery,* 474 U.S. 254, 260 (1986).

In state court, petitioner presented a comprehensive discussion of the DNA evidence's deficiencies, particularly related to the probability testimony and how the presence of Brown's two brothers in the area impacted the erroneous DNA probability analysis given at trial. The proposed

supplemental exhibits shall be admitted into the record. The matter shall be submitted to the court for consideration of the merits of the petition.

IT IS THEREFORE ORDERED that petitioner's Motion to Expand the Record (docket #48) is **GRANTED**.

IT IS FURTHER ORDERED that the Clerk shall detach the proposed exhibits from the motion and they shall be filed and docketed into the record.

Dated this 31st day of July, 2006.

/s/
PHILIP M. PRO
Chief United States District Judge

GEORGE J. CHANOS
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Attorney for Respondents

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Case No. 3:03-cv-0712-PMP-VPC

[Filed August 21, 2006]

TROY BROWN,	)
	)
Petitioner,	)
	)
vs.	)
	)
CRAIG FARWELL, *et al.*,	)
	)
Respondents.	)
	)

MOTION FOR RECONSIDERATION OR LEAVE TO FILE SUPPLEMENTAL ANSWER

Respondents, by and through counsel GEORGE J. CHANOS, Attorney General of the State of Nevada, and ERIK A. LEVIN, Deputy Attorney General, move

this court to reconsider its order granting TROY BROWN's (Brown) motion to expand the record or, alternatively, move this court for leave to file a supplemental answer to Brown's petition for writ of habeas corpus. This motion is made and based on the attached points and, as well as all other documents, pleadings and exhibits on file in this case.

I.

PROCEDURAL HISTORY

The complete procedural history has been set forth in Respondents' answer (Docket #42) and opposition to expand the record (Docket #51) and is not repeated herein.

On October 19, 2005, Respondents filed an answer to Brown's petition for writ of habeas corpus. Docket #42.

On March 1, 2006, Brown replied. Docket #47.

On March 1, 2006, Brown filed a motion to expand the record. Docket #48.

On March 30, 2006, Respondents opposed Brown's motion to expand the record. Docket #51.

On May 30, 2006, Brown replied to Respondents' opposition to motion to expand the record. Docket #54.

On July 31, 2006, the court granted Brown's motion to expand the record. Docket #55.

II.

DENIAL OF FACTUAL ALLEGATIONS

Respondents deny each and every factual allegation presented in Brown's motion to expand record and reply save and except those expressly found to exist by a Nevada court of competent jurisdiction.

III.

ARGUMENT

Brown moved to expand the record to present evidence (1) that he had four brothers and that two of them were living in Carlin, Nevada, at the same time Brown committed his crimes there, and (2) that the DNA calculations presented by the State's witness at trial, Renee Romero, did not correctly take into account the presence of Troy Brown's brothers.

None of the evidence presented in Brown's motion to expand the record has any relevance to the claims presented in his petition for writ of habeas corpus. In Ground 1, Brown claims that there was insufficient evidence to sustain his conviction. In reviewing a sufficiency of the evidence claim, "the relevant question is whether, *after viewing the evidence* in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318 (1979) (emphasis added).

Consideration of the sufficiency of the evidence under *Jackson* is limited to the record evidence produced during the state trial. *Jackson* at 318. *See*

also Herrera v. Collins, 506 U.S. 390, 401 (1993) (sufficiency of the evidence under *Jackson* is limited to the evidence adduced during the state trial). "*Jackson* does not extend to nonrecord evidence, including newly discovered evidence. Finally, the Jackson inquiry does not focus on whether the trier of fact made the correct guilt or innocence determination, but rather whether it made a rational decision to convict or acquit." *Herrera* at 402.

Brown now attempts to introduce new evidence to contradict the state's expert. Under *Jackson*, this evidence may not be considered in an analysis of the sufficiency of the evidence. Thus, as a matter of law, the evidence can have no relevance to Brown's insufficiency claim because Brown's exhibits were not evidence the jury had before it for consideration. Brown cannot now retry his case before the federal courts. It was the responsibility of the jury to "draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution." *Id.* at 319. In other words, "under *Jackson*, the assessment of the credibility of witnesses is generally beyond the scope of review." *Schlup v. Delo*, 513 U.S. 298, 330 (1995). Brown may not now attack the credibility of a witness to support a claim of insufficiency of the evidence. "Federal courts are not forums in which to relitigate state trials." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983).

It must further be stated that a claim of "'actual innocence' is not itself a constitutional claim, but

instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits. *Herrera* at 404. Because Brown's constitutional claims are now being addressed on their merits, any claims of actual innocence have no further bearing on these proceedings." *Id.*

In Ground 2, Brown alleges his counsel was ineffective for failing to enforce a stipulated protocol for testing DNA evidence and for failing to object to the admission of that evidence. But nothing in this claim or the challenged protocol addressed the interpretation of DNA testing, the calculations used, or the means of presenting results to the jury. In addressing this claim, the Nevada Supreme Court found and held:

> [Brown] argues that since [his attorney] failed to require [Brown's DNA expert] to be present during the DNA testing, he failed to comply with stipulated DNA procedure, and was thereby ineffective. Although the State and the defense stipulated to certain DNA procedures, the stipulation did not mandate that [Brown's DNA expert] be present during the DNA testing, but only required that she be present at all stages that she deemed critical. [Brown's attorney] testified that [Brown's DNA expert] informed him that she did not need to be present during the DNA testing, since she would review the test results. Because [Brown's attorney] was in full compliance with the stipulation in deferring to [Brown's DNA expert's] determination that she did not need to be present during the DNA testing, we conclude that Brown has failed to show that [his

> attorney] was ineffective for failing to require her presence.

Exhibit 172 at 4. Thus, the new exhibits proposed by Brown have no relevance to his claims in Ground 2.

In Ground 3, Brown alleges his counsel was ineffective for failing to present evidence that the victim's stepfather was an alcoholic prone to attack women when drunk, and who had been charged with felony sexual assault in Utah and was involved in a similar matter in Carlin, Nevada, prior to the attack on his stepdaughter. In Ground 4, Brown complains that his counsel was ineffective for failing to move for a mistrial because Brown was exposed to jurors while wearing shackles and jail garb. In Ground 5, Brown claims that trial counsel was ineffective for not making a motion to dismiss because the state lost evidence from teeth scrapings that would have excluded Brown as the assailant. Without question, the means of determining probabilities for DNA matching purposes has no relevance to Brown's claim in Grounds 3, 4, or 5.

IV.

CONCLUSION

Brown wants this court to consider his new "evidence" regarding his claim of insufficiency of the evidence, a claim that must be decided based upon the evidence introduced at trial. The United States Supreme Court has ruled that sufficiency of the evidence claims are to be decided in light of the evidence that *was* presented to the jury, not the evidence that *might* have been presented to the jury.

Jackson, supra. This court cannot consider Brown's "evidence" because it has no relevance to the claim Brown has presented. Brown is trying to make this proceeding a retrial of his guilt. Federal habeas corpus proceedings are not retrials. *Hastings v. U.S.*, 184 F.2d 939 (9th Cir. 1950).

Based upon the above, Respondents object to consideration of any evidence submitted by Brown that was not presented to the jury. Respondents request this court reconsider its order granting Brown's motion to expand the record and deny Brown's request. In the alternative, Respondents move the court for leave to have the instant pleading be treated as a supplemental answer to Brown's petition. Brown filed his request to expand the record contemporaneously with his reply to Respondents' answer. Respondents have had no opportunity, other than herein, to address the merits of Brown's underlying claims in relation to Brown's newly proposed exhibits.

RESPECTFULLY SUBMITTED this 21st day of August, 2006.

GEORGE J. CHANOS
Attorney General

By: /s/ Erik A. Levin
ERIK A. LEVIN
Deputy Attorney General

[certificate of service omitted in printing]

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CV-N-03-0712-PMP(VPC)

[Filed September 22, 2006]

TROY BROWN,	)
	)
Petitioner,	)
	)
vs.	)
	)
CRAIG FARWELL, et al.,	)
	)
Respondents.	)
	)

RESPONSE IN OPPOSITION TO MOTION FOR RECONSIDERATION OR LEAVE TO FILE SUPPLEMENTAL ANSWER

Petitioner, Troy Brown (hereinafter "Brown"), through his attorney Paul G. Turner, Assistant Federal Public Defender, hereby responds in

opposition to respondents' Motion For Reconsideration Or Leave To File Supplemental Answer (Clerk's Record (CR) 61). This response is made and based upon the attached memorandum of points and authorities, the exhibits filed herein and all pleadings on file.

Dated this 22nd day of September, 2006.

LAW OFFICES OF THE
FEDERAL PUBLIC DEFENDER

/S/ Paul G. Turner
PAUL G. TURNER
Assistant Federal Public Defender

POINTS AND AUTHORITIES

I.

INTRODUCTION

On December 12, 2003, Brown mailed a *pro se* petition for writ of habeas corpus to this Court pursuant to 28 U.S.C. § 2254. (CR 10.) Following appointment of the Office of the Federal Public Defender to represent petitioner (CR 6), the First Amended Petition was filed (CR 19) wherein Brown asserted five grounds for relief. Respondents moved to dismiss Ground One individually as unexhausted and the petition generally as mixed under Rose v. Lundy, 455 U.S. 509 (1982) (CR 30), which was subsequently denied. (CR 33.) On October 19, 2005, respondents filed their Answer (CR 17) to the amended petition. Brown filed a reply and a contemporaneous Motion to

Expand the Record (CR 47), seeking leave to expand the record with three exhibits pertaining to DNA evidence presented at his trial.[1] Respondents opposed expansion of the record and simultaneously moved to strike, in part, Brown's reply to the extent that he referred to the additional exhibits. CR 51. Following the filing of Brown's reply to such pleading (CR 54), this Court granted Brown's motion to expand the record, ordered Exhibits 196-98 filed and the case submitted for consideration on the merits. CR 55. Respondents thereafter filed a "Motion For Reconsideration Or Leave To File Supplemental Answer" (CR 61) to which Brown now responds.

II.

ARGUMENT

A. Expansion Of The Record To Include Exhibits 196-98 Was Appropriate As To Ground One.

This Court has granted Brown's motion to expand the record with Exhibits 196-98. See CR 55, p. 3, ll. 8-9. Respondents seek reconsideration of that order on the basis that such evidence should not be considered because irrelevant to Brown's post-conviction claims and outside the breadth of record review contemplated under Jackson v. Virginia, 443 U.S. 307 (1979). CR 61, p. 2, ll. 17-26. With respect to the relevance argument this Court has previously recognized that "[i]n state

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[1] Exhibits 1-195 (Vol. I-V) (CR 20-24) were filed with the First Amended Petition. Exhibits 196-98 (CR 56-58) were filed with the Motion To Expand The Record (CR 48) filed contemporaneously with petitioner's Reply (CR 47), which motion was granted by the Court (CR 55).

court, petitioner presented a comprehensive discussion of the DNA evidence's deficiencies, particularly related to the probability testimony and how the presence of Brown's two brothers in the area impacted the erroneous DNA probability analysis given at trial." CR 55, p. 3, ll. 3-5. Since the additional exhibits address the same subject matter, they are relevant to Brown's DNA claims.

With respect to the scope of review under Jackson v. Virginia, if a petitioner can show that

> there is no factual basis for [his] conviction ... it follows inexorably that [he] has been denied due process of law. *Thompson v. Louisville*, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960); *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979.

Goldyn v. Hayes, 444 F.3d 1062, 1071 (9th Cir. 2006), quoting from Dretke v. Haley, 541 U.S. 386, 397 (2004). Since, as set forth below, the additional exhibits (196-98) demonstrate that there was no factual basis for Brown's conviction, under the clearly established federal law determined by the Supreme Court in Thompson v. Louisville and Jackson v. Virginia, supra, they maybe considered in support of Brown's Ground One sufficiency of the evidence claim.

1. **No Factual Basis For Expert's "Source Probability" Opinion.**

Having obtained an expert opinion that there was a 1 in 3,000,000 ratio for finding a random match between the perpetrator's DNA and Brown's, the prosecution then solicited its expert's reluctant

calculation of a 99.99967 percent "likelihood" that Brown was the source of the DNA found on the victim's panties. See Ex. 31, pp. 335-38, 346; Ex. 184. The probability that a particular person contributed a DNA sample "can only be determined by considering all of the evidence in the case." See United States v. Shea, 957 F. Supp. 331, 345 (D.N.H. 1997). Absent the requisite factual basis for the expert opinion, such "source probability" testimony constitutes "incorrect reasoning[,]" United States v. Morrow, 374 F.Supp.2d 51, (D.D.C. 2005), which has been repeatedly criticized as a "prosecutor's fallacy." See, e.g., United States v. Chischilly, 30 F.3d 1144, 1157 (9th Cir. 1994); Reply (CR 47), pp. 5-6. In its Answer In Opposition to Brown's state post-conviction petition, the state conceded that "[t]here was insufficient evidence to convict the Defendant unless the DNA evidence established guilt . . . ." Ex. 161, p. 13, ll. 22-23. Therefore, absent the requisite additional factual basis, such "source probability" testimony was insufficient to sustain Brown's conviction. Since the additional exhibits (197, p. 2, 1st full ¶) support this proper Jackson v. Virginia analysis, the Court should not reconsider its order to expand the record as to them and should instead deny respondents' motion.

2. No Factual Basis For The Expert's Sibling DNA Match Testimony.

Since Troy Brown had four brothers, two of whom were known to be in Carlin, Nevada, the evening in question in close proximity to the crime scene (Ex. 198), the acknowledged similarity in sibling's DNA was critical to his defense. As set forth below, there was no factual basis for the prosecution expert's sibling DNA match testimony.

(a) No Factual Basis For Expert's Selection Of Brown's Parents' DNA.

Sibling DNA similarities vary with whether the parents were homozygous, i.e. had matching alleles at various loci, or heterozygous, i.e. had different alleles at various loci. See Reply (CR 47), p. 8, ll. 1-12. In using a 25% chance figure to calculate her 1/6500 sibling random match ratio the prosecution expert assumed that "both parents [were] heterozygotes and share[d] at most one allele in common[,]" the most disfavorable of circumstances for a criminal defendant sibling, ignoring that "[f]or other possible parental pairs the probability of two sibs matching could be 50% or 100%." See Ex. 197, p. 1, second ¶. However, there was no record evidence supporting the expert's choice of this "special case which suggests that sibs have the lowest chance of matching that is biologically possible." See id. Absent the requisite factual basis, such expert testimony was insufficient to sustain Brown's conviction. Since the additional exhibits (196-98) support this proper Jackson v. Virginia analysis, the Court should not reconsider its order to expand the record as to them and should instead deny respondents' motion.

(b) No Factual Basis For Assuming Two Brothers In Sibling Calculations.

Brown had four brothers at the time of the incident, two of whom were known to be in Carlin, Nevada, the evening of the crime and two of whom resided in the adjacent state of Utah. Ex. 198. However, the expert's 1/6500 probability ratio for sibling matches was based on two brothers. When all five of the brothers are considered, it was at least six to 12 times more likely

that the DNA matched one of Brown's two brothers in Carlin the evening in question rather than him. Reply (CR 47), p. 9, ll. 1-19; Ex. 197, p. 1, ¶¶ 3 & 4. Here again, there is no factual basis for the expert's calculation disfavoring the defendant. Absent the requisite factual basis, such expert testimony was insufficient to sustain Brown's conviction. Since the additional exhibits (196-98) support this proper Jackson v. Virginia analysis, the Court should not reconsider its order to expand the record as to them and should instead deny respondents' motion.

B. Expansion Of The Record To Include Exhibits 196-98 Was Also Appropriate As To Ground Two.

In Ground Two of the First Amended Petition Brown asserts that trial counsel was ineffective for failing to seek to enforce the stipulated DNA protocol and object to the DNA evidence. CR 19, p. 19-21. Respondents now assert that the additional DNA related exhibits (196-98) "have no relevance to his claims in Ground 2." CR 61, p. 4, ll. 2-3. As part of his Ground Two claim Brown notes the "evidentiary and foundational problems with the collection and testing of the DNA evidence" set forth in Ground One, see CR 19, p. 21, ll. 7-8, as the basis for his claim that counsel was ineffective in failing to object to the DNA evidence. Since, as set forth above, the additional exhibits (196-98) are relevant to the evidentiary problems addressed in Brown's Ground One claim, they are also relevant to Brown's Ground Two claim through this cross-reference and interconnection of the two claims.

III.

CONCLUSION

In reviewing a Jackson v. Virginia insufficiency of the evidence claim, "[a]n expert's testimony as to a theoretical conclusion or inference does not rescue a case that suffers from an underlying insufficiency of evidence to convict beyond a reasonable doubt[.]" Smith v. Mitchell, 437 F.3d 884, 890 (9th Cir. 2006) Since Exhibits 196-98 are relevant to Brown's post-conviction claims and properly demonstrate that there was no factual basis for the prosecution expert's DNA sibling match opinions, the motion to reconsider should be denied.[2] As previously ordered, Brown's claims should now be considered on their merits. Brown requests that an evidentiary hearing be held if the Court should determine that any material fact is in dispute.

Dated this 22nd day of September, 2006.

LAW OFFICES OF THE
FEDERAL PUBLIC DEFENDER

/S/ Paul G. Turner
PAUL G. TURNER
Assistant Federal Public Defender

[certificate of service omitted in printing]

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[2] Brown does not object to respondents' request that their motion (CR 61) be treated as a supplemental answer.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Case No. 3:-03-cv-0712-PMP-VPC

[Filed October 18, 2006]

TROY BROWN,	)
	)
Petitioner,	)
	)
vs.	)
	)
CRAIG FARWELL, *et al.*,	)
	)
Respondents.	)
	)

ORDER

This action is a petition for a writ of habeas corpus, pursuant to 28 U.S.C. §2254, by Troy Brown, a prisoner at the Lovelock Correctional Center. The matter is before the court on respondents' motion to reconsider the court's order to permit expansion of the record to include Exhibits 196-198 or to consider the motion as a supplemental answer. Petitioner has opposed the motion to reconsider and respondents have not replied.[1]

In his amended petition, Brown claims that his conviction was based upon insufficient evidence,

[1] Petitioner does not oppose allowing the brief to supplement the answer.

arguing that the DNA evidence offered at his trial was fatally flawed. The court granted the motion, noting that the substance of this information had been presented to the state court in his appellant's reply brief on direct appeal. *See* Exhibit 67, pp. 11-12. Now, respondents argue that the exhibits should not be included as they are not relevant to the claims raised. Respondents argue that a sufficiency of the evidence claim is analyzed under the rubric of *Jackson v. Virginia,* 443 U.S. 307, 318 (1979), which they contend, limits consideration only to evidence presented at trial.

Respondents' arguments are not persuasive. First, the additional exhibits are, in fact, relevant to both the sufficiency of the evidence claim (Ground 1) and to the claim that counsel was ineffective for failing to object to the DNA evidence at trial (Ground 2(2)).

Second, respondents' analysis is flawed. Petitioner has demonstrated that the State admitted that the DNA evidence was crucial to obtaining the conviction. Thus, if the DNA probability testimony was flawed, then the factual basis to support the conviction is absent and due process has been denied. *See Thompson v. City of Louisville,* 362 U.S. 199 (1960). Also, if the purportedly flawed analysis had not been admitted, because of a timely and supported objection by counsel, then the jury could not have relied upon it in deciding petitioner's guilt.

The motion for reconsideration shall be denied, but the request to consider the motion as a supplemental brief shall be granted.

IT IS THEREFORE ORDERED that petitioner's Motion to for Reconsideration or Leave to File

Supplemental Answer (docket #61) is **DENIED** as to reconsideration and is **GRANTED** as to the supplemental answer.

Dated this 18th day of October, 2006.

/s/
PHILIP M. PRO
Chief United States District Judge

PETITIONER'S BRIEF

No. 08-559

In The
Supreme Court of the United States

E. K. MCDANIEL, WARDEN and THE ATTORNEY GENERAL OF THE STATE OF NEVADA,
Petitioners,

v.

TROY BROWN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. What is the standard of review for a federal habeas court for analyzing a sufficiency-of-the-evidence claim under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)?

2. Does analysis of a sufficiency-of-the-evidence claim pursuant to *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979), under 28 U.S.C. § 2254(d)(1) permit a federal habeas court to expand the record or consider nonrecord evidence to determine the reliability of testimony given at trial?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS INVOLVED 1

STATEMENT OF THE CASE 3

SUMMARY OF THE ARGUMENT 13

ARGUMENT 16

I. The Nevada Supreme Court Decision Rejecting Respondent's Claim Under *Jackson v. Virginia* Was Neither Contrary To Nor An Unreasonable Application Of *Jackson* 16

A. The Nevada Supreme Court's decision was not "contrary to" the rule announced in *Jackson* 19

B. The Nevada Supreme Court's adjudication of Troy's *Jackson* claim was not objectively unreasonable 23

1. Ample evidence supported the Nevada Supreme Court's ruling 23

2. The Court of Appeals erred in its analysis 31

II. In This Case, The District Court Impermissibly Permitted Expansion Of The Record 39

A. The *Jackson* rule, by its terms and nature, looks only to the evidence before the jury . 40

B. Because Troy was not diligent in bringing new evidence to the state courts, Section 2254(e) barred Troy from introducing the new DNA evidence in his federal habeas petition 43

C. Consideration of the Mueller letter renders the *Jackson* claim unexhausted 47

D. The Mueller letter should have raised concerns in the District Court and the Court of Appeals 52

CONCLUSION 59

TABLE OF AUTHORITIES

CASES

Aiken v. Spaulding,
841 F.2d 881 (9th Cir. 1988) 48, 49

Bell v. Cone,
535 U.S. 685 (2002) 18, 38

Berryhill v. Calpone,
168 Fed. Appx. 253 (10th Cir. 2006) (unpublished) 21

Boyko v. Parke,
259 F.3d 781 (7th Cir. 2001) 46

Butcher v. Marquez,
758 F.2d 373 (9th Cir. 1985) 34

Commonwealth v. Blasioli,
685 A.2d 151 (Pa. Super. Ct. 1996) 54

Cooper-Smith v. Palmateer,
397 F.3d 1236 (9th Cir. 2004) 46

Daubert v. Merrell Dow Pharms.,
509 U.S. 579 (1993) 7

Davis v. Kemp,
829 F.2d 1522 (11th Cir. 1987) 21

Demarest v. Price,
130 F.3d 922 (10th Cir. 1997) 48, 49

Dupuy v. Cain,
201 F.3d 582 (5th Cir. 2000) 20

Early v. Packer,
537 U.S. 3 (2002) 12, 22

Estelle v. McGuire,
502 U.S. 62 (1991) 50

Herrera v. Collins,
506 U.S. 390 (1993) 17, 38, 40, 41, 43

Holland v. Jackson,
542 U.S. 649 (2004) (per curiam) 44, 45, 46

House v. Bell,
547 U.S. 518 (2006) 42

Jackson v. Virginia,
443 U.S. 307 (1979) ..... *passim*

Juan H. v. Allen,
408 F.3d 1262 (9th Cir. 2005) 20

Kazalyn v. State,
108 Nev. 67, 825 P.2d 578 (1992) 7, 19, 22

Keeney v. Tamayo-Reyes,
504 U.S. 1 (1991) 44

Koza v. State,
681 P.2d 44 (Nev. 1984) 22

Leonard v. State,
969 P.2d 288 (1999) 22

Lockyer v. Andrade,
538 U.S. 63 (2003) 19

Mark v. Ault,
498 F.3d 775 (8th Cir. 2007) 46

Marshall v. Lonberger,
459 U.S. 422 (1983) 38

McCleskey v. Zant,
499 U.S. 467 (1991) 45

People v. Reeves,
109 Cal.Rptr.2d 728 (Cal. Ct. App. 2001) 53

People v. Richie,
No. B158254, 2005 Westlaw 1340382 (Cal. Ct. App. June 8, 2005) (unpublished) 54

Rose v. Lundy,
455 U.S. 509 (1982) 45, 52

Schlup v. Delo,
513 U.S. 298 (1995) 41, 42

Schriro v. Landrigan,
550 U.S. 465 (2007) 38

State v. Copeland,
922 P.2d 1304 (Wash. 1996) 53

State v. Gore,
21 P.3d 262 (Wash. 2001) 53

State v. Gregory,
147 P.3d 1201 (Wash. 2007) 53

Teague v. Lane,
489 U.S. 288 (1989) 38

United States v. Amato,
495 F.2d 545 (5th Cir. 1974) 20

United States v. Chischilly,
30 F.3d 1144 (9th Cir. 1994) 10, 54

United States v. Goode,
54 M.J. 834 (N-M Ct. App. 2001) 53

United States v. Jorgenson,
451 F.2d 516 (10th Cir. 1971) 20

United States v. Marek,
238 F.3d 310 (5th Cir. 2001) 20

United States v. Scheffer,
523 U.S. 303 (1998) 34

Vasquez v. Hillery,
474 U.S. 254 (1986) 43, 45, 47, 48

Vincent v. Louisiana,
469 U.S. 1166 (1985) 45

Waddington v. Sarausad,
129 S.Ct. 821 (2009) 56

Williams v. Taylor,
529 U.S. 420 (2000) 44

Williams v. Taylor,
529 U.S. 362 (2000) 18, 19, 38

Wilson v. State,
664 P.2d 328 (Nev. 1983) 22

Wise v. Warden,
839 F.2d 1030 (4th Cir. 1988) 48

Woodford v. Visciotti,
537 U.S. 19 (2002) 22

CONSTITUTION

U.S. Const. Amend. V 1
U.S. Const. Amend. XIV 2

STATUTES AND RULES

28 U.S.C. § 1254(1) 1
28 U.S.C. § 2254 52
28 U.S.C. § 2254(b) 52
28 U.S.C. § 2254(b)(1) 2
28 U.S.C. § 2254(c) 48, 52
28 U.S.C. § 2254(d) 2
28 U.S.C. § 2254(d)(1) . . . . . *passim*
28 U.S.C. § 2254(e) 2, 10, 43
28 U.S.C. § 2254(e)(2) 44, 45
Nev. Rev. Stat. 200.366 . . . . . 3, 23
Nev. R. App. P. 28(c) 51
Rule 7 of the Rules Governing Section 2254 Cases
in the United States District Courts . . . . . *passim*
Sup. Ct. R. 13.3 1

OTHER

Black's Law Dictionary (6th ed.) 21

DNA Typing-PCR, http://dna.gov/ basics/ analysis /pcr 57

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The American Heritage Dictionary (Second College ed.) 21

Webster's Dictionary and Thesaurus (2002 ed.) . 21

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 525 F.3d 787 (9th Cir. 2008), and is reproduced in the petition for writ of certiorari. Pet. App. 1a. The decision of the United States District Court is reproduced in that appendix as well. Pet. App. 29a. The opinion of the Nevada Supreme Court is reported at 934 P.2d 235 (Nev. 1997), and is reproduced in the appendix to the petition. Pet. App. 68a.

JURISDICTION

The Court of Appeals issued its decision on May 5, 2008. Pet. App. 1a. It denied the Warden's timely petition for rehearing and rehearing en banc on July 30, 2008. This Court granted the Warden's petition for writ of certiorari. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 13.3.

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS INVOLVED

Fifth Amendment

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or

> property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, Section 1.

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254(b)(1) is reproduced at Pet.App. 99a-100a.

28 U.S.C. § 2254(d) is reproduced at Pet.App. 100a-01a.

28 U.S.C. § 2254(e) is reproduced at Pet.App. 101a-02a.

Rule 7 of the Rules Governing Section 2254 Cases in the United States District Courts.

> **(a) In General.** If the petition is not dismissed, the judge may direct the parties to expand the record by submitting additional materials relating to the petition. The judge may require that these materials be authenticated.

> **(b) Types of Materials.** The materials that may be required included letters predating the filing of the petition, documents, exhibits, and answers under oath to written interrogatories propounded by the judge. Affidavits may also be submitted and considered as part of the record.
>
> **(c) Review by the Opposing Party.** The judge must give the party against whom the additional materials are offered an opportunity to admit or deny their correctness.

Nev. Rev. Stat. 200.366 is reproduced at Pet.App. 103a-05a.

STATEMENT OF THE CASE

1. On the night of January 28, 1994, nine-year-old Jane Doe[1] was savagely raped in her own bedroom in Carlin, Nevada. In addition to physical injuries that required surgical repair, Jane Doe was mentally injured, suffering from post-traumatic stress disorder as the result of her attack. Joint Appendix (JA) 67- 71, 88-90. Because of the mental injury she suffered during the attack, Jane Doe could not positively identify her attacker. JA 74-75, 160.

Troy Brown (Troy) was charged with sexual assault on a child under the age of 14 years, sexual assault on a child under the age of 14 years causing substantial

---

[1] All reviewing courts have referred to the victim as "Jane Doe" to protect her identity. To avoid confusion, the victim will be referred to as "Jane Doe" throughout this brief.

bodily harm, child abuse causing substantial bodily harm and attempted murder. JA 28-33.

At trial, evidence showed that Troy's sister-in-law, Raquel Brown, called Jane Doe's mother, Pamela Doe, and asked if Jane Doe could babysit Raquel's children while Pamela and Raquel went to a local bar, C.G.'s, to celebrate Raquel's birthday with Raquel's husband (and Troy's brother), Trent. JA 102. Pamela agreed. JA 102.

After Pamela took Jane Doe and her sister to Raquel's, she and Raquel met Troy and Trent at the bar. JA 103, 113. Troy left C.G.'s first, followed by Trent and Raquel who returned home at around 8:00 p.m. JA 103-04, 117. Trent then took a shower and went to bed. JA 104. At 9:30 p.m., after letting the children finish watching a movie, Raquel took Jane Doe and her sister home. JA 105. No one else was at the residence, but Raquel was unconcerned because Pamela was supposed to be home within a half hour. JA 105-06. A short time later, Jane Doe called C.G.'s to let her mother know she arrived home safely, but the line was busy. Jane Doe then called the Peacock Bar, where Troy answered the phone and said he would go to C.G.'s to tell Pamela. When Troy arrived at C.G.'s, between 10:00 and 10:30 p.m., Pamela was speaking with Jane Doe on the phone. JA 119, 123. Troy told Pamela that Jane Doe was looking for her and she was at home. JA 119.

Shortly thereafter, Pamela Doe and Troy went to the Peacock Bar where they played a game of pool together. JA 121. Troy had been drinking so heavily that he vomited on his clothing while walking home. JA 613. A bartender at the Peacock testified that Troy

left no later than 12:15 to 12:20 a.m. JA 187-88. At around 1:00 a.m., Jane Doe called the bar and told Pamela that a man had hurt her and was looking for Pamela. Pamela hurried home to discover that her daughter had been savagely raped. JA 124-26.

At 1:05 a.m., a passing motorist and her husband spotted a person staggering in the middle of the street, in the vicinity of Jane Doe's home, wearing a cowboy hat, dark jeans, and black satin jacket with a bright green emblem on the back. JA 202-03, 206-07, 215-16, 220, 364, 603. That night, Troy wore a cowboy hat, dark jeans, and black satin jacket with an orange and yellow C.G.'s logo on the back.

When Jane Doe spoke to police later that night, she described her attacker as wearing a cowboy hat and a black jacket, and as having an "awful smell" like "beer or puke or something." JA 171, 173, 516, 518. She also stated she thought her attacker had a moustache, as Troy did at that time. JA 521, 648.

Further evidence presented at trial showed that Jane Doe's house was less than a 15 minute walk from the Peacock Bar, JA 220, 364, 603; that Troy knew the location of Jane Doe's bedroom, JA 605; and that Troy washed his pants and shirt immediately upon arriving home at around 1:30 a.m. JA 280, 286.

In addition to circumstantial evidence showing that Troy was the perpetrator, the prosecution presented DNA evidence which used the Restrictive Fragment Length Polymorphism (RFLP) method of analysis. DNA in semen recovered from Jane Doe's clothing was compared with a known sample of Troy's DNA. The State's expert, Renee Romero, testified the frequency

of such a match would be 1 in 3,000,000, and described this statistic as "very conservative." JA 437-38. In other words, only one person in 3,000,000 would share the same genetic code. JA 438. Romero further testified that there was only a 1 in 6,500 chance that one of Troy's brothers would match that DNA. JA 468-69.

Troy testified in his defense and denied committing the crimes. JA 602. He asserted that the reason he washed his clothes was because he was going to Loa, Utah, the next day and all his clothes were already packed. JA 602-03. He testified his route home from the bar differed from that where the passing motorists saw a man fitting his description shortly after the rape occurred. JA 610-11. Troy testified he called the police from Utah to see if he was wanted for arrest and went to a nurse for an examination to record his condition. JA 616-19, 640. Troy's counsel argued that Jane Doe was unable to identify her attacker, that there were conflicts in Jane Doe's description of her attacker, and that Troy's fingerprints were not found in the victim's home, JA 714, 720. Troy's brother, Travis, testified that when Troy arrived at his home later that night, Troy's demeanor seemed normal. JA 282. Finally, there was no evidence of blood or bite marks on Troy. JA 240, 400-07.

The jury found Troy guilty of two counts of sexual assault of a child under 14 years of age, and one count of child abuse by sexual assault. The jury acquitted Troy of attempted murder. JA 783-786.

Prior to sentencing, at the behest of the defense, an independent laboratory, Forensic Science Associates, did DNA testing using the PCR method which is not as

discriminating as the RFLP method. JA 909-21. This testing found a reciprocal frequency of its sample of 1 in 10,000. JA 916, 918. In other words, 1 in 10,000 people chosen at random would have the same DNA characteristics as the evidence it tested. Troy has these same DNA characteristics. JA 918. While it was not made part of the record at that time, Troy subsequently attached it to his Reply Brief on direct appeal. JA 909-21, and the trial judge made reference to the PCR test at sentencing. JA 799.

2. On direct appeal, Troy claimed, *inter alia*, the trial court should have conducted a hearing pursuant to *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), before admitting the DNA evidence. The court held that Troy forfeited that argument by failing to object at trial either to the lack of a pretrial evidentiary hearing or to qualifying Romero as an expert witness on DNA evidence. Pet. App. 82a.

The Nevada Supreme Court then rejected Troy's sufficiency-of-the-evidence claim on its merits. The court stated that the "standard of review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt. *Kazalyn v. State*, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992)." The court concluded that a jury, acting reasonably, could have been convinced of Troy's guilt beyond a reasonable doubt. The court pointed to testimony showing that Troy left the bar with ample time "to get from the bar to Jane Doe's house and to assault Jane Doe before she made the telephone call to her mother at approximately 1:00 a.m.;" a witness "saw someone resembling Troy in a black jacket and black hat stumbling in the road near Jane Doe's house

at 1:05 a.m.;" and Troy arrived home at 1:30 a.m. and proceeded immediately to wash his pants and shirt. The court noted that Troy wore clothing similar to Jane Doe's description; and he smelled like beer and vomit, as Jane Doe described. Lastly, the court pointed to the DNA evidence, which "indicated that semen collected from Jane Doe's underwear matched Troy's and that only 1 in 3,000,000 other people had matching DNA (the second DNA test indicated that 1 in 10,000 people had matching DNA)." Pet. App. 82a-83a.[2]

Troy pursued a state post-conviction action in which he claimed, among other things, that his counsel was ineffective for failing to object to the admission of the DNA evidence, and for failing to explore the possibility that Jane Doe's stepfather was the true perpetrator. JA 1036, 1043. The state courts found that counsel was not ineffective. JA 1489-99, 1500-06.

3. Troy filed a federal habeas petition and, later, an amended petition. JA 2; Pet. App. 130a. In his amended petition, Troy claimed there was insufficient evidence to convict him of the charges, and his counsel was ineffective for various reasons, including his failure to enforce the stipulated RFLP protocol and his failure to object to the DNA evidence admitted at trial. Pet. App. 147a-73a. The Warden moved to dismiss Troy's amended petition, arguing that Troy's sufficiency-of-the-evidence claim was unexhausted because Troy attacked the reliability of the DNA

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[2] The Nevada Supreme Court also vacated the conviction for child abuse because it violated double jeopardy and held that the judge abused his discretion at sentencing. Pet. App. 94a-96a.

testing, which he had not done in state court, and because Troy did not rely on any federal constitutional provision when he presented the claim in state court. Pet. App. 175a-85a.

Troy opposed the motion arguing, *inter alia*, that he had presented the substance of his sufficiency-of-the-evidence claim to the state courts, the standard applied by the Nevada Supreme Court was, in fact, the *Jackson* standard, and his new factual allegations did not fundamentally change the claim. JA 1512-26. The District Court denied the Warden's motion. JA 6.

The Warden then answered the amended habeas petition. Pet App. 186a. Troy replied and contemporaneously moved, pursuant to Rule 7 of the Rules Governing Section 2254 Cases in the United States District Courts, to expand the record to include three documents – the curriculum vitae of Dr. Laurence Mueller, a letter by Dr. Mueller, and an affidavit of the federal public defender's investigator – because they were "pertinent to the issues raised" by Troy in his amended petition and reply. JA 1552, Pet.App. 219a-21a. In his letter, Mueller challenged aspects of Romero's testimony, but did not contest the RFLP test showing that only 1 in 3,000,000 people would, like Troy, match the DNA found in Jane Doe's underwear. JA 1581-84. Rather, Mueller alleged that Romero erred in finding the chances of a sibling match at 1 in 6500 when, in Mueller's opinion, it was 1 in 1024. He concluded that "the chance that among four brothers one or more would match is 1 in 66." JA 1583. Mueller also asserted that Romero committed the "prosecutor's fallacy," when, in response to a question, she agreed with the prosecutor's statement, that given the 1 in 3,000,000 figure, "the likelihood

that it is not Troy Brown would be 0.000033%."[3] JA 1583.

Over the Warden's objection, the District Court granted Troy's motion to expand the record, holding that the limits on evidentiary hearings imposed by AEDPA, 28 U.S.C. § 2254(e), did not apply because Troy exercised due diligence in pursuing his challenge to the DNA evidence in state court, and that the new evidence did not render the claim unexhausted because Troy sought merely to supplement the information previously developed. Pet.App. 222a-39a, JA 1595-98.

Relying on Dr. Mueller's letter, the District Court determined the state's expert had committed the "prosecutor's fallacy." Accordingly, the District Court held that the DNA evidence presented at trial was unreliable and excluded it from consideration for purposes of assessing Troy's *Jackson* claim. The District Court then concluded there was insufficient remaining evidence to convict Troy because, "even after weighing the evidence in favor of the prosecution, there [is] sufficient conflicting testimony to raise a reasonable doubt in the mind of any rational trier of fact." Pet. App. 42a. In particular, the District Court found that there were conflicts in Jane Doe's description of her assailant; there was no evidence of blood or bite marks on Troy; Troy testified that he washed the clothes he was wearing the night of the

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[3] The "prosecutor's fallacy" occurs when the jury is asked to use the DNA evidence as source probability for the DNA sample instead of random source probability. *See United States v. Chischilly*, 30 F.3d 1144, 1157 (9th Cir. 1994) (explaining "prosecutor's fallacy").

attack because he was leaving for a week in Utah; Troy testified he called Carlin to see if he was wanted for arrest; Troy testified he went to a nurse for a full body examination and wanted to record his condition; none of Troy's fingerprints were found in the victim's home; Troy surrendered his hat and jacket for examination; and because Troy denied involvement in the crime, including when being sentenced. The District Court further ruled that the Nevada Supreme Court applied the wrong standard in analyzing Troy's *Jackson* claim. The District Court also found merit in Grounds 2 and 3 of Troy's amended petition (raising ineffective assistance of counsel claims). Pet. App. 31a.

4. The Court of Appeals affirmed the District Court's order granting habeas relief on Troy's *Jackson* claim. Pet. App. 13a. The Court of Appeals first determined that the *Jackson* claim was exhausted and the District Court had properly expanded the record. Pet. App. 11a-13a. Turning to the merits, the Court of Appeals found the Nevada Supreme Court's decision was "contrary to" *Jackson* within the meaning of 28 U.S.C. § 2254(d)(1) because the Nevada Supreme Court applied a different standard, which asked what a "reasonable" jury – not a "rational" jury – would hold. Pet. App. 13a-14a. The Court of Appeals also criticized the Nevada Supreme Court for "recit[ing] all of the facts cumulatively without analyzing whether each or any of those facts established an essential element of the counts of conviction beyond a reasonable doubt, and that a rational juror could have so found." Pet. App. 14a.

The Court of Appeals next found that the Nevada Supreme Court's resolution of the *Jackson* claim was

an "unreasonable application of" *Jackson* within the meaning of 28 U.S.C. § 2254(d)(1) because, in light of the Mueller report, and its exclusion of the DNA evidence, no rational trier of fact could have found Troy guilty beyond a reasonable doubt. The Court of Appeals found that the DNA evidence was unreliable because Romero had committed the "prosecutor's fallacy" and had wrongly minimized the likelihood that Troy's DNA would match one of his four brothers. Ignoring the DNA evidence that only 1 in 3,000,000 persons would (like Troy) match the DNA found in Jane Doe's underwear, and ignoring even Mueller's assertion that the odds are only 1 in 66 that one of Troy's brothers would also match that DNA, the Court of Appeals held that it would violate due process to consider *any* DNA evidence for purposes of the *Jackson* inquiry. Pet. App. 14a-19a. The Court of Appeals then assessed the evidence against Troy, after stating that "it is [the Warden's] burden to establish guilt beyond a reasonable doubt for each and every element of the offense, a burden that [he has] not carried here." Pet. App. 19a. Tracking the District Court's reasoning, the Court of Appeals concluded that conflicts, inconsistencies and faults with respect to some of the testimony, were such that no rational juror could have found Troy was the assailant beyond a reasonable doubt. Pet. App. 19a-21a. Because the panel found relief appropriate under the *Jackson* claim, it did not address the other claims. Pet. App. 21a.

Judge O'Scannlain dissented. He found that the standard applied by the Nevada Supreme Court "mirrors the *Jackson* approach, and that AEDPA "does not require express citation to federal law." Pet.App. 23a. (*citing Early v. Packer*, 537 U.S. 3, 8 (2002)).

Judge O'Scannlain faulted the District Court for "fail[ing] to view the evidence in the light most favorable to the prosecution," and instead granting relief on the existence of disputed facts. "[U]nder *Jackson*, these disputed facts should have been viewed in the light most favorable to the government." Pet. App. 25a. Judge O'Scannlain also criticized the panel majority's failure to give any weight to the DNA evidence and pointed out that even if one were to accept Dr. Mueller's estimate, the probabilities still constituted overwhelming DNA evidence against Troy which the jury was entitled to consider. Pet. App. 26a-27a. Judge O'Scannlain noted there was considerable circumstantial evidence linking Troy to the crime, and concluded that "[t]he compelling force of the DNA evidence, coupled with the strong circumstantial evidence and inferences supported by the totality of the evidence, firmly grounded the Nevada Supreme Court's decision." Pet. App. 28a. (O'Scannlain, J., dissenting).

The Court of Appeals denied the Warden's petition for rehearing and suggestion for rehearing en banc. JA 24-25.

SUMMARY OF THE ARGUMENT

The test for a state court reviewing a sufficiency-of-the-evidence claim is whether after reviewing the trial record evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The examination required by that test is limited to record evidence adduced at trial. *Id.* at 324.

That is the clearly established federal law as determined by this Court.

Federal habeas courts are required to analyze sufficiency-of-the-evidence claims by applying "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Moreover, federal habeas relief cannot be granted unless the state court's adjudication of the claim resulted in a decision that was contrary to or an objectively unreasonable application of, clearly established federal law, as determined by this Court. *Id.*

The Nevada Supreme Court examined Troy's sufficiency-of-the-evidence claim under the *Jackson* standard. The Nevada Supreme Court's adjudication of the sufficiency-of-the-evidence claim was neither contrary to nor an objectively unreasonable application of *Jackson*.

After the federal district court granted habeas relief on Troy's *Jackson* claim, the Court of Appeals erred in affirming the grant of federal habeas relief for several reasons. First, the Court of Appeals erroneously determined that the Nevada Supreme Court did not apply the *Jackson* standard and, therefore, its adjudication of Troy's claim was "contrary to" clearly established federal law. Second, the Court of Appeals erroneously determined that the Nevada Supreme Court's adjudication of the claim was an "unreasonable application" of the *Jackson* standard because evidence not presented to the jury purportedly made DNA evidence given to the jury unreliable and subject to exclusion. Third, the Court Of Appeals erred in its analysis by failing to properly apply the

clearly established standard and principles of *Jackson* and 28 U.S.C. § 2254(d)(1). Specifically, the Court of Appeals erred by considering evidence that had not been adduced at trial to conclude that evidence given at trial was unreliable and, therefore, subject to exclusion. That holding contravened *Jackson*'s requirement that the court consider *all* evidence given at trial in the light most favorable to the prosecution and *only* the evidence adduced at trial. In affirming the grant of habeas relief, the Court of Appeals erred in several additional significant respects. The court (1) wrongly excluded reliance on the DNA evidence altogether, (2) did not apply the deferential *Jackson* standard in assessing the evidence, and (3) failed to apply the deference required by 2254(d)(1).

The Court of Appeals also erred by affirming the expansion of the record authorized by the District Court. Consideration of a *Jackson* claim is limited to evidence adduced at trial and not other evidence. Expansion of the record which allows a federal habeas court to determine that evidence adduced at trial is not reliable is not permitted. Furthermore, expansion of the record to permit consideration of evidence not adduced at trial when analyzing a *Jackson* claim is not permitted.

Resolution of this case in Troy's favor would have the effect of making a state court trial a mere formality, a warm-up for proceedings in federal court, and would permit federal courts to usurp the province of the jury to resolve conflicts, determine the credibility of the evidence, the reliability of the evidence and the weight to give evidence. Federal habeas corpus actions would no longer be collateral attacks, but, rather, would be "retrials" in the most

literal sense with the federal courts sitting in the stead of the jury.

Resolution of this case in Troy's favor would have the added deleterious effect of permitting federal habeas courts to diverge from the congressionally mandated standard of review, 28 U.S.C. § 2254(d)(1). Federal habeas courts are required to determine whether the State court's adjudication of a sufficiency-of-the-evidence claim was an objectively unreasonable application of clearly established federal law, not merely erroneous.

ARGUMENT

I. The Nevada Supreme Court Decision Rejecting Respondent's Claim Under *Jackson v. Virginia* Was Neither Contrary To Nor An Unreasonable Application Of *Jackson*.

The core issue in this case is whether the Nevada Supreme Court decision rejecting Troy's sufficiency-of-the-evidence claim was "contrary to or ... an unreasonable application of clearly established Federal law, as determined by [this] Court." 28 U.S.C. § 2254(d)(1). Resolving that issue requires application of the rule announced in *Jackson v. Virginia*, 443 U.S. 307 (1979), and the limitations on federal habeas corpus review set forth in 28 U.S.C. § 2254(d)(1). As will be seen, both *Jackson* and § 2254(d)(1) require a federal court to review a state conviction with great deference.

The clearly established test for examining sufficiency-of-the-evidence claims is whether, after reviewing the trial record evidence in the light most

favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* at 319. Attendant to that test are several principles. The standard must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law. *Id.* at 324 n.16. The reviewing court is not required to ask itself whether it believes that the evidence at trial established guilt beyond a reasonable doubt and, indeed, is not permitted to make its own subjective determination of guilt or innocence. *Id.* at 318-19. The trier of fact has the responsibility to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from the basic facts to ultimate facts; the reviewing court must assume that the trier of fact resolved any evidentiary conflicts in favor of the prosecution, even if the determination does not appear on the record, and must defer to that resolution. *Id.* at 318-19, 326. Upon a finding of guilt, upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution. *Id.* at 318-19. The prosecution has no obligation to rule out every hypothesis except guilt. *Id.* at 326.

Additionally, the sufficiency-of-the-evidence review authorized by *Jackson* is limited to "record evidence adduced at trial." *Id.* at 324. *Jackson* does not extend to non-record evidence, including newly discovered evidence. The *Jackson* inquiry does not focus on whether the trier of fact made the *correct* guilt or innocence determination, but whether it made a *rational* decision to convict or acquit. *Herrera v. Collins*, 506 U.S. 390, 401 (1993).

When a state inmate brings a *Jackson* claim in federal habeas, an additional layer of deference is added. A federal court can not grant federal habeas relief with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by this Court. 28 U.S.C. § 2254(d)(1).

A state court decision is "contrary to" this Court's clearly established precedent where "the state court applies a rule that contradicts the governing law set forth in our cases," or "if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." *(Terry) Williams v. Taylor*, 529 U.S. 362, 405-06 (2000).

Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. *Williams*, 529 U.S. at 413. The "unreasonable application" clause requires the state court's application of clearly established law be more than incorrect or erroneous; it must be "objectively unreasonable." *Id.* at 409-10. Two years after *Williams*, this Court recognized that the AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under the law." *Bell v. Cone*, 535 U.S. 685, 693 (2002).

Of course, the threshold matter for a federal habeas court is to decide what constitutes "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Clearly established Federal law under 28 U.S.C. § 2254(d)(1) is the governing legal principle or principles set forth by this Court at the time the state court renders its decision. *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003); *Williams*, 529 U.S. at 405. *Jackson* is the clearly established Federal law with respect to sufficiency-of-the-evidence claims, as determined by this Court at the time the Nevada Supreme Court rendered its decision.

A. The Nevada Supreme Court's decision was not "contrary to" the rule announced in *Jackson*.

Review under *Jackson* asks "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 318. The Nevada Supreme Court stated, "The standard of review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt." Pet. App. 82a (*citing Kazalyn v. State*, 825 P.2d 578, 581 (Nev. 1992). The Court of Appeals held that this statement of the legal standard was "contrary to" Jackson because it used the term "reasonable" jury rather than a "rational" juror. Pet. App. 14a. That holding was erroneous.

In *Jackson* itself, this Court recognized that the rule was not novel and referred to earlier circuit cases

which used the word "reasonable" rather than the word "rational." *Jackson*, 443 U.S. at 319 n.12. See *United States v. Amato*, 495 F.2d 545, 549 (5th Cir. 1974) ("whether, taking the view [of the evidence] most favorable to the Government, a *reasonably-minded jury* could accept the relevant evidence as adequate and sufficient to support the conclusion of the defendant's guilt beyond a reasonable doubt") (emphasis added); *United States v. Jorgenson*, 451 F.2d 516, 521 (10th Cir. 1971) ("whether, 'considering the evidence in the light most favorable to the government, there is substantial evidence from which a jury might *reasonably find* that an accused is guilty beyond a reasonable doubt'") (emphasis added).

Indeed, the Court of Appeals' insistence on the use of the word "rational" is contrary to usage by the Court of Appeals itself. *See Juan H. v. Allen*, 408 F.3d 1262, 1275 (9th Cir. 2005) ("In our Circuit, we have held that a writ of habeas corpus should have been granted to a petitioner who demonstrated that no *reasonable* jury could have found that false statements given under oath were material to an underlying court case, an element essential to sustaining his conviction for perjury") (emphasis added). The Court of Appeals' distinction is also contrary to usage by at least three other circuits. *See Dupuy v. Cain*, 201 F.3d 582, 589 (5th Cir. 2000) ("Obviously, the evidence is sufficient for a *reasonable* juror to find, beyond a reasonable doubt, that Dupuy intended to kill Normand") (emphasis added); *United States v. Marek*, 238 F.3d 310, 314 (5th Cir. 2001) ("A panel of this Court concluded that a *reasonable* jury could have found that (1) the fortune teller had participated in international telephone calls as Cisneros's agent, and (2) those calls were sufficiently connected to the murder to be 'in

furtherance' of that crime") (emphasis added); *Berryhill v. Calpone*, 168 Fed. Appx. 253, 255 (10th Cir. 2006) (unpublished) ("Based on the record, we agree with the district court and the OCCA that a *reasonable* juror could have found proof beyond a reasonable doubt that Berryhill manufactured methamphetamine") (emphasis added); *Davis v. Kemp*, 829 F.2d 1522, 1532 (11th Cir. 1987) ("Although this may be true, a *reasonable* juror could have found beyond a reasonable doubt that the victim was raped") (emphasis added).

The Court of Appeals' distinction is also contrary to the usage in *Black's Law Dictionary,* Sixth Edition, 1265 ("reasonable"); *The American Heritage Dictionary*, Second College Edition, 1028 ("rational"), 1031 ("reasonable"); and *Webster's Dictionary and Thesaurus*, 2002 Edition, 311 ("rational"), 312 ("reasonable"); all of which use the terms synonymously.

The Court of Appeals also found a distinction between *Jackson*'s "trier of fact could have found the essential elements of the crime beyond a reasonable doubt" requirement and the Nevada Supreme Court's requirement that the jury "could have been convinced of the defendant's guilt" beyond a reasonable doubt. Pet. App. 14a. The Court of Appeals criticized the Nevada Supreme Court for "merely reciting all of the facts cumulatively without analyzing whether each or any of those facts established an essential element of the counts of conviction beyond a reasonable doubt, and that a rational juror could have so found." Pet. App. 14a. That objection is misplaced because the only issue on direct appeal with respect to Troy's *Jackson* claim was whether there was sufficient evidence

presented to establish him as the perpetrator. Pet. App. 120a. The Nevada Supreme Court did not need to engage in a ritualistic discussion of matters not at issue. The state court addressed the issue before it – whether there was sufficient evidence presented at trial to identify Troy as the perpetrator – and set out evidence showing that there was. Pet. App. 82a-83a.

Nevada case law confirms that the Nevada Supreme Court's description of the sufficiency-of-the-evidence standard is not a repudiation of the *Jackson* standard. The Nevada Supreme Court's decisions clearly indicate that the court understands that a finding of guilt beyond a reasonable doubt necessarily requires a finding of each element of the offense beyond a reasonable doubt. *Leonard v. State*, 969 P.2d 288, 297 (1999); *Koza v. State*, 681 P.2d 44, 47 (Nev. 1984); *Wilson v. State*, 664 P.2d 328, 336 (Nev. 1983). Furthermore, Troy himself admitted in the litigation below that the *Kazalyn* standard is the same as the *Jackson* standard. JA 1521.

The Court of Appeals' nitpicking at the Nevada Supreme Court's opinion runs afoul of this Court's repeated admonition that state courts are presumed to know and follow the law and that § 2254's "highly deferential standard for evaluating state-court rulings demands that state court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 23-24 (2002). The Court of Appeals' opinion disregarded 28 U.S.C. § 2254(d)(1), and this Court's opinions, *Early v. Packer*, 537 U.S. 3, 8-11 (2002), and *Woodford*, 537 U.S. at 23-24 (2002). The Court of Appeals erred in finding that the Nevada Supreme Court's decision was "contrary to" *Jackson*.

B. The Nevada Supreme Court's adjudication of Troy's *Jackson* claim was not objectively unreasonable.

1. Ample evidence supported the Nevada Supreme Court's ruling.

Troy was charged by information with two felonies in violation of Nev. Rev. Stat. 200.366: sexual assault on a child under the age of 14 years, and sexual assault on a child under the age of 14 years resulting in substantial bodily harm.[4] JA 28-20.

Under Nevada law, in order to convict Troy of sexual assault on a child under the age of 14 years, the State was required to prove beyond a reasonable doubt that the defendant subjected a child under the age of 14 years to sexual penetration against that person's will or under conditions in which the perpetrator knew or should have known that the child was mentally or physically incapable of resisting or understanding the nature or his conduct. Nev. Rev. Stat. 200.366; JA 29. With respect to the latter charge, the State was additionally required to prove that the act resulted in substantial bodily harm. *Id.* The jury convicted Troy of both charges. JA 30.

In his direct appeal to the Nevada Supreme Court, Troy claimed there was insufficient evidence to convict him. Pet. App. 120a.

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[4] Brown was also charged with attempted murder and child abuse resulting in substantial mental harm as a result of sexual assault. However, Brown was found not guilty of attempted murder and the Nevada Supreme Court found that the child abuse charge merged with the sexual assault conviction.

In rejecting that claim, the Nevada Supreme Court held:

> We conclude that a jury, acting reasonably, could have been convinced of Troy's guilt beyond a reasonable doubt.
>
> Testimony indicated that Troy left the bar around 12:15 a.m., that Troy lived very close to the bar, and that Troy lived very close to Jane Doe. Troy had enough time to get from the bar to Jane Doe's house and to assault Jane Doe before she made the telephone call to her mother at approximately 1:00 a.m. While Jane Doe could not identify her assailant, her description of his clothing was similar to what Troy was wearing; she also said that her assailant smelled like beer or vomit and testimony indicated that Troy had been drinking beer and had vomited several times that night. Furthermore, testimony indicated that Troy got home at approximately 1:30 a.m., which gave him enough time to assault Jane Doe. Additionally, the Lokes testified that they saw someone resembling Troy in a black jacket and black hat stumbling in the road near Jane Doe's house at 1:05 a.m. Troy also washed his pants and shirt when he got home, arguably to remove the blood evidence from his clothes. Finally, the DNA evidence indicated that semen collected from Jane Doe's underwear matched Troy's and that only 1 in 3,000,000 other people had matching DNA (the second DNA test

indicated that 1 in 10,000 people had matching DNA).

Pet. App. 82a-83a.

There is no dispute that Jane Doe was sexually assaulted or that Jane Doe suffered substantial bodily harm as a result. There is no dispute that Jane Doe was under the age of 14 when she was assaulted. The only dispute on direct appeal was whether a rational juror could have concluded from the evidence presented at trial that the perpetrator was Troy. As quoted above, the Nevada Supreme Court referred to evidence from which a rational juror could have concluded that the perpetrator was Troy. Pet. App 82a-83a.

The trial evidence from which a rational juror could have concluded that Troy was the perpetrator includes:

The surgeon who performed surgery on Jane Doe following the sexual assault described traumatic injuries to Jane Doe's vagina and rectum. JA 79, 83-84, 87-89. The surgeon described Jane Doe's injuries to both her vagina and anus as "trauma secondary to insertion of a blunt object" consistent with an adult erect penis. JA 91-92. Additionally, semen was found on Jane Doe's panties and pajama bottoms. JA 230-32; 377-80. From this testimony, the jury could rationally have concluded that the attacker was an adult male.

Pamela Doe, Jane Doe's mother, testified that Troy had been to her home 10-12 times. JA 115. Troy admitted to having been in the Doe's home on previous occasions. JA 605. Pamela Doe owned a dog, which would bark at strangers but not at people with whom

it was familiar. JA 125, 164. The dog would not bark at Troy. JA 125. Jane Doe remembered that the dog was inside with her on the night of the attack. JA 158-59. The jurors could rationally conclude that the perpetrator was not someone at whom the dog would bark and that Troy is among that class of persons.

Jane Doe was unable to identify her attacker. JA 160. However, the jury could have rationally concluded that inconsistencies in Jane Doe's testimony and her description of her attacker and her inability to identify her attacker were the result of her suffering from Post Traumatic Stress Disorder (PTSD) as a result of her attack. JA 65, 67, 69-71, 74. A person suffering from PTSD might not remember specific information, such as the identity of an attacker. JA 76.

Connie Walker, an Elko police detective, testified that Jane Doe stated that her attacker wore a cowboy hat and thought he wore a black jacket. JA 518, 516. Pamela Doe described Troy as wearing a western shirt, jeans, boots, a black satin jacket, and a black cowboy hat the night of the attack. JA 119, 147. Travis, Troy's brother, testified that the night of the sexual assault, Troy was wearing a black hat and jacket. JA 280. Moreover, according to Travis, when Troy walked into their house at 1:32 a.m., Troy removed his hat and jacket. JA 275-80. From this testimony, the jury could reasonably have concluded that the attacker wore a cowboy hat and a black jacket and that Troy wore a cowboy hat and a black jacket the night of the attack.

Jane Doe testified that the person who attacked her smelled of alcohol and vomit. JA 172-73. Several

witnesses, including Troy himself, testified that Troy had been drinking the night of the attack. JA 121, 187, 303, 608, 627. Troy admitted in his trial testimony that he vomited on his clothes while walking home. JA 613. From this testimony, the jury could reasonably have concluded that the attacker smelled of alcohol and had vomited. The jury also could reasonably have concluded that Troy smelled of alcohol and had vomited and, therefore, that Troy was among the class of people who could have been the attacker.

At around 11:40 p.m. on January 28, 1994, bartender Steven Pennino observed Troy at the Peacock Bar. JA 186-87. Troy seemed "very intoxicated" that night. JA 187. Troy left the bar no later than 12:15 to 12:20 a.m. on January 29. JA 187-88. Pennino remembered Pamela Doe receiving a phone call at around 1:00 a.m. JA 189. Pamela Doe abruptly left the bar after the telephone call. JA 190. Pamela Doe testified that she left the bar after receiving a phone call from Jane Doe in which Jane Doe told her that she had been hurt. JA 123-24.

Pamela Doe also testified that Troy lived about 10 houses down in the same trailer park. JA 115. Troy admitted knowing the location of Jane Doe's bedroom. JA 605. A police officer testified that at his own normal pace, it was a 12 ½ minute walk from the bar to Jane Doe's house, and four minutes from Jane Doe's house to Travis's home, where Troy also resided. JA 364, 220, 603.

From this testimony, the jury could reasonably have concluded that Troy left the bar around 12:15 a.m., that Troy lived very close to the bar, and that Troy lived very close to Jane Doe. The jury could

reasonably conclude that Troy had enough time to get from the bar to Jane Doe's house and to assault Jane Doe before she made the telephone call to her mother at approximately 1:00 a.m.

At 1:05 a.m., a passing motorist and her husband spotted a person wearing a black cowboy hat, a black satin jacket, and dark jeans staggering in the middle of the street, in the general vicinity of Jane Doe's home. JA 202, 207, 216. From this testimony and the other testimony regarding what Troy was wearing the night of the attack, the testimony that Troy had been drinking heavily, the testimony where Jane Doe and Troy lived relative to each other, and the testimony when Troy left the bar, the jury could reasonably have concluded that it was Troy whom the passing motorist and her husband had seen.

David Prescott, Troy's roommate, testified that Troy told him that he could not remember what had happened the night of the sexual assault. JA 298, 306-07, 309. However, when he testified on his own behalf, Troy was able to account for his whereabouts that night and recalled the route he had taken home as being different from that where the passing motorists saw a man walking. JA 612-13. The jury could reasonably have concluded that Prescott was truthful and that Troy was lying. Furthermore, the jury could have considered Troy's lying as his consciousness of his guilt.

Travis testified that Troy woke him at 1:32 a.m. as Troy entered the trailer wearing a hat and jacket. JA 280. In his trial testimony, Troy admitted that when he got home, he put his clothes in the washing machine and started it. JA 613. Travis testified that

Troy asked him to remove his clothes from the washer and put them in the dryer. JA 284. Travis described the clothes he removed from the washer and put in the dryer as a black pullover shirt and a pair of black jeans. JA 286. The jury reasonably could have concluded that Troy washed his clothes to remove blood or other evidence.

In his trial testimony, Troy claimed that his route home was different from where the passing motorists saw a man walking. JA 619. Other testimony indicated that Troy claimed he did not remember what had happened the night of the sexual assault. JA 306-07. From this testimony, the jury could reasonably have concluded that Troy was lying and that he was conscious of his guilt.

Raquel testified that at approximately 9:30 p.m., she took Jane Doe and Jane Doe's sister home from babysitting at Raquel's residence. JA 105. Raquel denied that either she or her husband, Trent, left that evening after she took Jane Doe home. JA 105. This testimony provided Trent with an alibi that the jury was entitled to accept and exclude Trent as a suspect.

Travis testified that he gave his brother Troy a ride to a Carlin bar so that he could get his paycheck from Trent. JA 278. Travis testified that he left Troy at the bar and returned home. JA 278. Travis testified that he subsequently fell asleep watching television. JA 279. Travis testified that at 1:32 a.m., Troy woke him when he entered the trailer. JA 280. Notably, Troy did not contradict this testimony when he testified. JA 614. Troy's own testimony provided Travis with an alibi that the jury was entitled to accept and exclude Travis as a suspect.

There is evidence from which the jury could have inferred that Troy knew that Jane Doe was home unsupervised. Jane Doe called the Peacock Bar to see if Pamela Doe was there; Troy answered the phone and Jane Doe asked him if Pamela was there. Troy stated he thought she was at C.G.'s. Jane Doe said that she was trying to find Pamela in order to tell her that she and her sister were home safely. Troy said he would go to C.G.'s to deliver the message. Troy went to C.G.'s, but when he arrived, Pamela was already talking to Jane Doe on the phone. JA 119, 159, 165. Between 10:00 and 10:30 p.m., Pamela spoke with Jane Doe on the telephone. JA 119, 123. While Pamela and Jane Doe were talking, Troy came into C.G.'s Bar and told Pamela that Jane Doe was looking for her and that she was at home. JA 119, 123. Subsequently, both Pamela and Troy went to the Peacock Bar, where the two of them played a game of pool. JA 121. Troy left approximately "an hour to an hour and a half" after Pamela spoke with Jane Doe, but before Pamela left. JA 122-23.

There was also physical evidence in this case. Semen was detected in the crotch area of Jane Doe's panties and her pajama bottoms. JA 227, 232, 377-79.

Renee Romero, a criminalist for the Washoe County Crime Lab, was the State's DNA expert at trial. JA 412-14. The court recognized Romero as a DNA expert without objection. JA 414. Romero began her testimony with a brief overview of DNA. JA 415-23. Romero examined known samples of Troy's and Jane Doe's blood, as well as a section of Jane Doe's panties. JA 426. Romero conducted RFLP DNA testing with respect to each of the samples. JA 423, 427, 430-32.

The stain from the sperm fraction visually matched the known sample of Troy's DNA. JA 434-37. The frequency of such a match would be 1 in 3,000,000. JA 437. In other words, only one person in 3,000,000 would share the same genetic code. JA 438. Romero described this statistic as "very conservative." JA 438. Romero testified that another way to look at the percentage would be that 99.99967% of the population would not have this DNA. JA 458.

Romero also testified that for two non-identical twin offspring, the odds are 1 in 6,500 against the brothers having the same DNA profile. JA 468-69. In other words, the probability of two non-identical twin brothers having the same DNA profile would be 0.02%. JA 471-72.

From the evidence recited above, a rational juror could have found, beyond a reasonable doubt, that Troy committed the crimes. Consequently, the Nevada Supreme Court's adjudication of the sufficiency-of-the-evidence claim was not an objectively unreasonable application of *Jackson*.

2. The Court of Appeals erred in its analysis.

In affirming the grant of habeas relief, the Court of Appeals erred in several significant respects. The court (1) wrongly excluded reliance on the DNA evidence altogether, (2) did not apply the deferential *Jackson* standard in assessing the evidence, and (3) failed to apply the deference required by 28 U.S.C. § 2254(d)(1).

a. As shown in Section II, *infra*, the Court of Appeals erred in taking the Mueller letter into account since it was new evidence and not part of the trial record. Because the Mueller letter served as the principal basis for the Court of Appeals' exclusion of the DNA evidence introduced at trial, this alone justifies reversing the Court of Appeals' ruling. But even if the Mueller letter were properly considered, the Court of Appeals' exclusion of the DNA evidence is manifestly wrong. In excluding the DNA evidence in its entirety, the Court of Appeals made four additional fundamental errors.

First, nothing in the Mueller letter challenged the 1 in 3,000,000 figure. The "prosecutor's fallacy," so heavily emphasized by the Court of Appeals, is a red herring that, at most, justifies exclusion of Romero's statement that there is a 99.99967% chance that Troy committed the crime. However, excluding that statement is not the same as excluding any of the rest of Romero's testimony. Troy asserted a *Jackson* claim, not a claim that Romero's fleeting commission of the "prosecutor's fallacy" violated the Due Process Clause. The Court of Appeals' assertion that the admission of unreliable evidence might violate the Due Process Clause is therefore beside the point.

Second, to the extent the Mueller letter challenged the reliability of Romero's testimony, including her testimony that there is only a 1 in 6500 chance that one of Troy's brothers would match the DNA, *Jackson* dictates that reliability issues be resolved in the prosecution's favor. As explained in Section II, *infra*, *Jackson* requires reviewing courts to assess only the evidence adduced at trial and to assume that the jury resolved conflicts within that evidence in favor of the

prosecution. That is why the Mueller letter, which was never put before the jury, may not be taken into account in assessing Troy's *Jackson* claim. The Court of Appeals nonetheless not only accepted the Mueller letter as relevant to the *Jackson* claim, it went on to resolve the conflict between the letter and Romero's testimony in favor of the defense. The court therefore piled error upon error. If a rational juror could have found Romero's 1 in 6500 figure more accurate than Mueller's 1 in 1024 figure, the 1 in 6500 figure must be accepted for purposes of the *Jackson* inquiry. And the Court of Appeals did not even purport to demonstrate that a rational juror could not have found Romero more persuasive on this point. Indeed, as shown in Section II(D), infra, there is ample basis to conclude that Mueller mischaracterized Romero's analysis.

Third, even accepting the Court of Appeals' assertion (based on the Mueller letter) that "the chance that Troy's DNA would match at least one of his four brothers' DNA can increase to 1/66," that still means that there is a 65 in 66 chance that the DNA is still Troy's and not any of the brothers'. As Judge O'Scannlain correctly observed, even if one accepted Mueller's estimate, no rational trier of fact would have changed his mind:

> [T]he DNA still would have suggested that the rape was committed by Brown or one of his brothers. And the likelihood that one of his brothers would have such DNA was very slim: if not 1/6500, then at most 1/132. Thus, it was extremely unlikely that a random person committed the crime, and of the brothers, it was extremely unlikely that the specimen DNA would match not only Troy – as it did – but

> another brother. These probabilities put together still constitute overwhelming DNA evidence against Troy which the jury was entitled to consider.

Pet. App. 26a-27a (O'Scannlain, J., dissenting) (footnote omitted). As noted above, Travis had an uncontested alibi. Trent also had an alibi. There was overwhelming evidence that, as between Trent and Troy, the rapist was Troy.

The Court of Appeals' reasoning appears to be that, because (in its view) Romero's 1 in 6500 testimony was flawed, due process requires that no DNA evidence be considered whatsoever. But even if the 1 in 6500 testimony were so flawed that its introduction violated due process (and it was not), that would not require a reviewing court to ignore altogether the DNA evidence that remains on the record – such as the 1 in 3,000,000 result and Mueller's own 1 in 66 finding (assuming, for the sake of argument, that Mueller's letter were properly admitted and taken into account by the habeas courts).[5]

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[5] The Court of Appeals therefore erred in relying on two cases for the proposition that a federal court on habeas may exclude evidence admitted in the state court if the evidence "rendered [the] trial so fundamentally unfair as to violate due process." Pet. App. 18a, *citing Butcher v. Marquez*, 758 F.2d 373, 378 (9th Cir. 1985), and *United States v. Scheffer*, 523 U.S. 303, 309 (1998). Neither has anything whatsoever to do with a *Jackson* analysis. Neither contains a statement that in a *Jackson* analysis a reviewing court may exclude evidence for any reason. And both dealt with types of claims that are not even cognizable in a federal habeas action.

Fourth, the District Court and the Court of Appeals both mistakenly placed heavy emphasis on the statements by the State in the state post-conviction action that it had no case without the DNA evidence. Pet.App. 3a; 42a.[6] As an initial matter, the Warden's counsel never conceded any such thing in the federal habeas action. Moreover, the Court of Appeals did not find estoppel; and, there *is* DNA to consider even accepting the Mueller letter. This is, therefore, not a case without DNA evidence. Lastly, a concession made in a state post-conviction action does not absolve a federal habeas court from faithfully applying the tenets of *Jackson* and 28 U.S.C. § 2254(d)(1).

b. The Court of Appeals failed to apply the exceedingly deferential standard of review required by *Jackson* for assessing sufficiency-of-the-evidence claims. The "rational juror" standard established by *Jackson* requires courts to resolve all conflicts in testimony, and to draw all reasonable inferences, in favor of the prosecution. *Jackson*, 443 U.S. at 319. The Court of Appeals instead arrogated to itself the ability to determine the truth or falsity of evidence and substituted its own judgment for that of the jurors. This can be seen both in the standard the Court of Appeals set for itself and in the manner in which the court conducted its review.

After excluding the DNA evidence, the Court of Appeals recited what the District Court wrote: "there

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[6] The Court of Appeals appears to have been making reference to the answer in opposition to Troy's state post-conviction petition and statements of counsel during argument made in response to Troy's claim that his counsel was ineffective for failing to investigate witnesses. JA 1176, 1180, 1483.

[is] sufficient conflicting testimony to raise a reasonable doubt in the mind of any rational trier of fact." Pet. App. 19a. That statement shows that neither court applied the correct standard. The trier of fact has the responsibility to resolve conflicts in the testimony, whereas the reviewing court must assume that the trier of fact resolved any evidentiary conflicts in favor of the prosecution, even if the determination does not appear on the record, and must defer to that resolution. *Jackson*, 443 U.S. at 318-19, 326.

The Court of Appeals next wrote, "On appeal, [the Warden] argues that there is much evidence to support the conviction. However, it is [the Warden's] burden to establish guilt beyond a reasonable doubt for each and every element of the offense, a burden that [the Warden has] not carried here." Pet. App. 19a. The Court of Appeals is wrong. *Jackson*, 443 U.S. at 318-19, 326. No known authority supports the Court of Appeals' conclusion that the Warden has the same burden on *Jackson* sufficiency-of-the-evidence review that the State undeniably has at trial. The Court of Appeals applied a standard that was far less deferential than the *Jackson* standard.

This became evident when the Court of Appeals examined the evidence. Instead of resolving all conflicts, and drawing reasonable inferences, in favor of the prosecution, the Court of Appeals found the existence of conflicts to support Troy's *Jackson* claim. The court noted there were "inconsistencies" and "considerable conflict" in certain testimony, and drew inferences inconsistent with the prosecution's theory (e.g. by relying on Travis's claim that he did not see anything unusual about Troy's appearance when he arrived home at 1:32 a.m., and an officer's statement

that he did not see scratch marks on Troy's hands the next morning). The Court of Appeals rejected the logical inference that Troy had laundered his clothes in order to remove evidence and substituted its own inference that was consistent with Troy's explanation for washing them, but inconsistent with the prosecution's theory. The Court of Appeals also found fault with the manner in which the forensic evidence was collected and examined, pointed out that some testing was not done, and observed that a fingerprint found on the night light did not match Troy's. Finally, the court relied on Troy denying he was involved in the crime and taking actions purportedly inconsistent with having something to hide. Pet. App. 21a. The Court of Appeals concluded, "The conflicts in the evidence are simply too stark for any rational trier of fact to believe that Troy was the assailant beyond a reasonable doubt." Pet. App. 21a.

All told, the Court of Appeals took great pains to focus on evidence helpful to Troy, "inconsistencies," and inferences that pointed to innocence rather than guilt. The Court of Appeals failed to respect the jurors' role to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from the basic facts to the ultimate facts. The Court of Appeals failed to honor the tenet that the prosecution has no obligation to rule out every hypothesis except guilt. And the Court of Appeals failed to honor the *Jackson* rule that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution. *Jackson*, 443 U.S. at 318-19, 326. Instead, the Court of Appeals substituted its own judgment for that of the jurors.

c. The Court of Appeals compounded its failure to apply *Jackson* properly by failing to apply § 2254(d)(1) at all. Even before Congress enacted AEDPA, this Court established that federal habeas courts have no license to re-determine the credibility of witnesses whose demeanor has been observed by the state trial court, but not by them. *Jackson*, 443 U.S. at 319, 324, 326; *Herrera*, 506 U.S. at 400-01; *Marshall v. Lonberger*, 459 U.S. 422, 434-35 (1983). Federal habeas actions are not "retrials" of state criminal convictions. *Bell*, 535 U.S. at 693; *Herrera*, 506 U.S. at 400-02; *Williams*, 529 U.S. at 375-90; *Jackson*, 443 U.S. at 318-19. Habeas corpus is "a collateral remedy, providing an avenue for upsetting judgments that have become otherwise final. It is not designed as a substitute for direct review." *Teague v. Lane*, 489 U.S. 288, 306 (1989).

Section 2254(d)(1) adds teeth to these principles by requiring federal courts to give an added level of deference on top of the "rational juror" standard of *Jackson*. "The question under AEDPA is not whether the state court's determination was incorrect but whether that determination was unreasonable – *a substantially higher threshold*." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) (emphasis added). The Court of Appeals failed to review the Nevada Supreme Court's adjudication of the *Jackson* claim with the added level of deference required by AEDPA. The Court of Appeals did not even ask whether, having found that the Nevada Supreme Court erred (in its view), was that decision objectively unreasonable. The Court of Appeals wrongly equated error with unreasonable application, in fundamental conflict with the limits on habeas review imposed by § 2254(d)(1).

The Nevada Supreme Court applied the clearly established Federal law, as determined by this Court, when it adjudicated Troy's *Jackson* claim in his federal habeas action. Its adjudication of that claim was not objectively unreasonable. Therefore, the Court of Appeals erred in affirming the grant of habeas relief.

II. In This Case, The District Court Impermissibly Permitted Expansion Of The Record.

In order to find that there was insufficient evidence to convict Troy, the Court of Appeals had to exclude DNA evidence presented through Renee Romero's testimony. The Court of Appeals has never suggested that *with* consideration of the DNA evidence, there would be insufficient evidence to find Troy guilty. In order to exclude Romero's testimony, the District Court and the Court of Appeals accepted without question a letter written by Dr. Laurence Mueller. The Mueller letter was first introduced in the federal habeas corpus proceedings over the Warden's strenuous objections. The expansion of the record to include the Mueller letter was error for multiple reasons.

First, the District Court and Court of Appeals allowed expansion of the record for a *Jackson* claim. *Jackson* specifically held that the review is based on the trial record. *Jackson v. Virginia*, 443 U.S. 307, 324 (1979). Second, even if a *Jackson* claim allowed the expansion of the record, the District Court and the Court of Appeals failed to recognize the lack of diligence on Troy's part. Third, the District Court and Court of Appeals expanded the record in a manner that would render the *Jackson* claim unexhausted.

Finally, there are multiple reasons to discount the Mueller letter.

In the end, the Court of Appeals had no proper basis on which to discard Romero's testimony. That testimony powerfully confirms the strong case the State had against Troy, and would readily allow a rational juror to convict him.

A. The *Jackson* rule, by its terms and nature, looks only to the evidence before the jury.

The standard of review for sufficiency of the evidence claims involves a highly deferential evaluation of the state trial. The reviewing court does not "ask itself whether it believes that the evidence at trial established guilt beyond a reasonable doubt." *Jackson*, 443 U.S. 307 at 318. Instead, the reviewing court must determine, "after reviewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (emphasis in original). In a footnote, *Jackson* also noted, "The standard announced . . . does not permit a court to make its own subjective determination of guilt or innocence." *Id.* at 319 n.13. Instead, the reviewing court must consider only the trial record. *Id.* at 324.

Fourteen years later, this Court felt *Jackson*'s footnote 13 was important enough to be given its own paragraph in the text of another opinion. *Herrera v. Collins*, 506 U.S. 390, 402 (1993). *Herrera* also noted three important things that differentiated a *Jackson* sufficiency-of-the-evidence claim from one that a habeas corpus petitioner was "factually innocent." (1) A *Jackson* inquiry looks at whether there was a

constitutional violation because the State is required to prove each element of an offense beyond a reasonable doubt; (2) only "record evidence" may be used in a making a *Jackson* analysis and "new evidence" may not be considered; and (3) a *Jackson* analysis does not focus on whether the jury made a correct determination of guilt, but rather whether it made a rational determination of guilt. *Id.*

Not surprisingly, given the specific language of *Jackson* and *Herrera*, the Warden has discovered no other case in which a court has considered new evidence while deciding a *Jackson* claim.

As Judge O'Scannlain wrote in his able Court of Appeals dissent, "*Jackson* does not permit a federal court to resolve a sufficiency-of-the-evidence claim by imagining a different state trial in which evidence actually presented would have been excluded – especially not on the basis of reports added to the record during federal habeas review." Pet. App. 26a (O'Scannlain, J., dissenting).

It appears likely that both the District Court and the Court of Appeals confused sufficiency of the evidence claims, governed by *Jackson*, with assertions of "actual innocence" so as to overcome a procedural bar, governed by *Schlup v. Delo*, 513 U.S. 298, 314-15 (1995). *Jackson* claims and *Schlup* claims are, of course, separate and distinct. Like the type of claim foreclosed by this Court in *Herrera*, a *Jackson* claim is substantive -- that is, the claim of insufficient evidence itself provides a basis for relief. By contrast, a *Schlup* claim is procedural – that it, its resolution merely allows the consideration of other claims. *See Schlup*,

513 U.S. at 314 (discussing difference between substantive and procedural claims of innocence).

Indeed, *Schlup* claims require a petitioner "to support his allegations of constitutional error with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful." 513 U.S. at 324.

In 2007, this Court discussed the difference between *Jackson* and *Schlup*. *House v. Bell*, 547 U.S. 518, 538-39 (2006). *House* explained that a *Jackson* analysis presumes that the jury reasonably resolved evidentiary disputes so long as sufficient evidence supports the verdict. On the other hand, because a claim of "actual innocence" includes evidence the jury did not have before it, a *Schlup* analysis requires a reviewing court to determine how a jury would weigh all of the evidence, both old and new – and that might include considering whether witnesses were credible. *Id*.

The distinction is best illustrated and understood in the following scenario: A hypothetical prisoner could challenge his conviction based on the sufficiency of the evidence, only to procedurally default this claim in the state courts. In federal habeas corpus litigation, this prisoner could use newly discovered evidence to show, procedurally, that he is "actually innocent" under a *Schlup* analysis so that his otherwise defaulted claim could then be heard. However, the reviewing court could then examine only the trial record and make a substantive determination under a *Jackson* analysis

whether there was sufficient evidence presented at trial to sustain the conviction. If the reviewing court determined that sufficient evidence was presented at trial, it would be required to deny the petition on the grounds of sufficiency of the evidence, even though it was convinced of the prisoner's "actual innocence."

Simply put, a federal court can not consider evidence not adduced at trial in deciding whether or not there was sufficient evidence to sustain a conviction under *Jackson*. As a result, expansion of the record pursuant to Rule 7 is not allowed. To do otherwise would permit a prisoner to present in a federal habeas action a free-standing claim of actual innocence which is not permitted. *Herrera*, 506 U.S. at 416-17. Because both the District Court and the Court of Appeals committed this error, their judgments cannot stand.

B. Because Troy was not diligent in bringing new evidence to the state courts, Section 2254(e) barred Troy from introducing the new DNA evidence in his federal habeas petition.

In the courts below, Troy argued, and the Court of Appeals agreed, that he was entitled to expand the record, pursuant to Rule 7 of the Rules Governing Section 2254 Cases, with the Mueller letter because it "merely clarifies, rather than fundamentally alters, the DNA evidence and expert testimony that was already before the Nevada courts." Pet. App. 12a, *citing Vasquez v. Hillery*, 474 U.S. 254, 260 (1986).

Read in isolation, Rule 7 is one of extraordinary breadth, seeming to allow consideration of just about

any kind of material in deciding federal writs of habeas corpus. In actuality, Rule 7 is not as broad as it seems – particularly given the restraints on granting habeas corpus relief found in federal law. Most significantly in that regard, federal habeas corpus law requires petitioners to develop the factual basis for their claims in state court. 28 U.S.C. § 2254(e)(2).

In 2000, this Court examined the current codification of 28 U.S.C. § 2254(e)(2), and determined when an evidentiary hearing is allowed. *(Michael) Williams v. Taylor*, 529 U.S. 420, 429-34 (2000). *Williams* explained that unless state prisoners are diligent in seeking to develop the factual basis of their claims in state court, an evidentiary hearing may not be held. *Id.* at 432. *Williams* also held, "The question is not whether the facts could have been discovered but instead whether the prisoner was diligent in his efforts." *Id.* at 435.

Williams then interpreted "lack of diligence" to give the term the same definition it had been given in *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1991). *Williams*, 529 U.S. at 432-34. However, *Williams* also acknowledged that Congress, in enacting § 2254(e)(2), had not created a freestanding claim of "actual innocence" within the statute. *Id.* at 433.

In 2004, this Court summarily reversed the Sixth Circuit, holding that "we have made clear that whether a state court's decision was unreasonable must be assessed in light of the record the [state] court had before it." *Holland v. Jackson*, 542 U.S. 649, 652 (2004) (*per curiam*). *Holland* explained that the requirements of 28 U.S.C. 2254(e)(2) must be met even, as in this case, when a prisoner seeks relief

based on new evidence and an evidentiary hearing is not held. *Id.* at 652-53.

On the other hand, since its adoption in 1976, this Court and its members have mentioned Rule 7 on only four occasions. *McCleskey v. Zant*, 499 U.S. 467, 498 (1991); *Vasquez v. Hillery*, 474 U.S. 254, 256 (1986); *Vincent v. Louisiana*, 469 U.S. 1166, 1169 (1985) (Brennan, J., dissenting from denial of *certiorari*); *Rose v. Lundy*, 455 U.S. 509, 526 n.3 (1982) (Blackmun, J., concurring). Only *Vasquez* contains any significant analysis of the rule and its interplay with other habeas corpus concepts.

The *Vasquez* Court allowed expansion of the record with information that "did not fundamentally alter the legal claim already considered by the state courts, and, therefore, did not require that respondent be remitted to state court for consideration of that evidence." 474 U.S. at 260. *Vasquez*, of course, is a pre-AEDPA case, and its continuing viability to justify expansion of the record is doubtful given the requirements of 28 U.S.C. § 2254(e)(2).

Reliance on *Vasquez* and Rule 7 as justification to expand the record suffers from a fundamental problem, particularly with respect to *Jackson* claims, which are limited to record evidence: A federal court's consideration of evidence beyond the trial record does violence to its statutory duty found in 28 U.S.C. § 2254(d)(1).

The Circuit Courts of Appeal have attempted to harmonize 28 U.S.C. § 2254(e)(2) and Rule 7 while following this Court's decisions. The Ninth Circuit, for example, has held that "under *Holland*, [a petitioner]

must comply with § 2254(e)(2) in order to expand the record under Rule 7." *Cooper-Smith v. Palmateer*, 397 F.3d 1236, 1241 (9th Cir. 2004) (footnote omitted). Prior to *Holland*, the Seventh Circuit adopted a rule very similar to the *Holland* rule. *Boyko v. Parke*, 259 F.3d 781, 790 (7th Cir. 2001). The Eighth Circuit expressly endorsed *Cooper-Smith*. *Mark v. Ault*, 498 F.3d 775, 788 (8th Cir. 2007).

Troy did not challenge the DNA evidence at trial. Because he failed to object, the Nevada Supreme Court declined to consider the issue on appeal. Pet. App. 82a. Additionally, although Troy raised his *Jackson* claim on direct appeal, he still had an opportunity, during his post-conviction hearing, to again challenge the DNA evidence. In this case, Troy filed a petition for post-conviction relief, raising various challenges to DNA testimony, including a claim that trial counsel was ineffective for failing "to object to the lack of pre-trial evidentiary hearing or to qualifying Renee Romero as an expert witness thereby precluding appellate review of the DNA evidence." JA 1099.

The state district court conducted an evidentiary hearing on Troy's post-conviction petition. JA 1202. At that evidentiary hearing, Troy presented *no evidence*, from Dr. Mueller or anyone else, challenging the adequacy of Romero's testimony, her qualifications or the reliability of the DNA evidence she presented. Instead, Troy criticized the collection of evidence but provided no actual evidence that the DNA evidence was mishandled. Troy, if he was being diligent, could have used *that* state hearing to buttress his claim that the DNA evidence was somehow unreliable. This he did not do.

Instead, at Troy's state post-conviction hearing, the thrust of the testimony was that trial counsel should have explored the possibility that Jane Doe's stepfather was the true perpetrator. JA 1217-18, 1224-32, 1265-69, 1223-29. Troy argued that Jane Doe's stepfather, who was at work on the night of her attack, should have been investigated as a suspect, particularly since he had been convicted of sexual assault in Utah subsequent to Troy's trial and had a period during his work schedule that might cast doubt on his whereabouts. JA 1475.

Since Jane Doe's stepfather is not one of Troy's numerous brothers, the Mueller letter is inconsistent with Troy's theory presented at the state post-conviction hearing. Indeed, Troy's alternative theory that his brother Trent might have been the perpetrator received scant attention in that proceeding, even though Trent testified as a witness. JA 1278 (Troy's mother testifying about location of Trent's residence); JA 1316-42 (Trent's testimony).

Because he did not present the Mueller letter or something similar at the state evidentiary hearing, Troy was not diligent. Consequently, the District Court erred in admitting and then considering the Mueller letter in the first instance.

C. Consideration of the Mueller letter renders the *Jackson* claim unexhausted.

If the record can be expanded in deciding *Jackson* claims and if the District Court properly allowed expansion of the record despite Troy's lack of diligence, the District Court and Court of Appeals still erred. As already noted, *Vasquez* interpreted Rule 7 to allow

expansion of the record when such expansion does "not fundamentally alter the legal claim already considered by the state courts." *Vasquez*, 474 U.S. at 260.

However, at least three circuits have held that evidence offered pursuant to Rule 7 after a state court's review of a claim impermissibly undermines the exhaustion requirement of § 2254(c) when it transforms the claim "into a significantly different and more substantial claim, placing the claim in a significantly different and stronger posture than it was when the state courts considered it." *Demarest v. Price*, 130 F.3d 922, 935 (10th Cir. 1997) (citation and internal quotation omitted). *Accord Aiken v. Spaulding*, 841 F.2d 881, 884 n.3 (9th Cir. 1988); *Wise v. Warden*, 839 F.2d 1030, 1034 (4th Cir. 1988).

Demarest took the position that unless the factual basis for the new evidence was contained within the claim, the new evidence would render a claim unexhausted. 130 F.3d at 936-37. Significantly, in *Demarest* there was a general attack on the admissibility of blood splatter evidence in the state court. *Id.* at 937. However, in federal court, the petitioner presented an expert who criticized the state trial expert. *See id.* ("Essentially, Dr. Kennedy's testimony regarding the state's blood-spatter evidence was that the 'physics are wrong, so the science is wrong, so the conclusions are wrong'"). This type of evidence rendered the claim unexhausted. *Id.*

Aiken took a similar position, finding that the new evidence – a sound expert critiquing a tape recording in *Aiken* – rendered the claims unexhausted. *Aiken*, 841 F.2d at 883.

This case mirrors *Demarest* and *Aiken*. At trial, Troy's attorney *did not object* to the DNA evidence. On appeal, Troy raised as an issue that DNA evidence in general was unreliable and should not have been admitted without a hearing. JA 841-49. Troy only mentioned the DNA evidence in a passing reference to his sufficiency-of-the-evidence claim with the conclusory assertion "that there was a total failure of the DNA evidence to be established as trustworthy and reliable in this particular case." JA 849.

In his reply brief on direct appeal, Troy attempted to attack the admissibility of the DNA evidence, and included as an appendix the results of DNA testing done by Forensic Science Associates (FSA). JA 909-21. The FSA report did not criticize the State's DNA expert or how the evidence was handled in any fashion. Rather, FSA concluded that using PCR-based DNA testing, it had identified a genotype found in 1 in 10,000 persons in the Caucasian population and that Troy has this genotype. JA 916, 918. This number is not at all inconsistent with Romero's trial testimony of a 1 in 3,000,000 match using RLFP testing.

The Nevada Supreme Court declined to consider the DNA argument, instead holding:

> Troy argues that the district judge erred in not conducting a pretrial hearing to determine whether the DNA results were trustworthy and reliable. However, Troy made no objection to either the lack of a pretrial evidentiary hearing or to qualifying Romero as an expert witness on DNA evidence. Failure to object in the district court precludes consideration of the issues on appeal; however, this court may address plain

> error *sua sponte*. Because we conclude that the failure to conduct an evidentiary hearing was not plain error, we will not consider this issue.

Pet. App. 82a.[7]

On the other hand, the Mueller letter, taken at face value, is a broad-based critique of Renee Romero's trial testimony. JA 1581-84. This critique has no evidentiary link to anything presented to the state courts.[8] Instead, the argument Troy raised on direct appeal, and which Troy defaulted, had to do with DNA testing in general.

In finding the trial DNA evidence unreliable in its order granting habeas corpus relief, the District Court gave great weight to the claimed lack of reliability of the State's statistical figures. Pet. App. 38a-42a. In doing so, the District Court and the Court of Appeals relied upon evidence that was never presented to any Nevada court respecting alleged errors in the statistical probabilities of Troy's brothers in the

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[7] Of course, the admissibility of evidence at trial is generally an issue outside the scope of habeas corpus review. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Significantly, Troy raised no constitutional claim with respect to the admissibility of DNA evidence on direct appeal. Pet. App. 111a.

[8] Independent of Dr. Mueller's actual testimony, the letter has no evidentiary value at all, since it is indisputably hearsay and there is nothing in the Federal Rules of Evidence that would make it self-authenticating and thus admissible. The District Court and the Court of Appeals chose to consider this letter for the truth of the matter asserted even though Dr. Mueller's conclusions have not been subject to the crucible of cross-examination – and did so in order to discount completely Romero's testimony.

vicinity of the crime. The only similar argument presented to the Nevada Supreme Court was in footnote 1 of Troy's reply brief on direct appeal, which read:

> The impact of brothers in the suspect population is an important consideration that bears on the Random Match Probabilities (RMP). "But the probability that the suspect and his biological brother will share a set of alleles on each of the three probe sites is approximately (1/4)3 = 1/64." See Jonathan J. Koehler, DNA Matches and Statistics: Important Questions, Surprising Answers, 76 Judicature 222 (1993). In the present case, that factor is critically important, not only because the victim constantly referred to "Trent" instead of "Troy", but also because Renee Romero, the States's DNA "expert" quoted the odds of two brothers sharing the same alleles as **1 in 6,500!** (TR 344).

JA 893-94 (emphasis in original).

However, the Nevada Supreme Court could not consider this argument because reply briefs are limited to answering any new matters set forth in the opposing brief. Nev. R. App. P. 28(c). Reply briefs are not vessels for presenting new issues. Additionally, this argument was presented to support Troy's argument that his sentencing was improper, not to support a claim that the DNA evidence was unreliable. JA 889-94.

Consequently, even if the District Court properly expanded the record with respect to the *Jackson* claim

and then considered the Mueller letter, the consideration rendered the claim unexhausted. The substance of Mueller's letter was not considered by the Nevada state courts in the first instance. Mueller's letter makes Troy's *Jackson* claim both significantly different and more substantial – and as a consequence, unexhausted. 28 U.S.C. § 2254 (b), (c); *Rose v. Lundy*, 455 U.S. 509, 510 (1982).

D. The Mueller letter should have raised concerns in the District Court and the Court of Appeals.

The District Court, without ordering an evidentiary hearing, accepted the Mueller letter as authoritative, and on that basis, discounted Romero's testimony in its entirety in finding insufficient evidence to sustain Troy's conviction. Pet. App. 40a-42a. There are several reasons the District Court should have been more skeptical, particularly given Dr. Mueller's biases and the skepticism other courts have shown toward him.

Perhaps most significantly in this case, Dr. Mueller performed no actual DNA testing. Instead, the Mueller letter critiques Romero's trial testimony and, in its final paragraph, critiques the FSA report. JA 1581-84.

That the Mueller letter should not have been uncritically accepted is almost self-evident in Dr. Mueller's curriculum vitae. JA 1552. While Dr. Mueller asserts he has spoken at a host of conferences on DNA testing, all were for criminal defense organizations. JA 1556-59. This potential bias alone

suggests the district court erred in accepting Dr. Mueller's letter without further analysis.

A simple Westlaw search would have raised even more serious concerns. The Washington Supreme Court made a point of criticizing Dr. Mueller by name on at least three occasions. *See State v. Gregory*, 147 P.3d 1201, 1241 n.38 (Wash. 2007) ("We have also questioned testimony from Dr. Mueller"); *State v. Gore*, 21 P.3d 262, 274 n.9 (Wash. 2001) (noting the amount of money Dr. Mueller made as an expert witness and that his testimony was at odds with the opinion of the National Research Council); *State v. Copeland*, 922 P.2d 1304, 1318 n.5 (Wash. 1996) (noting the amount of money Dr. Mueller made as an expert witness and his lack of expertise in human genetics).

Likewise, in an earlier case, the California Court of Appeal noted that the trial court had "found Dr. Mueller's analysis to be biased and not entirely credible." *People v. Reeves*, 109 Cal.Rptr.2d 728, 745 (Cal. Ct. App. 2001).

The Navy-Marine Court of Military Appeals reached a similar conclusion when it observed, "[I]t was likely that the court members would find that Dr. Mueller and Dr. D'Eustachio were too extreme in their views and discount their testimony." *United States v. Goode*, 54 M.J. 834, 850 (N-M Ct. App. 2001).

Of even more concern, the California Court of Appeal observed in 2005, "On cross-examination, Dr. Mueller acknowledged that he did not have any formal training in interpreting data from forensic DNA testing, that he had never worked for a laboratory accredited in forensic DNA testing, and that he had

never done any DNA testing himself." *People v. Richie*, No. B158254, 2005 Westlaw 1340382, *5 (Cal. Ct. App. June 8, 2005) (unpublished).

Finally, a state court in Pennsylvania may have expressed it best when, after Dr. Mueller was proffered as a defense expert, it stated, "Well, I'm going to permit him to testify, but just barely, so proceed." *Commonwealth v. Blasioli*, 685 A.2d 151, 168 (Pa. Super. Ct. 1996).

In addition to not proceeding with caution before uncritically accepting Dr. Mueller's letter as authoritative, the District Court and the Court of Appeals gave the letter undue weight in determining that Romero's testimony could be disregarded in its entirety.

Most significantly, the Mueller letter challenges neither the RFLP testing nor Romero's conclusion that the tested evidence matched Troy's profile and that the probability of such a match happening at random was 1 in 3,000,000. Instead, the Mueller letter diverts attention by talking about the "prosecutor's fallacy." JA 1583.

The "prosecutor's fallacy" occurs when the jury is asked to use the DNA evidence as source probability for the DNA sample instead of random source probability. *See United States v. Chischilly*, 30 F.3d 1144, 1157 (9th Cir. 1994) (explaining "prosecutor's fallacy").

Romero committed this fallacy in her testimony. When initially asked if DNA testing is like a fingerprint, Romero made a critical distinction

between the two. "A fingerprint is making an identification. It's been accepted in the courts; it's being an identification of the one person who left that fingerprint. In DNA comparison, I'm making a comparison. I'm not making an identification." JA 439.

Shortly thereafter, Romero testified that the frequency she would expect to find the match "in the White, Black, and Hispanic populations, male and female" to be "one in 3 million." JA 440.

However, on re-direct examination, the prosecutor asked if that meant that the likelihood that the semen sample did not come from Troy would be .000033%, Romero responded, "I'd prefer to refer to it as one in 3 million." JA 458. When the prosecutor confused the concepts of comparison and identification in that question, he committed the "prosecutor's fallacy."

The Court of Appeals gave great weight to the "prosecutor's fallacy" in affirming the District Court. Pet. App. 15a-16a. There is a major problem with doing so: this Court has never held that the "prosecutor's fallacy" somehow undermines a DNA expert's proper testimony when doing a *Jackson* analysis or even that the "prosecutor's fallacy" violates due process. Indeed, the case below is the only time a Court of Appeals has ever addressed the "prosecutor's fallacy" in the context of federal habeas corpus litigation. As a result, the Nevada Supreme Court's *Jackson* analysis is neither "contrary to, nor an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Ironically, just five days before this Court granted *certiorari* in this

case, it reiterated § 2254(d)(1)'s principle in a case involving purportedly improper jury instructions. *Waddington v. Sarausad*, 129 S.Ct. 821, 823 (2009).

Further, the Mueller letter criticizes Romero's testimony about the likelihood of two brothers matching at the same loci. The Mueller letter suggests that the arithmetic is straightforward: .25 to the fifth power $(.25)^5$, which equals 0.0009765625 and corresponds to 1 in 1024. JA 1582. However, Romero expressly testified:

> In the National Research Council report, the one I spoke about earlier, the committee wrote the report under the auspices of the National Academy of Sciences, they addressed that problem, in their discussion of useful data-banking DNA, and they have a formula in there, and they state that they could share – 25 percent could share two bands and 50 percent chance to share one band. And they have a formula they use – utilize the frequency of occurrence of the alleles. And in this case that turns out to be one in 6,500. Meaning those two adults would have to mate and produce offspring 6,500 times to come up with that pattern again.

JA 468-69.

It seems logical to assume that if the formula was simple, Romero could have testified that it was a matter of arithmetic: $(.25)^5$. However, Romero's rather longer explanation appears to be based on a scientific study that differentiates between "bands" and "alleles" and included more than arithmetic.

Troy did not challenge these numbers at trial. The Mueller letter does not even opine that the National Research Report is wrong or that the "formula" the National Research Report used was merely one of arithmetic. Rather, the letter simply concludes Romero was wrong because 1 in 6500 does not equal $(.25)^5$.

Additionally, in this case, the defense did not challenge the DNA evidence at trial. However, at the initial sentencing hearing, the trial judge referenced the FSA analysis initially prepared for the defense. JA 799. This report was attached as a supplement to Troy's reply brief on direct appeal. JA 909-21.

FSA did PCR testing. JA 909-10, 912. Renee Romero, the trial expert, referenced a 1 in 3,000,000 probability using RFLP testing. PCR stands for polymerase chain reaction and uses a copying method "to replicate DNA regions in a test tube. By repeating the copying process, a small number of DNA molecules can be reliably increased up to billions within several hours. RFLP analysis requires a biological sample about the size of a quarter, but PCR can be used to reproduce millions of copies of the DNA contained in a few skin cells." *DNA Typing-PCR,* http://dna.gov/basics/analysis/pcr.

RFLP, on the other hand, is a technique for analyzing the variable lengths of DNA fragments. RLFP involves using a special kind of enzyme to digest a DNA sample. This enzyme cuts DNA at a specific sequence pattern. As a result, "The presence or absence of certain recognition sites in a DNA sample generates variable lengths of DNA fragments, which are separated using gel electrophoresis. They are then

hybridized with DNA probes that bind to a complementary DNA sequence in the sample." *DNA Forensic*, http://www.ornl.gov/sci/techresources/Human_Genome/elsi/forensics.shtml.[9]

In Appendix 1 of their report, FSA found a random match probability statistic of 1 in 10,000. JA 916, 918. In other words, 1 in 10,000 people chosen at random would have these DNA characteristics. Troy also has these characteristics.

In this case, the District Court, confronted with a letter that appeared to contradict portions of Romero's testimony, decided – contrary to *Jackson*, contrary to 28 U.S.C. § 2254(d)(1), and without taking any additional evidence, without holding the letter to any kind of scrutiny, without having any expert critique of the letter or *its* conclusions, in short, without holding an evidentiary hearing – that it could discount completely the testimony of a witness who qualified as an expert and whose own testimony was subject to cross-examination.[10] As noted in the preceding section, the District Court's and the Court of Appeals' conduct eviscerated the deference owed the trial jury's findings.

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[9] RLFP testing is considered more discriminating than PCR testing. As a result, the PRC and RLFP results are not at odds with each other.

[10] Given the posture of the case, the only issue before the Court is sufficiency of the evidence. However, the District Court also accepted the Mueller letter as indisputable fact in addressing the ineffective assistance of counsel claim. Pet. App. 47a-50a.

Following this discounting, the District Court then weighed the trial evidence for sufficiency and found it wanting. Pet. App. 46a. The District Court fundamentally erred in doing this – and the Court of Appeals compounded the error by not correcting it on appeal.

CONCLUSION

This Court should reverse the decision of the Ninth Circuit Court of Appeals.

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RESPONDENT'S BRIEF

No. 08-559

IN THE

Supreme Court of the United States

E.K. MCDANIEL, WARDEN, *et al.*,
Petitioners,

v.

TROY BROWN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. What is the standard of review for a federal habeas court for analyzing a sufficiency of the evidence claim under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)?

2. Does analysis of a sufficiency of the evidence claim pursuant to *Jackson* v. *Virginia*, 443 U.S. 307, 318-19 (1979), under 28 U.S.C. § 2254(d)(1) permit a federal habeas court to expand the record or consider nonrecord evidence to determine the reliability of testimony and evidence given at trial?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
BACKGROUND	4
A. The DNA Evidence	4
B. The Non-DNA Evidence	6
C. The DNA Expert Testimony	12
D. State Court Appellate And Post-Conviction Proceedings	16
E. Federal Court Proceedings	17
SUMMARY OF ARGUMENT	18
ARGUMENT	20
THE NEVADA SUPREME COURT'S DECISION IS CONTRARY TO CLEARLY ESTABLISHED FEDERAL DUE PROCESS LAW	20
A. The DNA Testimony Was Impermissibly Suggestive And Unreliable	20
B. The Admission Of Inaccurate And Misleading DNA Testimony Violated Brown's Due Process Rights	24
1. The Ninth Circuit granted habeas relief on due process grounds and ordered a new trial	24

TABLE OF CONTENTS—continued

Page

2. Because the Nevada Supreme Court failed to provide the fundamentally fair procedures to which Brown was entitled under the Due Process Clause, that court's decision was "contrary to, or . . . an unreasonable application of, clearly established Federal law." 25

3. The constitutional error of allowing the faulty DNA testimony was not harmless 30

4. Although Brown's sufficiency of the evidence claim was analyzed under the *Jackson* framework in the District Court and Ninth Circuit, it is more properly viewed as presenting a Due Process Clause violation 33

C. The Mueller Report Was Properly Admitted By The District Court 35

D. Brown Exhausted The Remedies Available In The Nevada Courts 40

CONCLUSION 45

TABLE OF AUTHORITIES

CASES Page

Aiken v. *Spalding*, 841 F.2d 881 (9th Cir. 1988) 43
Ake v. *Oklahoma*, 470 U.S. 68 (1985) 31
Boumediene v. *Bush*, 128 S. Ct. 2229 (2008) 36
Brecht v. *Abrahamson*, 507 U.S. 619 (1993) 2, 31, 35
Bunting v. *Mellen*, 541 U.S. 1019 (2004) 3
Carey v. *Musladin*, 549 U.S. 70 (2006) 26, 27
Caspari v. *Bohlen*, 510 U.S. 383 (1994) 34
Caterpillar Inc. v. *Lewis*, 519 U.S. 61 (1996) 35
Colorado v. *Connelly*, 479 U.S. 157 (1986) ... 26
Cooper v. *McGrath*, 314 F. Supp. 2d 967 (N.D. Cal. 2004) 34
Delaware v. *Fensterer*, 474 U.S. 15 (1985) .. 29, 30
Demarest v. *Price*, 130 F.3d 922 (10th Cir. 1997) 43
Dias v. *State*, 601 P.2d 706 (Nev. 1979) 44
Dieleman v. *Sendlein*, 670 P.2d 578 (Nev. 1983) 42
Ducksworth v. *State*, 942 P.2d 157 (Nev. 1997) 42
Emmons v. *State*, 807 P.2d 718 (Nev. 1991) *abrogated on other grounds*, *Harte* v. *State*, 13 P.3d 420 (Nev. 2000) 44
Estelle v. *Williams*, 425 U.S. 501 (1976) 26
Grey v. *State*, 178 P.3d 154 (Nev. 2008) 44
Hall v. *State*, 435 P.2d 797 (Nev. 1975) 38
Hardison v. *State*, 437 P.2d 868 (Nev. 1968) 44
Herrera v. *Collins*, 506 U.S. 390 (1993) 2, 36
Hogan v. *Warden*, 860 P.2d 710 (Nev. 1993) 38

TABLE OF AUTHORITIES—continued

Page

Jackson v. *Virginia*, 443 U.S. 307 (1979) 2
K Mart Corp. v. *Cartier, Inc.*, 485 U.S. 176 (1988) 4
Keeney v. *Tamayo-Reyes*, 504 U.S. 1 (1992) 36
Lisenba v. *California*, 314 U.S. 219 (1941) .. 26
Lockhart v. *Nelson*, 488 U.S. 33 (1988) 25
Lonchar v. *Thomas*, 517 U.S. 314 (1996) 36
Manson v. *Brathwaite*, 432 U.S. 98 (1977) 19, 27
McCullough v. *State*, 657 P.2d 1157 (Nev. 1983) 44
Melendez-Diaz v. *Massachusetts*, 129 S. Ct. 2527 (2009) 21
Neil v. *Biggers*, 409 U.S. 188 (1972) 27
Ohio v. *Robinette*, 519 U.S. 33 (1996) 34
Panetti v. *Quarterman*, 127 S. Ct. 2842 (2007) 27, 28
People v. *Collins*, 438 P.2d 33 (Cal. 1968) 42
Roberts v. *Galen of Va., Inc.*, 525 U.S. 249 (1999) 3
Russell v. *Rolfs*, 893 F.2d 1033 (9th Cir. 1990) 6
Schlup v. *Delo*, 513 U.S. 298 (1995) 36
Somee v. *State*, 187 P.3d 152 (Nev. 2008) 44
Spencer v. *Texas*, 385 U.S. 554 (1967) 26
Sterling v. *State*, 834 P.2d 400 (Nev. 1992) 44
Teague v. *Lane*, 489 U.S. 288 (1989) 34
Thigpen v. *Roberts*, 468 U.S. 27 (1984) ... 3, 34, 35
Thomas v. *State*, 148 P.3d 727 (Nev. 2006), *cert. denied*, 128 S. Ct. 1061 (2008) 42
Turner v. *Armontrout*, 845 F.2d 165 (8th Cir. 1988) 29

TABLE OF AUTHORITIES—continued

Page

United States v. *Chischilly*, 30 F.3d 1144 (9th Cir. 1994) 12, 21
United States v. *Gwaltney*, 790 F.2d 1378 (9th Cir. 1986) 42
United States v. *Hicks*, 103 F.3d 837 (9th Cir. 1996), *overruled on other grounds by United States* v. *W.R. Grace*, 526 F.3d 499 (9th Cir. 2008) 12
United States v. *Lanier*, 520 U.S. 259 (1997) 27, 28
United States v. *Lovasco*, 431 U.S. 783 (1977) 26
United States v. *Morrow*, 374 F. Supp. 2d 51 (D.D.C. 2005) 21
United States v. *Shea*, 957 F. Supp. 331 (D.N.H. 1997), *aff'd*, 159 F.3d 37 (1st Cir. 1998) 21
Vasquez v. *Hillery*, 474 U.S. 254 (1986) 36, 37, 41
Wainwright v. *Goode*, 464 U.S. 78 (1983) 29
Walch v. *State*, 909 P.2d 1184 (Nev. 1996) 44
Weaver v. *State*, 117 P.3d 193 (Nev. 2005) ... 42
Wigglesworth v. *Oregon*, 49 F.3d 578 (9th Cir. 1995) 33
Williams v. *Taylor*, 529 U.S. 420 (2000) 38
In re Winship, 397 U.S. 358 (1970) 31
Wright v. *West*, 505 U.S. 277 (1992) 27

STATUTE

28 U.S.C. § 2254(d)(1) 26, 27, 28

TABLE OF AUTHORITIES—continued

RULE Page

28 U.S.C. foll. § 2254, Rules Governing Section 2254 Cases in the United States District Courts, R. 7(a)..... 36

STATEMENT OF THE CASE

This habeas case arrives at the Court in an odd procedural posture. Although the Ninth Circuit and the District Court purported to apply the remedial analysis set forth in *Jackson* v. *Virginia*, 443 U.S. 307 (1979), in addressing Respondent Troy Brown's due process claim, the reasoning in their opinions and the type of remedy imposed (a new trial) demonstrate that Brown's claim was not actually decided pursuant to *Jackson*.[1] Brown agrees both with the Solicitor General and with the National Association of Criminal Defense Lawyers ("NACDL") that the true remedial standard of *Jackson* is inapplicable to the due process violation that rendered Brown's trial fundamentally unfair. Brief of the Solicitor General as *Amicus* at 16-19 ("*Amicus* U.S. Br."); *Amicus* NACDL Br. That violation occurred when the State presented and relied upon the improper and gravely prejudicial testimony of its DNA expert. The understandable confusion on all fronts in this case stems from the reality that, as the State earlier conceded, the remaining evidence adduced at Brown's trial was wholly insufficient to support a verdict of guilt beyond a reasonable doubt on the charged offenses. In more precise terms, the improper testimony of the State's expert was not harmless error.

Like the District Court, the Ninth Circuit held that the admission of the unreliable DNA testimony "rendered the trial fundamentally unfair" and

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[1] The District Court also granted Brown a conditional writ on two of his ineffective assistance of counsel claims. Pet. App. 54a. Because the Court of Appeals affirmed on the *Jackson* claim, it did not reach the two ineffective assistance claims. *Id.* at 21a.

"violated [Brown's] due process rights." Pet. App. 19a; see also *id.* at 38a ("if the evidence is not reliable, then due process requires it be excluded"). Then, "[a]fter excluding [the expert's] testimony," the District Court and the Ninth Circuit sought to determine the effect of that improper testimony by "weigh[ing] the sufficiency of the remaining evidence in the light most favorable to the prosecution," under the remedial analysis set forth in *Jackson*. *Id.* at 19a. This analysis is not a true *Jackson* analysis because, as the Solicitor General observes, a *Jackson* review is based on the "record evidence adduced at the trial." *Amicus* U.S. Br. 17 (citing 443 U.S. at 324). The purpose of a *Jackson* analysis is to determine whether the jury acted in a rational manner in returning a guilty verdict based on the evidence before it, not whether improper evidence violated due process. See, *e.g.*, 443 U.S. at 317-18; see also *Herrera* v. *Collins*, 506 U.S. 390, 402 (1993).

Instead, the proper remedy analysis for the violation identified in this case (and acknowledged by the State) should have been harmless error review pursuant to *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993). The references to *Jackson* in Brown's case, however, ultimately worked in the State's favor. The courts below asked whether, absent the improperly admitted DNA testimony, "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *E.g.*, Pet. App. 13a (citing *Jackson*, 443 U.S. at 319) (emphasis in original). That standard is more deferential to the jury's verdict than harmless error review under *Brecht*, which looks to whether the improperly admitted testimony had a "substantial and injurious effect or influence in determining the jury's verdict." 507 U.S. at 623.

That *Jackson* was not, in fact, the basis of the underlying decisions in this case is further demonstrated by the remedy that was ordered—a retrial. Pet. App. 21a; see also *id.* at 54a. As the Solicitor General correctly observes, the Double Jeopardy Clause precludes retrial after a successful *Jackson* claim. *Amicus* U.S. Br. 17. Thus, had the decisions wholly relied upon *Jackson*, the federal courts could not have subjected Brown to a retrial.

Because Brown agrees with the Solicitor General that this case should not be decided under *Jackson*, see *Amicus* U.S. Br. 15-16, the two questions presented are properly viewed as moot. A proper disposition of this case would be a remand to the Ninth Circuit for a proper analysis of Brown's claim under *Brecht*. See, *e.g.*, *Roberts* v. *Galen of Va., Inc.*, 525 U.S. 249, 253-54 (1999) (per curiam). The Court could also properly affirm the judgment of the Ninth Circuit on the grounds, discussed below, see, *e.g.*, *infra* pp. 20-35, that it reached the correct result (although relying on the wrong standard) by finding a violation of due process resulting from the use of impermissible, unreliable testimony about the DNA evidence which was not harmless and which justified habeas relief.[2] See *Thigpen* v. *Roberts*, 468 U.S. 27, 32-33 (1984) (affirming on grounds other than those on which certiorari was granted); see also *Bunting* v. *Mellen*, 541 U.S. 1019, 1023 (2004) (Scalia, J., dissenting) ("This Court reviews judgments, not statements in opinions.") (quoting *California* v.

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[2] As explained below, the *Jackson* analysis referenced by the District Court and the Ninth Circuit imposes a standard that is more deferential to the jury's verdict than that under *Brecht*. For this reason, and others explained in the NACDL brief, a dismissal of the case as improvidently granted could also be an appropriate disposition. *See Amicus* NACDL Br.

Rooney, 483 U.S. 307, 311 (1987)); *K Mart Corp.* v. *Cartier, Inc.*, 485 U.S. 176, 185 (1988) ("Although we reject the Court of Appeals' analysis, we nevertheless agree with its conclusion . . . ."). In any event, in light of the plain constitutional error which infected Brown's trial, it is clear that reversal of the grant of habeas relief, as the State requests, is not warranted.

BACKGROUND

A. The DNA Evidence

During Troy Brown's trial for sexual assault, the State made two errors in describing the statistical meaning of the deoxyribonucleic acid ("DNA") evidence to the jury that rendered his trial fundamentally unfair.

First, the State relied on the "prosecutor's fallacy" in its presentation to Brown's jury. See Pet. Br. 54 ("[The expert] committed this fallacy in her testimony."); *id.* at 55 ("When the prosecutor confused the concepts of comparison and identification in that question, he committed the 'prosecutor's fallacy.'"). The "prosecutor's fallacy" is a highly prejudicial scientific error whereby the prosecution represents the probability that a person picked at random would match the crime scene DNA sample ("random match probability") as if it were the likelihood that the person on trial is the source of the DNA ("source probability"). See *id.* at 54-55. In essence, the prosecutor's fallacy improperly converts the statistical probability of a random match into an "identification" of the perpetrator of a crime. The State's DNA expert testified—incorrectly—that there was a .000033 percent chance that Brown was not the source of the crime scene DNA sample. J.A. 460-62. In his final argument to the jury, the prosecutor compounded this error by arguing that the DNA

proved that the jury could be "99.999967 percent sure" that Brown was guilty. *Id.* at 730.

Like other identification procedures that are unnecessarily suggestive and unreliable, the prosecutor's procedure of introducing the DNA evidence as a means of "identifying" the assailant violated the Due Process Clause of the Fourteenth Amendment. The admission of expert testimony about source probability is improperly suggestive because it incorrectly implies that the DNA evidence has proven the source of the crime scene DNA. Here, such testimony was not only unreliable, it was demonstrably wrong.

Second, the State's expert testified that the probability that two brothers would share a DNA pattern at five loci was one in 6,500 or .02 percent. *Id.* at 468-69. This figure is mathematically incorrect. Moreover, the testimony fails to take into account that Brown has four brothers, two of whom were in the immediate area during the night of the assault. *Id.* at 427, 1582-83, 1586. When asked of whom the assailant reminded her, the victim repeatedly named Trent Brown, one of these brothers, see *id.* at 177, 521-22, 526-29, although she ultimately never made any positive identification of her assailant at trial.

These errors rendered Brown's trial fundamentally unfair and denied him due process of law. The errors were not harmless; even the State has conceded that, absent the faulty DNA evidence, there was not sufficient evidence to establish Brown's guilt. See *id.* at 1173, 1176, 1483.

Because the inaccurate DNA testimony was unnecessarily suggestive and unreliable, but was presented to the jury as irrefutable scientific evidence

establishing Brown's guilt, the District Court and Ninth Circuit correctly held that Brown's due process rights were violated and granted his petition for writ of habeas corpus. Pet. App. 31a-54a; see also *id.* at 1a-28a.

B. The Non-DNA Evidence

The State has conceded that the non-DNA evidence is insufficient to convict Brown. J.A. 1173, 1176, 1483. Brown agrees.[3]

In the early morning hours of January 29, 1994, 9-year-old Jane Doe (a pseudonym) was sexually assaulted in her home in Carlin, Nevada. *Id.* at 160. According to Jane, a man entered her bedroom and raped her. *Id.* She "played dead," and he left. *Id.* at 162. Jane has never identified her assailant. When police showed Jane a photo line-up containing Brown's picture, she identified him as someone she knew, but not as her assailant. *Id.* at 528-30, 533-34.

Jane described her assailant as a man with blond hair. *Id.* at 503, 515, 520. Brown has brown hair. *Id.* at 106. Jane said she thought the man had a moustache. *Id.* at 521. That night, Brown was clean shaven. *Id.* at 135; see also *id.* at 606. Jane said her assailant wore a black coat that had "a zipper, for sure," and a watch that scratched her face. *Id.* at 516-18. That night, Brown was wearing dark jeans and a black satin coat with no zipper. *Id.* at 291, 646. Brown not only did not wear a watch; he does not own one. *Id.* at 610, 630. The trial evidence

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[3] The State's attempt to withdraw this concession in its brief, *see* Pet. Br. 35, is foreclosed. *See, e.g.*, *Russell* v. *Rolfs*, 893 F.2d 1033, 1038 (9th Cir. 1990) ("[T]he federal courts can protect the integrity of the federal system by preventing the state from taking advantage of a state decision it secured by telling the state court the opposite of what it told the federal court.").

established that Jane said her assailant wore no hat or cap. *Id.* at 519.[4] That night, Brown was wearing a black cowboy hat with a silver rim. *Id.* at 192, 595. Jane said her assailant smelled of cologne. *Id.* at 524. Jane's mother Pam Henle testified that she had danced with Brown that night and he did not smell of cologne. *Id.* at 134-35.

Jane said she bit her assailant on the hand. *Id.* at 176. About four hours after the assault, a police officer found no evidence of any bites on Brown's hands. *Id.* at 240. As a result of the assault, Jane was covered in blood. *Id.* at 124, 251. Hours later, that same police officer found no evidence of blood on Brown or the boots he wore that night. *Id.* at 254, 261-62.

Jane believed that her assailant turned off the lighted make-up mirror that she used as a night light; after the assault, the light was off and turned from its normal position. *Id.* at 139, 514. Police lifted one fingerprint from the mirror and determined it did not match Brown. *Id.* at 495-98.

At trial, Jay and Leah Doke testified that they saw a man on Jane Doe's street at 1:05 a.m. wearing a black jacket with a bright green emblem on the back. *Id.* at 202, 207, 543, 547. Leah Doke said the emblem on the back of the jacket was "fluorescent green" and reminded her of "a skull, bandit emblem." *Id.* at 543. Brown's brother Travis owns a black satin jacket with a zipper that has a bright blue-green SKOAL emblem

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[4] The State asserts that Connie Walker, an Elko police detective, "testified that Jane Doe stated that her attacker wore a cowboy hat." Pet. Br. 26. The record directly contradicts this. Connie Walker initially stated this fact, but upon further examination she admitted that Jane Doe in fact said her attacker did *not* wear a hat. J.A. 518-19.

on the back. See *id.* at 291-93. The jacket was entered into evidence as trial exhibit M. *Id.* at 292-95. The black jacket that Brown was wearing on the night of the assault has snaps instead of a zipper and a very colorful orange and yellow depiction of a woman on the back. *Id.* at 291. Brown's jacket was admitted as trial exhibit L. *Id.* at 294.

On the night before the assault, Jane and her sister were at Brown's brother Trent's trailer, babysitting for Trent and his wife Raquel's two younger children. *Id.* at 102-04. Trent and his wife had been out at a bar with Jane's mother Pam. *Id.* Trent and his wife returned home at 7:30 or 8:00 p.m.; around 9:30 p.m., Jane and her sister went back to their own home. *Id.* at 103-05. Around 10:00 or 10:30 p.m., Jane called the Peacock Bar to find her mother and let her know that they had returned home. *Id.* at 119, 123. Brown answered the telephone when Jane called the bar. *Id.* at 119-23, 608. He told Jane that her mother was at CG's Bar and that he would deliver the message that she had called. *Id.* at 608-09. Brown went across the street to CG's Bar, but by the time he arrived, Pam was already on the phone with Jane, and so Brown returned to the Peacock Bar and kept drinking. *Id.* At trial, Jane testified that she went to sleep around 11:00 p.m. and that the attack lasted about two hours. *Id.* at 159-60.

After the assault, Jane telephoned her mother (Pam) at the bar where she was drinking. *Id.* at 123, 129-30, 189. Jane stated that a man who had been looking for her mother had hurt her. *Id.* at 123. Pam went home and called 911. Carlin Police Officer Michael Terry arrived at approximately 1:15 a.m. *Id.* at 219-20. Jane was covered in blood. *Id.* at 124, 251. Pam blurted out that she was feuding with her ex-husband and that he had threatened to "f*** her

daughter in order to get back at her." *Id.* at 253, 553, 599.

At the hospital, examination confirmed that Jane had been penetrated both vaginally and anally. *Id.* at 91-92, 480-82. A "sexual assault kit" was taken, including a vaginal smear, to test for the presence of sperm. *Id.* at 481-82. Debris was collected off Jane's teeth by the emergency room doctor because Jane said she had bit her assailant. *Id.* at 176, 346, 504-05. All physical and medical evidence was kept by Carlin Police and later taken to Washoe County's Crime Lab. *Id.* at 339-40, 347. At trial, it was revealed that, although a policeman testified he saw it, the emergency room doctor had no recollection of taking teeth debris scrapings, nor was any ever located or tested by the lab. *Id.* at 483, 486-87. In addition, although Brown's bedding was collected by police, see *id.* at 347, it was never examined or tested. See *id.* at 398-99, 402-03.

A few days after the attack, when Jane was pressed by police to say who the man reminded her of, she said "Troy." *Id.* at 521-22. The police asked "who?" and Jane replied "Trent. Yes, Trent," referring initially to Troy Brown and then correcting herself and indicating his brother Trent Brown. *Id.* at 522. Both Troy and Trent Brown were friends with Jane's step-father Wayne, and both had previously been to Jane's home to visit Wayne. *Id.* at 143, 289, 522, 604.

When Jane saw a television report that there was a warrant for Troy Brown's arrest she became upset. *Id.* at 526. The police were called, and Jane told them she "knew it was him" and that the man that attacked her "sent [her] flowers." *Id.* at 526-29. Jane retrieved the card from the flowers and showed it to police. It was signed by "Trent and Raquel," who are Brown's brother Trent and Trent's wife. *Id.* at 527.

Police showed Jane a photo line-up containing Brown's photo but no one else Jane knew. *Id.* at 526-28, 538. Photos of Brown's brothers Trent and Travis were not included in the line-up. *Id.* at 369, 527-28. Jane identified Brown as someone she knew, but not as her assailant. *Id.* at 528-30, 533-34.

At trial, Jane said she did not know who had assaulted her. *Id.* at 160. She said the man reminded her of Brown's brother Trent "[a] little" and that he smelled "kind of the same," like the same type of cologne. *Id.* at 177. Jane testified that she did not know Brown's other brother Travis Brown. *Id.* at 180. Trent, Troy, Travis, and the two youngest Brown brothers all resemble each other. *Id.* at 275.

Jane's neighbor Ellen Johnson testified that two or three days after the crime a young man with longer dirty blond hair who had lived in the same trailer park suddenly appeared clean shaven and with real short hair. *Id.* at 589-91.

On January 28, 1994, Brown spent the night drinking at two bars in Carlin, Nevada—CG's Bar and the Peacock Bar. *Id.* at 606-08. Brown's brothers Trent and Travis were also at CG's Bar during parts of the evening. *Id.* Brown, who was not wearing a watch, could not say what time he left the Peacock Bar. *Id.* at 610. One bartender said about 12:15 am or 12:20 a.m., *id.* at 187-89; another bartender said Brown left closer to 1:30 a.m. *Id.* at 596.

After Brown left the Peacock Bar he walked to CG's, ordered a beer, took a few sips, and walked home. *Id.* at 610-11. He was highly intoxicated and vomited on his walk home. *Id.* at 608, 613. According to his roommate and younger brother Travis, Brown got home at 1:32 a.m. *Id.* at 280. (A

policeman later determined Travis's digital clock was about 6 minutes fast. *Id.* at 280-81.) Brown took off his hat, put his pants and shirt into the washer to get rid of the vomit, and went to bed in his underwear. *Id.* at 279-80, 612-13. Travis did not see any traces of blood anywhere. *Id.* at 287.

At about 5:00 a.m. on the morning of the assault, Carlin Police Officer Michael Terry went to Brown's home. *Id.* at 282. Brown, who had been sleeping, spoke with Officer Terry while wearing nothing but his underwear. *Id.* at 238. Officer Terry questioned Brown for about 30 minutes and looked for evidence pertaining to the case. *Id.* at 239-40, 261-62. Officer Terry looked at Brown's hands and found no evidence of any bites. *Id.* at 240. Officer Terry also did not see any blood on Brown. *Id.* at 254. He looked at Brown's boots and saw no evidence of blood spatter. *Id.* at 261-62.

Later that day, after Brown left for a previously planned trip to his parent's house in Loa, Utah, police came back with a search warrant and took Brown's bedding. *Id.* at 616. Brown's father suggested he go to a medical clinic to confirm he had no bites or scratches on his body. *Id.* at 617-18. He did so on Wednesday, February 2, 1994, and a nurse confirmed he was free of any and all abrasions, scratches, bruises, and lacerations. *Id.* at 617-18, 761. On February 3, 1994, Brown voluntarily went in for questioning by Carlin police. *Id.* at 620-21.

Brown has consistently denied any involvement in the crime. See, *e.g.*, *id.* at 602. When a police officer lied to him, saying they found his fingerprints in Jane's bedroom and that a car light had shone upon his face in front of her trailer, Brown still denied involvement. *Id.* at 651-53, 672-74. Even at his sentencing hearing, when offered leniency if he would

confess, Brown maintained his innocence. See, *e.g.*, *id.* at 809 ("I know that I'm not guilty . . . all I'd like to say is I—I'm not guilty."). The duress Brown faced at his sentencing hearing was so strong that the Nevada Supreme Court ordered a resentencing. Pet. App. 92a-94a. At trial, Jane did not identify Brown as her assailant. See J.A. 160.

C. The DNA Expert Testimony

Renee Romero of the Washoe County Sheriff's Office Crime Lab conducted Restriction Fragment Length Polymorphism ("RFLP") testing on the semen found in the victim's panties and compared it to samples of blood from the victim and from Brown. *Id.* at 427, 434-37.

Only a few months before Brown's trial, the Ninth Circuit approved the admission of RFLP evidence in that circuit. *United States* v. *Chischilly*, 30 F.3d 1144, 1153, 1156 (9th Cir. 1994); see *United States* v. *Hicks*, 103 F.3d 837, 844 n.7 (9th Cir. 1996), *overruled on other grounds by United States* v. *W.R. Grace*, 526 F.3d 499 (9th Cir. 2008). In doing so, it warned against using RFLP DNA evidence for "source probability (i.e., the likelihood that the defendant is the source of the evidentiary sample)." *Chischilly*, 30 F.3d at 1156.

At the preliminary hearing, Romero testified that she did not think she could conduct the RFLP test because she believed there was insufficient semen to test. J.A. 432. However, after the preliminary hearing, and five months after collecting the samples, Romero said she looked at another section of the panties and "there was more than enough semen." *Id.* Romero claimed she "just didn't catch it the first time." *Id.*

At trial, in his opening statement, the prosecutor equated the DNA evidence to a "fingerprint" and promised the jury that it would identify Brown as the perpetrator of the crime: "We have another type of fingerprint that the State has to show that the defendant committed this crime. And that is called DNA." *Id.* at 37-38.

Romero was qualified as the State's expert and testified that Brown's DNA profile matched the DNA profile presented in the semen sample found in the victim's panties. *Id.* at 436-40. Applying the "ceiling principle" from the National Research Council, Romero testified that "one in 3 million" people would be expected to share the same specific genetic code. *Id.* at 437-38.

The prosecutor asked Romero for "another way to show that statistic," asking "what is the likelihood that the DNA found in the panties is the same as the DNA found in the defendant's blood?" *Id.* at 458. At first, Romero resisted, stating that percentages are "[n]ot the way forensics likes to look at it. We prefer the one in 3 million." *Id.* The prosecutor pressed Romero, again requesting she provide "another way to look at it, what would that percentage be?" *Id.* "It would be 99.99967 percent," Romero stated. *Id.*

The prosecutor pressed Romero further. He had Romero write the percentage on a blackboard and then subtract the figure from one hundred percent. *Id.* at 458-60. The mathematical calculation was introduced into evidence as exhibit 31:

100.000000

- 99.999967%

.000033

Id. at 460, 754.

The prosecutor asked "would it be fair to say, based on that that the chances that the DNA found in the panties—the semen in the panties—and the blood sample, the likelihood that it is not Troy Brown would be .000033?" *Id.* at 460. Romero agreed that it was "not inaccurate" to state it that way.[5] *Id.* at 462.

In his final argument to the jury, the prosecutor commented on the likelihood that Brown committed the crime:

> Are you 75 percent sure? Based on the DNA? 90 percent, 99, sometimes people use the phrase, I'm 99 percent sure about that. Well, in this case the evidence shows—how sure can you be? 99.999967 percent sure.

Id. at 730. The prosecutor emphasized that, based on the DNA testing on the semen, the jury would be "able to determine beyond a reasonable doubt, based on reliable scientific evidence that you heard that he committed this crime." *Id.* at 731.

Romero was also asked about the probability that brothers would share a DNA pattern. *Id.* at 468. She testified that there is a 25% chance of two brothers' DNA matching at a single locus. *Id.* Based on her understanding of a National Research Council report, she said that "in this case [where five loci were tested] that turns out to be one in 6,500. Meaning those two adults would have to mate and produce offspring 6,500 times to come up with that pattern again." *Id.* at 469. The prosecutor again had Romero use the blackboard to "convert" the probability into a

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[5] Romero testified in such a manner even though, in earlier testimony, she had recognized that a DNA comparison, unlike a fingerprint, is *not* an identification. J.A. 438-39.

percentage. *Id.* at 471-72. She provided the following calculation:

$$\begin{array}{r} 10000 \\ \underline{99.982} \\ .02 \end{array}$$

Id. at 754.

Romero then agreed with the prosecutor's statement "that the likelihood of the parents having one child, and then the very next child having the same genetic code would be .02 percent." *Id.* at 472. Asked on cross-examination, "[d]oes that change at all with two brothers?," Romero replied "No." *Id.*

On September 30, 1994, the jury found Brown guilty of sexual assault on a child under the age of 14 years, resulting in substantial bodily harm (count I), and sexual assault on a child under the age of 14 years (count II) in violation of Nev. Rev. Stat. § 200.366.[6] J.A. 783-84. The jury found Brown not guilty of attempted murder. *Id.* at 785.

On count I, the court sentenced Brown to life with the possibility of parole after ten years has been served. *Id.* at 787. On count II, the court sentenced Brown to life with the possibility of parole after ten years, to run consecutive to the other sentence. *Id.* at 810.

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[6] Brown was also found guilty of abuse or neglect of a child less than 18 years of age, resulting in substantial mental harm, J.A. 786, but the Nevada Supreme Court subsequently reversed this conviction on double-jeopardy grounds. Pet. App. 68a-96a.

D. State Court Appellate And Post-Conviction Proceedings

Brown appealed, challenging *inter alia* the introduction of the DNA evidence discussed above. *Id.* at 812-51, 878-922. The Nevada Supreme Court affirmed in part, and remanded for resentencing because the trial court had abused its discretion at the first sentencing hearing. Pet. App. 68a-96a. On March 18, 1998, Brown was again sentenced to life in prison with the possibility of parole after 10 years on count II, consecutive to the sentence in count I. Pet. App. 63a-67a. Brown appealed, and the Nevada Supreme Court affirmed on September 8, 2000. J.A. 1083.

On August 30, 2001, Brown filed a timely petition for writ of habeas corpus in state court. *Id.* at 1036-47. The prosecutor conceded in the State's answer to Brown's habeas petition that "there is essentially no argument that, *but for the DNA evidence, there was insufficient evidence to convict Brown.*" *Id.* at 1173 (emphasis added). Later in the same pleading, the prosecutor stated:

> There was insufficient evidence to convict the Defendant unless the DNA evidence established his guilt, but the insufficiency of the evidence established at trial, combined with the alleged evidence not discovered by trial counsel is simply not enough to make the DNA evidence suspect.

Id. at 1176. In his closing argument at the state post-conviction evidentiary hearing, the prosecutor again conceded:

> [Defense counsel] created a reasonable doubt. And everybody concedes, everybody—I think, concedes that but for the DNA there was reasonable doubt. How much reasonable doubt

> does [defense counsel] have to keep piling up when the problem is the DNA?

Id. at 1483. On February 21, 2002, the court denied Brown's petition. *Id.* at 1489-99.

Brown appealed. On November 21, 2003, the Nevada Supreme Court filed its order of affirmance. *Id.* at 1500-06.

E. Federal Court Proceedings

Brown's first federal amended petition for writ of habeas corpus asserted five grounds for relief. Pet. App. 130a-74a. The District Court granted Brown's motion to expand the record with a report of Dr. Lawrence Mueller. J.A. 1595-98; see also *id.* at 1581-84.

The District Court granted Brown's habeas petition on three grounds. Pet. App. 31a-54a. Applying the Antiterrorism and Effective Death Penalty Act's ("AEDPA's") standard of review under 28 U.S.C. § 2254(d)(1) and the analytical framework set forth in *Jackson* v. *Virginia*, 443 U.S. 307 (1979), the District Court held that there was insufficient evidence to convict Brown, granting relief on ground one of the petition but allowing the State to retry him. Pet. App. 31a-54a. In addition, the District Court granted relief on Brown's ineffective assistance claims set forth in grounds two and three of the first amended petition. *Id.* The court determined that trial counsel, while having expert resources, did not effectively challenge the DNA evidence and, notwithstanding the primarily exculpatory lay testimony, inexplicably

failed to apprise the jury of another suspect, the victim's stepfather. *Id.*[7]

The Ninth Circuit affirmed the District Court's grant of Brown's habeas petition. Pet. App. 1a-28a. Although the parties briefed all three grounds on which the writ was granted, the court decided the case solely on Brown's sufficiency of the evidence DNA claim. *Id.* The Ninth Circuit affirmed the District Court's remedy as to the DNA claim—a conditional writ directing the State to retry or release Brown. *Id.* at 21a. It then denied the State's petition for rehearing and petition for rehearing en banc. *Id.* at 97a-98a.

SUMMARY OF ARGUMENT

The constitutional error in this case is clear and fundamental. The prosecutor told the jury in Brown's rape trial that DNA evidence proved Brown's guilt with a 99.999967% degree of certainty. In fact, the DNA evidence did not prove Brown's guilt at all, and could not be relied upon as proof of identity. Rather, the point of the DNA evidence, and its sole reasonable interpretation, was as proof that in a random population sampling only a small percentage of individuals will share the same genetic code, which should be considered in the context of Brown having four brothers. By mischaracterizing this evidence to show something it could not—that Brown must have committed the crime—the prosecutor obtained a guilty verdict despite demonstrable evidentiary shortcomings in the case against Brown.

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[7] The District Court provided the same remedy for Brown's two successful ineffective assistance of counsel claims. Pet. App. 54a.

These errors rendered the trial fundamentally unfair and violated Brown's right to due process under the Constitution. This Court held in *Manson* v. *Brathwaite*, 432 U.S. 98 (1977), that identification testimony which is "unnecessarily suggestive" of the defendant's guilt, if based upon state practices that lack reliability, represents a violation of due process. *Id.* at 110, 114. The expert testimony and argument of the prosecutor in this case, suggesting that the DNA evidence identified Brown as the assailant when the evidence in fact did not and could not establish that fact, constitutes precisely the type of "unnecessarily suggestive" testimony rejected in *Brathwaite*. That opinion clearly applied and clearly established the constitutional violation in this case.

The prosecutor's error in presenting the DNA evidence was not harmless, especially because (as the State has conceded) the non-DNA evidence was entirely insufficient to establish Brown's guilt. Had the State accurately presented the statistical meaning of the DNA evidence, instead of suggesting that it had identified Brown as the assailant, there clearly would have been reasonable doubt concerning Brown's guilt. Other evidence suggested that the assailant was not Brown, but one of his brothers. Only through a mistaken interpretation of the DNA evidence did the prosecutor link Brown to the crime and secure conviction.

Habeas relief was plainly justified in light of this error and the resulting due process violation. The Ninth Circuit, however, incorrectly addressed this issue under the *Jackson* sufficiency of the evidence standard, rather than the *Brecht* harmless error analysis. Brown agrees with the Solicitor General's contention that this case cannot be decided pursuant to *Jackson*. For that reason, the two questions

presented are moot. Nevertheless, under either the standard applied by the Ninth Circuit or under *Brecht*, Brown's petition for a writ of habeas corpus was properly granted. The judgment below should therefore be affirmed. In the alternative, the case should be remanded to the Ninth Circuit for analysis under *Brecht*.

ARGUMENT

THE NEVADA SUPREME COURT'S DECISION IS CONTRARY TO CLEARLY ESTABLISHED FEDERAL DUE PROCESS LAW.

A. The DNA Testimony Was Impermissibly Suggestive And Unreliable.

The most egregious due process errors with respect to the DNA evidence presented in Brown's trial were the State expert's commission of the "prosecutor's fallacy" and her inaccurate testimony about the probability that one of Brown's brothers would share the same DNA profile as Brown. J.A. 436-72. The prosecutor compounded these errors by emphasizing the expert's inaccurate and misleading statements as irrefutable scientific proof of Brown's guilt during his final argument to the jury. *Id.* at 730-31.

1. The State concedes that, in describing the statistical meaning of the DNA evidence, Romero and the prosecutor committed the "prosecutor's fallacy." See Pet. Br. 54 ("Romero committed this fallacy in her testimony."); *id.* at 55 ("When the prosecutor confused the concepts of comparison and identification in that question, he committed the 'prosecutor's fallacy.'"). Specifically, Romero committed the prosecutor's fallacy when she testified that there was a 99.999967% chance that Brown was the assailant and, conversely, that there was a

.000033 percent likelihood that the perpetrator was not Brown. The statistics from which Romero derived this testimony can show the chance that a person chosen at random would match the evidence DNA profile, but they undisputedly do not show—as Romero's testimony suggests—the likelihood that a particular person committed the crime. J.A. 1583.

The prosecutor's fallacy is a serious error because it suggests the DNA evidence has "identified" the person who committed the crime with a high degree of certainty. "Forensic evidence is not uniquely immune from the risk of manipulation." *Melendez-Diaz* v. *Massachusetts*, 129 S. Ct. 2527, 2536 (2009). Indeed, "[s]erious deficiencies have been found in the forensic evidence used in criminal trials." *Id.* at 2537. It is therefore critical to ensuring a fair trial that the prosecution not be permitted to claim that random match statistics "identify" the source of the crime scene DNA sample. Numerous courts have warned against such incorrect mathematical calculations.[8]

The State suggests that, at most, the "prosecutor's fallacy" justifies "exclusion of Romero's statement

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[8] *See, e.g.*, *Chischilly*, 30 F.3d at 1157 ("The . . . matching statistic does not represent *source probability*. . . . To illustrate, suppose the . . . evidence establishes that there is a one in 10,000 chance of a random match. The jury might equate this likelihood with *source probability* by believing that there is a one in 10,000 chance that the evidentiary sample did not come from the defendant. This equation of *random match probability* with *source probability* is known as the *prosecutor's fallacy*.") (emphases added); *accord United States* v. *Morrow*, 374 F. Supp. 2d 51, 66 (D.D.C. 2005) (prosecutor's fallacy is a "very real danger"); *United States* v. *Shea*, 957 F. Supp. 331, 345 & n.44 (D.N.H. 1997) ("[t]his type of incorrect reasoning is often referred to as the fallacy of the transposed conditional, or the prosecutor's fallacy"), *aff'd*, 159 F.3d 37 (1st Cir. 1998); *see also* *Amicus* Scholars of Forensic Evidence Br.

that there is a 99.99967% chance that [Brown] committed the crime." Pet. Br. 32. But the federal courts should not attempt to imagine a situation where Romero testified differently and then decide whether a trier of fact would have developed a reasonable doubt of Brown's guilt based on that revised testimony. Cf. *id.* at 33 (arguing that, "even if one accepted Mueller's estimate, no rational trier of fact would have changed his mind"). Such an approach would improperly usurp the role of the jury and should be rejected by this Court.

Ironically, while the State argues that the Ninth Circuit "arrogated to itself the ability to determine the truth or falsity of evidence and substituted its own judgment for that of the jurors," *id.* at 35, it is the approach recommended by the State that would result in such an improper situation. By ordering a retrial, the Ninth Circuit determined that the proper body to weigh the DNA evidence should be a jury, not the court.

2. The random match probability between siblings is higher than the general population. Romero testified that there is a 25% chance of two brothers' DNA matching at a single locus and that the chance of two siblings matching at five loci would be 1 in 6,500. J.A. 468-69. Romero's 25% figure is unfounded and, in fact, could be 50% or even 100%, depending on the DNA makeup of Brown's parents. *Id.* at 1582. Specifically, the 25% probability is accurate only if Brown's parents are heterozygotes, sharing only one allele in common. *Id.* Yet no evidence regarding Brown's parents' DNA was presented during trial. In addition, even if the 25% figure were accurate, Romero's probability of 1 in 6,500 is mathematically incorrect—the correct figure

is much lower. See *id.*; see also *Amicus* Scholars of Forensic Evidence Br.

More importantly, Romero improperly indicated that her testimony regarding the probability of a DNA match between brothers would not change if there were more brothers. J.A. 472. In fact, the probability of a match is impacted by the number of brothers. *Id.* at 1582-83. Specifically, the "chance that among two brothers one or more would match is 1 in 132 and the chance that among four brothers one or more would match is 1 in 66." *Id.* at 1583. Brown has four brothers. *Id.* at 1586. At the time of the crime, two brothers were living in Carlin, Nevada, where the crime occurred, and two brothers were living nearby, in Loa, Utah. *Id.*

As the District Court found, a "1 in 66 probability is significantly different than a 1 in 6500 probability." Pet. App. 42a. The jury should be permitted to assess Brown's guilt based on a statistically accurate presentation of the evidence and decide whether a 1 in 66 probability that one of Brown's four brothers also matches the evidence DNA profile, when considered with all the other primarily exculpatory non-DNA evidence, raises reasonable doubt of Brown's guilt. At Brown's trial, the jury's ability to fairly consider the testimony about the sibling match probability was also likely affected by the State's commission of the prosecutor's fallacy. Because the State's expert told the jury, incorrectly, that the DNA evidence identified Brown as the perpetrator of the crime with a 99.999967% level of certainty, the jury was certainly less likely to appreciate the statistical relevance of the expert's subsequent testimony about siblings' DNA (even if it had been statistically accurate). As the Solicitor General points out, "without specialized knowledge of genetics, DNA, and

probability theory, a typical juror would not have a sound reason to reject the accuracy" of Romero's testimony. *Amicus* U.S. Br. 26.

As demonstrated below, the presentation of the DNA evidence violated Brown's due process rights and was not a harmless error.

B. The Admission Of Inaccurate And Misleading DNA Testimony Violated Brown's Due Process Rights.

1. The Ninth Circuit granted habeas relief on due process grounds and ordered a new trial.

Romero's inaccurate and misleading testimony about the DNA evidence and related statements by the prosecutor rendered Brown's trial so fundamentally unfair that it violated his due process rights.[9] The Ninth Circuit correctly held that the admission of the inaccurate DNA testimony resulted in a violation of the Due Process Clause. Pet. App. 19a ("admission of Romero's unreliable and misleading testimony violated [Brown's] due process rights"). The court characterized the testimony "that [Brown] was 99.99967 percent likely to be guilty" as "misleading, as it improperly conflated random match probability with source probability," and as "scientifically flawed" and "false, but highly persuasive, evidence." *Id.* at 16a-17a. Likewise, it found that such testimony "inaccurately minimized the likelihood that [Brown's] DNA would match one of his four brothers' DNA, thus underestimating the

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[9] The failure of Brown's counsel to investigate and marshal competing expert evidence with respect to the DNA evidence also violated Brown's Sixth Amendment rights and is the basis for one of his two successful ineffective assistance claims. *See* Pet. App. 46a-50a.

likelihood that one of [Brown's] brothers could have been the perpetrator" and was "misleading because it presented the narrowest interpretation of the DNA evidence." *Id.* at 17a-18a. The court determined that Romero's testimony was inaccurate and ignored logical implications, and that "[a]dmission of this unreliable testimony most certainly rendered the trial fundamentally unfair." *Id.* at 19a.

The Ninth Circuit determined that, without the DNA testimony, the remaining evidence was insufficient to convict Brown, and it remanded the case for a retrial. As noted above, while the Double Jeopardy Clause precludes retrial after a finding of evidentiary insufficiency under *Jackson*, the Ninth Circuit ordered a retrial, which was consistent with the court's view of Brown's claim as a standard due process claim. This remedy is also appropriate under *Lockhart* v. *Nelson*, 488 U.S. 33 (1988): "[W]here the evidence offered by the State and admitted by the trial court—whether erroneously or not—would have been sufficient to sustain a guilty verdict, the Double Jeopardy Clause does not preclude retrial." *Id.* at 34. Here, the inaccurate and misleading testimony regarding the DNA evidence violated Brown's due process rights and should never have been presented to the jury.

2. Because the Nevada Supreme Court failed to provide the fundamentally fair procedures to which Brown was entitled under the Due Process Clause, that court's decision was "contrary to, or ... an unreasonable application of, clearly established Federal law."

By rejecting Brown's due process argument that the State's presentation of the DNA evidence was

unreliable and rendered his trial unfair, the Nevada Supreme Court's decision was contrary to *Brathwaite*, warranting relief under AEDPA. See 28 U.S.C. § 2254(d)(1).

"The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment." *Estelle* v. *Williams*, 425 U.S. 501, 503 (1976) (citing *Drope* v. *Missouri*, 420 U.S. 162, 172 (1975)); see *Spencer* v. *Texas*, 385 U.S. 554, 563-64 (1967) ("Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial."). Certain courtroom practices "are so inherently prejudicial that they deprive the defendant of a fair trial." *Carey* v. *Musladin*, 549 U.S. 70, 72 (2006). To determine whether a particular practice rises to the level of a due process violation, the question is whether the practice presents "an unacceptable risk . . . of impermissible factors coming into play." *Id.* at 75 (internal quotation marks omitted); see also *Lisenba* v. *California*, 314 U.S. 219, 236 (1941) (the "denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice").

The requirement of due process aims to prevent fundamental unfairness in the use of evidence. *Colorado* v. *Connelly*, 479 U.S. 157, 167 (1986) (citing *Lisenba*, 314 U.S. at 236); see *United States* v. *Lovasco*, 431 U.S. 783, 790 (1977) (the court's task is to determine if action complained of violates "conceptions of justice which lie at the base of our civil and political institutions" and "which define 'the community's sense of fair play and decency'") (citations omitted). In some certain circumstances, "exclusion of evidence may be necessary to protect constitutional guarantees." *Connelly*, 479 U.S. at 167.

Under AEDPA, 28 U.S.C. § 2254(d)(1), the Nevada Supreme Court's decision was contrary to the clearly established law set forth in *Brathwaite*. See 432 U.S. at 114. The State presented "identification testimony" that lacked reliability and deprived Brown of due process of law when it argued to the jury that the DNA evidence could identify the source of the crime scene sample. This practice is contrary to the holding of *Brathwaite*, which is clearly established law on the due process requirements associated with testimony that purports to identify the perpetrator of an alleged crime. Under *Brathwaite*, the admission of identification testimony may deprive a defendant of due process of law if it is unnecessarily suggestive and the identification procedure lacks reliability. 432 U.S. at 114; see also *Neil* v. *Biggers*, 409 U.S. 188, 198 (1972) ("It is the likelihood of misidentification which violates a defendant's right to due process . . . ."). Reliability is "the linchpin" in determining the admissibility of such "identification testimony." *Brathwaite*, 432 U.S. at 114.

While the State emphasizes that this Court has not specifically held that the prosecutor's fallacy violates due process, see Pet. Br. 55, "AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.'" *Panetti* v. *Quarterman*, 127 S. Ct. 2842, 2858 (2007) (citing *Musladin*, 549 U.S. at 81 (Kennedy, J., concurring)); *Wright* v. *West*, 505 U.S. 277, 309 (1992) (plurality opinion) (Kennedy, J., concurring) ("Where the beginning point is a rule [like *Jackson*] of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent."); see also *United*

States v. *Lanier*, 520 U.S. 259, 271 (1997) (in considering adequacy of notice under due process clause, "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful'") (quoting *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987)) (alteration in original). AEDPA does not prohibit "a federal court from finding an application of a principle unreasonable when it involves a set of facts 'different from those of the case in which the principle was announced.'" *Panetti*, 127 S. Ct. at 2858. Therefore, even a general standard like due process can be applied in an unreasonable manner. Cf. *id.*

Here, application of the Court's well-established holding in *Brathwaite*, that admission of unreliable "identification testimony" stemming from an unnecessarily suggestive process violates due process, shows that commission of the prosecutor's fallacy—the particular factual context of this case—is a violation of the Due Process Clause. As such, the Nevada Supreme Court's decision rejecting Brown's due process claim was contrary to clearly established federal law, as determined by this Court. 28 U.S.C. § 2254(d)(1).

The Solicitor General argues that the Due Process Clause does not generally impose thresholds of evidentiary reliability.[10] *Amicus* U.S. Br. 27-28. The question is not, however, whether the admission of

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[10] The State made this same argument in the answer to Brown's amended petition in the District Court. Pet. App. 197a-202a. The District Court rejected this argument and specifically found that the introduction of the tainted DNA evidence violated Brown's right to due process. *Id.* at 37a-39a.

the DNA testimony violated Nevada's evidentiary rules. "It is axiomatic that federal courts may intervene in the state judicial process only to correct wrongs of a constitutional dimension." *Wainwright* v. *Goode*, 464 U.S. 78, 83-84 (1983) (per curiam). Although the admissibility of evidence is ordinarily a matter of state law, it is a legitimate basis for habeas relief "when a state court's evidentiary ruling infringes upon a specific constitutional protection or is so prejudicial that it amounts to a denial of due process." *Turner* v. *Armontrout*, 845 F.2d 165, 169 (8th Cir. 1988). Here, the State's presentation of the DNA evidence does not merely raise "questions concerning the reliability of evidence," as the Solicitor General contends. *Amicus* U.S. Br. 28. The State expert's mischaracterization of the DNA evidence, and the prosecutor's insistence that the testimony demonstrated a 99.999967 percent chance of Brown's guilt, rendered Brown's trial fundamentally unfair, in violation of the Due Process Clause.

The United States argues that this case does not require the Court to resolve "whether the introduction of an expert opinion with no basis could *ever* be so lacking in reliability, and so prejudicial, as to deny a defendant a fair trial." *Amicus* U.S. Br. 31 n.14 (emphasis added) (quoting *Delaware* v. *Fensterer*, 474 U.S. 15, 22-23 (1985)). Brown agrees that the Court need not reach the question reserved in *Fensterer* because the existing, clearly established law in *Brathwaite* shows that Brown was denied a fair trial. As explained above, in *Brathwaite* the Court held that admission of unreliable identification testimony will deny a defendant a fair trial if it stems from an unnecessary and unreliable state practice. Because the State's conduct in pressing the expert to commit the prosecutor's fallacy and introducing

inaccurate DNA testimony is such a practice, the court need not establish any new legal principle in this case. Moreover, the facts in *Fensterer* demonstrate that the issue the Court reserved is not squarely presented by Brown's case. In *Fensterer*, the question presented was whether the state's introduction of expert testimony where the prosecution knew "that its expert would be unable to give the precise basis for his opinion" denied the defendant a fair trial. 474 U.S. at 23. In contrast, Romero never testified that she could not recall the basis of her opinion. Therefore, the reserved issue—whether such expert testimony could ever violate due process—need not be decided by this Court at this time.

The State has never shown, nor could it, that there is any legitimate state purpose behind the admission of expert testimony that is inaccurate because of the "prosecutor's fallacy." The testimony about the DNA evidence, and the prosecution's commentary related to that evidence, was inaccurate, misleading, and inflammatory.[11]

3. The constitutional error of allowing the faulty DNA testimony was not harmless.

By the prosecutor's own admission, in the motion to dismiss Brown's post-conviction petition to the state court, see J.A. 1160-81, Romero's testimony had

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[11] The Solicitor General's brief suggests that source probability evidence can, in some instances, properly serve a role in identifying an individual as perpetrator of a crime. *Amicus* U.S. Br. 4 n.2. However, it does not assert that the evidence *in this case* could properly serve that role. *See id.* And, again, the State concedes in its brief that the prosecutor's fallacy occurred in this case. Pet. Br. 54-55.

a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 623.

Expert scientific testimony can be very persuasive to a jury. See *Ake* v. *Oklahoma*, 470 U.S. 68, 81 n.7 (1985) ("[T]estimony emanating from the depth and scope of specialized knowledge is very impressive to a jury."). In particular, testimony about DNA evidence can be extremely powerful and, when it is inaccurately presented, presents a great risk that it will mislead a jury. See *Amicus* NACDL Br. Here the expert's commission of the prosecutor's fallacy and the prosecutor's exploitation of that testimony in arguing to the jury that the DNA evidence proved they could be "99.999967 percent sure" that Brown was guilty, J.A. 730, prevented Brown from receiving a fair trial by effectively directing a guilty verdict. See *In re Winship*, 397 U.S. 358, 364 (1970) ("[T]he Due Process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

The statistics presented to the jury about the probability that Brown's DNA would match one of his brothers was also highly prejudicial as it was inaccurate by nearly a hundred-fold. Romero testified that the probability that Brown and one of his brothers would share a DNA profile at five loci is one in 6,500; the actual sibling match probability is one in 66. Given that the entire case rested upon the power of the DNA evidence, such an error is certainly not harmless.

The harm of the constitutional error is in direct proportion to the weakness of the State's evidence outside of the unconstitutionally admitted evidence. *Brecht*, 507 U.S. at 629. Here, the non-DNA evidence

generally pointed away from Brown as the perpetrator of the crime. Indeed, the prosecution has repeatedly conceded that, without the flawed DNA evidence, there was insufficient evidence to convict Brown. See J.A. 1173 ("there is essentially no argument that, but for the DNA evidence, there was insufficient evidence to convict Brown"); *id.* at 1176 (there "was insufficient evidence to convict the Defendant unless the DNA evidence established his guilt"); *id.* at 1483 ("everybody—I think, concedes that but for the DNA there was reasonable doubt").

The prosecutor's concession is not surprising: Jane never positively identified Brown as the assailant, and the fingerprint discovered at the scene of the crime did not match Brown. *Id.* at 495-98. Brown also did not match Jane's description of her assailant.[12]

Certain non-DNA evidence is particularly relevant to analyzing whether the State expert's inaccurate sibling match probability testimony was harmless. First, Jane repeatedly stated that her assailant reminded her of Brown's brother Trent. *Id.* at 177,

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[12] While the assailant had blond hair and a moustache, Brown had brown hair and no moustache. *Compare* J.A. 503, 515, 520-21 *with id.* at 106, 135, 606. While the assailant was wearing a jacket with a zipper and a watch, Brown was wearing a jacket with no zipper, and was not wearing a watch. *Compare id.* at 516-18 *with id.* at 291, 610, 630. While the assailant was wearing no hat, Brown was wearing a hat. *Compare id.* at 519 *with id.* at 192, 595. While the assailant smelled of cologne, Brown did not. *Compare id.* at 524 *with id.* at 134-35. While Jane said she bit her assailant on the hand, *id.* at 176, 240, Brown showed no evidence of any bite marks only hours after the crime, *id.* at 240. In addition, although Jane was covered in blood after the assault, *id.* at 124, 251, the police found no evidence of blood on Brown or the boots he wore that night. *Id.* at 254, 261-62.

521-22, 526-29. Second, Leah Doke testified that she saw a man on Jane's street on the morning of the crime, wearing a jacket similar to a jacket owned by Brown's brother Travis. *Id.* at 291, 543. In light of this non-DNA evidence, the jurors could have very well determined that a one in 66 chance that one of Brown's brothers also matched the DNA evidence from the crime scene raised reasonable doubt in their minds that Brown committed the crime.

4. Although Brown's sufficiency of the evidence claim was analyzed under the *Jackson* framework in the District Court and Ninth Circuit, it is more properly viewed as presenting a Due Process Clause violation.

The State asserts that the Ninth Circuit's conclusion that "the admission of unreliable evidence might violate the Due Process Clause is . . . beside the point" because Brown presented "a *Jackson* claim." Pet. Br. 32; see also *id.* at 50 n.7 (arguing that "[Brown] raised no constitutional claim with respect to the admissibility of DNA evidence on direct appeal"). The State is wrong. Brown has consistently argued that the DNA evidence was improperly admitted against him, in violation of his due process rights. At the time of Brown's petition for writ of habeas corpus, the practice in the Ninth Circuit was to apply a *Jackson*-style standard to determine the appropriate remedy when the court determined that the admission of evidence was a due process violation. See *Wigglesworth* v. *Oregon*, 49 F.3d 578, 581-82 (9th Cir. 1995) (after concluding that admission of lab technician's report violated petitioner's due process rights, court reviewed the sufficiency of the remaining evidence under *Jackson*, without considering the report).

Following *Wigglesworth*, the district courts within the Ninth Circuit have applied the *Jackson* analytical framework when evaluating other similar constitutional violations. For example, in *Cooper* v. *McGrath*, 314 F. Supp. 2d 967 (N.D. Cal. 2004), the court excluded from its consideration a witness' statement to police that violated the Confrontation Clause in order to determine whether there was sufficient evidence to support a murder conviction. *Id.* at 988-89. The *Cooper* court explained that its reason for conducting the *Jackson* analysis in this context was to determine the appropriate remedy; because "the evidence is determined to be insufficient when the improperly admitted evidence is excluded from the equation but sufficient when the improperly admitted evidence is included in the equation," the court held that "retrial rather than acquittal is the remedy." *Id.* (citing *Lockhart*).

The applicability of *Brecht* and nature of the due process error were not explicitly addressed in the petition for writ of certiorari or brief in opposition, but are arguably encompassed within the scope of the questions presented. Cf. *Caspari* v. *Bohlen*, 510 U.S. 383, 388-90 (1994). In any event, this Court undoubtedly has the discretion to address these issues, particularly when they have been raised and briefed by the Solicitor General and the parties. See *Thigpen*, 468 U.S. 27, 32-33 (1984) (affirming in habeas case on grounds other than those on which certiorari was granted); *Teague* v. *Lane*, 489 U.S. 288, 300 (1989) ("The question of retroactivity with regard to [the] fair cross section claim has been raised only in an amicus brief."); see also *Ohio* v. *Robinette*, 519 U.S. 33, 38 (1996) (permitting respondents to defend a judgment on grounds not raised in the brief in

opposition); *Caterpillar Inc.* v. *Lewis*, 519 U.S. 61, 75 n.13 (1996) (same).

Brown agrees with the Solicitor General that *Jackson* does not provide the appropriate framework for analyzing Brown's due process claim, but the Court may and should affirm the holding that the presentation of the DNA evidence at trial violated Brown's due process rights and was not harmless error, warranting habeas relief. See *Thigpen*, 468 U.S. at 32-33. As described above, applying *Jackson* only served to set a higher standard of proof for Brown. Brown's claim should have been resolved by asking "whether the . . . error 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht*, 507 U.S. at 623 (citing *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946)). As explained above, this standard is easily satisfied.

C. The Mueller Report Was Properly Admitted By The District Court.

The Mueller report is not "new evidence," as it has been characterized by the State. Rather, the report helped explain the DNA information that was presented to the Nevada Supreme Court and was before the federal District Court. The report was appropriately admitted to inform Brown's entire habeas petition, which raised multiple grounds for relief. J.A. 1595-98; see also *id.* at 1615 (finding exhibits relevant to both the sufficiency of the evidence claim *and* an ineffective assistance claim). Therefore, even if the report would not be properly considered in evaluating a *Jackson* claim (which Brown does not assert here), it was nonetheless properly admitted to inform Brown's DNA due process and ineffective assistance of counsel claims.

District courts may, and commonly do, expand the record in habeas cases "to clarify the relevant facts." *Vasquez* v. *Hillery*, 474 U.S. 254, 258 (1986); see 28 U.S.C. foll. § 2254, Rules Governing Section 2254 Cases in the United States District Courts, R. 7(a) ("[T]he judge may direct the parties to expand the record by submitting additional materials relating to the petition."); see also *Boumediene* v. *Bush*, 128 S. Ct. 2229, 2270 (2008) ("Federal habeas petitioners long have had the means to supplement the record on review, even in the postconviction habeas setting."); *Lonchar* v. *Thomas*, 517 U.S. 314, 327 (1996) ("The [Habeas Corpus] Rules . . . afford the district court substantial discretion . . . to order expansion of the record to facilitate a disposition on the merits . . . ."); *Schlup* v. *Delo*, 513 U.S. 298, 308-10 & n.18 (1995) (approvingly discussing petitioner's request to supplement the record); *Herrera*, 506 U.S. at 445 (Blackmun, J., dissenting on other grounds) ("It is common to rely on affidavits at the preliminary-consideration stage of a habeas proceeding."); *Keeney* v. *Tamayo-Reyes*, 504 U.S. 1, 14 (1992) (O'Connor, J., dissenting) (noting that the characteristic functions of habeas include introduction of documentary evidence). In *Vasquez*, this Court made clear that "[w]e have never held that presentation of additional facts to the district court, pursuant to that court's directions, evades the exhaustion requirement when the prisoner has presented the substance of his claim to the state courts." 474 U.S. at 257-58.

In *Vasquez*, this Court considered whether the federal district court's expansion of the state court record to include additional statistics altered Vasquez's claim. *Id.* at 257-60. In his state court proceedings, Vasquez had raised an equal protection challenge to the discriminatory selection of the grand

jury. *Id.* Seeing a need to "'supplement and clarify'" the state court record, the district court ordered the state to provide statistical figures regarding juror eligibility at the time of Vasquez's trial and directed the parties to present their views regarding the application of statistical probability analysis to the facts of the case. *Id.* This Court rejected the argument that the district court's order had drastically altered Vasquez's claim, thereby rendering it unsuitable for review without prior consideration before the state courts, explaining that the statistical estimates added "nothing to the case" that was not already intrinsic to the consideration of the grand jury discrimination claim. *Id.* at 259. The Court further noted that the district court's request for further information was "evidently motivated by a responsible concern that [the court] provide the meaningful federal review of constitutional claims that the writ of habeas corpus has contemplated throughout its history." *Id.* at 260.

The Mueller report similarly supplements and clarifies Brown's DNA claims by further explaining why the statistics presented by Romero were inaccurate, incomplete, and misleading. Like in *Vasquez*, where the Court determined the "supplemental evidence presented by respondent did not fundamentally alter the legal claim already considered by the state court[]," *id.*, the Mueller report merely clarifies the complicated DNA issues that Brown raised before the state court.

The State emphasizes that *Vasquez* is a pre-AEDPA case and doubts its continuing viability "given the requirements of 28 U.S.C. § 2254(e)(2)."[13]

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[13] The State also argues that expanding the record was improper for a *Jackson* claim because *Jackson* limits review to

Pet. Br. 45. However, the requirements of AEDPA are consistent with the *Vasquez* holding and, regardless, are satisfied here.

Under 28 U.S.C. § 2254(e)(2), as amended by AEDPA, if a habeas petitioner shows that he exercised diligence in developing the factual basis for his claims in state court, he need not make any additional showing to expand the record. *Williams* v. *Taylor*, 529 U.S. 420, 431-37 (2000). Here, Brown objected to the DNA evidence during the state court proceedings and raised the issue on direct appeal, including statistical errors in the prosecution expert's testimony. Pet. App. 111a-21a; see *id.* at 122a-29a. The Nevada Supreme Court rejected the argument on the merits, thus leaving no avenue for the claim to be relitigated. See, *e.g.*, *Hall* v. *State*, 435 P.2d 797, 799 (Nev. 1975) ("the doctrine of law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made"); see also *Hogan* v. *Warden*, 860 P.2d 710, 715 (Nev. 1993) (rejecting argument in habeas proceedings that had been raised on direct appeal). Brown thus was diligent in developing the facts related to his due process claim.

Though the State faults Brown for not introducing evidence from Mueller at the evidentiary hearing in state court on Brown's post-conviction petition, see Pet. Br. 46, Brown was not required to do so because he had already presented the factual basis for his due

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the trial record. Pet. Br. 39. However, as explained above, Brown is not asserting a *Jackson* claim, but rather a due process claim based on the State's presentation of highly suggestive and unreliable DNA testimony that purported to "identify" the source probability of the crime scene DNA sample.

process claim in state court.[14] The Mueller report merely clarified and explained those same facts.

Brown provided the factual basis for his due process claim in his opening and reply briefs on direct appeal to the Nevada Supreme Court.[15] Brown devoted an entire section of his opening brief to discuss: "Was the DNA Evidence Improperly Admitted Into Evidence?" J.A. 842-50. Brown noted the challenges with properly presenting statistics about DNA evidence, especially faulty comparisons to the general population, and pointed to the danger of putative experts equating statistical probabilities with guilt. See, *e.g.*, *id.* at 848 ("[T]he expert cannot talk about 'matching' DNA . . . or give his or her opinion about the strength of the DNA evidence."). In the reply brief, Brown further detailed why the DNA evidence was improperly admitted.[16] *Id.* at 893-94 n.1, 897-909.

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[14] The State made this very point during Brown's post-conviction litigation. J.A. 1167-68 (contending that the Nevada Supreme Court had reviewed the admission of the DNA testimony for plain error and rejected it on the merits and that decision precluded review under Nevada's law of the case doctrine). The state trial court refused to hear any objection to or conduct an evidentiary hearing on the DNA claim on law of the case grounds. *Id.* at 1497-98.

[15] Brown first raised objections to the presentation of the DNA evidence during trial. *See, e.g., id.* at 461.

[16] Brown highlighted the prejudicial testimony by Romero:

> In our case, Romero told the jury that the percent of likelihood that the DNA in the panties is the same as the defendant's DNA is 99.99967%. That is improper exaggeration and source error, according to the experts. It is also extremely prejudicial to the accused.

Id. at 907; *see also id.* at 904 ("When a jury is told that the 'chances that the DNA in the panties and the blood is not [Brown's] is 1 in 3 million' and that is 3 times the entire

Although the State attacks Mueller's expertise and "biases" at length, see Pet. Br. 52-54, it does not dispute any of Mueller's conclusions. Nor did it ever present any evidence to contradict Mueller in any of Brown's previous state or federal litigation. In fact, the State admits that the prosecution's expert and the prosecutor committed the "prosecutor's fallacy." See *id.* at 54 ("Romero committed this fallacy in her testimony."); *id.* at 55 ("When the prosecutor confused the concepts of comparison and identification in that question, he committed the 'prosecutor's fallacy.'").

In light of these arguments, the federal District Court correctly found that Brown had "presented a comprehensive discussion of the DNA evidence's deficiencies" in state court and permitted consideration of the Mueller report to clarify Brown's habeas petition. J.A. 1597-98.

D. Brown Exhausted The Remedies Available In The Nevada Courts.

The State argues that the admission of the Mueller report has served to render Brown's due process

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population of Nevada, this effectively relieves the jury of its decision-making task by replacing the jury's function of weighing all the evidence with considering instead the probability of guilt.") (emphasis omitted).

Brown also pointed out that "[t]he impact of brothers in the suspect population is an important consideration that bears on the Random Match Probabilities (RMP). '*But the probability that the suspect and his biological brother will share a set of alleles on each of the three probe sites is approximately (1/4)3 = 1/64.*'" *Id.* at 893-94 n.1 (citation omitted). Brown emphasized that this "factor is critically important, not only because the victim constantly referred to 'Trent' instead of 'Troy', but also because Renee Romero, the State's DNA 'expert' quoted the odds of two brothers sharing the same alleles as 1 in 6,500!" *Id.* (emphasis omitted).

claim unexhausted. Pet. Br. 47. However, "[f]orm would indeed triumph over substance were [the Court] to allow the question of exhaustion to turn on whether a federal judge had relied on educated conjecture or has sought out a more sophisticated interpretative aid to accomplish the same objective." *Vasquez*, 474 U.S. at 260. As explained above, the Mueller report clarified the complicated issues presented by the DNA claims that Brown raised in state court. The Mueller report merely helped the federal District Court interpret Brown's previously exhausted due process claim.

Brown has consistently claimed that, in violation of due process, he was convicted based on inaccurate and misleading DNA testimony, without which there was insufficient evidence to sustain his conviction. As described above, in state court, Brown specifically challenged Romero's statements about the DNA evidence that improperly conflated the likelihood of a random DNA match with source probability, as well as her testimony about the probability that one of Brown's brothers would share the same DNA profile as Brown.

In his opening brief to the Nevada Supreme Court, Brown argued that, during his trial, there was a "total failure of the DNA evidence to be established as trustworthy and reliable." J.A. 850. Brown expanded on this argument in his reply brief, in response to the State's brief.[17] See *id.* at 897-909. Brown argued

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[17] Although the State emphasizes that Brown's reply brief offered a more detailed due process argument than his opening brief, his arguments responded to the State's brief. For example, he was responding to the State's argument that there was "undisputed testimony that the probability that someone other than Brown committing the act in the little town of Carlin was one in three million using the conservative ceiling

that the DNA statistics presented at trial "replac[ed] the jury's function of weighing *all of the evidence* at trial with considering instead the *probability of guilt*." *Id.* at 904 (emphasis in original). Brown argued that Romero's testimony that there was a 99.999967 percent of likelihood Brown was the source of the DNA at the crime scene was "improper exaggeration and source error" and "extremely prejudicial to the accused." *Id.* at 906-07. He specifically explained why this error rendered his trial unfair: "Exaggeration of the odds of a defendant being the source of the evidence, *and thus turning a comparison into an identification*, are all too common and egregious because they lead jurors to conclude that there is no possibility that someone other than the defendant is the source of the DNA evidence." *Id.* (emphasis in original).[18] Brown therefore presented

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principle." J.A. 877. Moreover, the Nevada Supreme Court has repeatedly considered issues first raised in reply briefs. *See, e.g., Thomas* v. *State*, 148 P.3d 727, 735 (Nev. 2006) (noting rule that issue could not be raised for the first time in reply brief but addressing it anyway), *cert. denied*, 128 S. Ct. 1061 (2008); *Weaver* v. *State*, 117 P.3d 193, 198-99 (Nev. 2005) (per curiam) (same); *Ducksworth* v. *State*, 942 P.2d 157, 165 (Nev. 1997) (per curiam) ("[W]e are not required to consider the issue. However, because of the serious nature of the crimes and length of the sentence imposed, we will reach the issue."); *Dieleman* v. *Sendlein*, 670 P.2d 578, 579 (Nev. 1983) (per curiam) (same).

[18] Brown cited two cases that show presenting statistics to the jury that purport to prove a probability of guilt is patently prejudicial. *See* J.A. 905 (citing *People* v. *Collins*, 438 P.2d 33, 38 (Cal. 1968) (finding the use of mathematical probability statistics injected "fundamental prejudicial errors" which distracted the jury from its function), and *United States* v. *Gwaltney*, 790 F.2d 1378, 1382-83 (9th Cir. 1986) (finding that a mathematical probability was okay because it did not predict the "odds" of guilt, thereby implying that any mathematical probability that did predict the odds of guilt would be impermissible)).

this claim to the Nevada courts, exhausting it for purposes of § 2254.

Brown's detailed arguments regarding the DNA evidence in his direct appeal show that, contrary to the State's assertions, the explanations provided in the Mueller report were not a "significantly different and more substantial claim" than what Brown raised before the state court. See Pet. Br. 48. The State cites *Demarest* v. *Price*, 130 F.3d 922 (10th Cir. 1997), and *Aiken* v. *Spalding*, 841 F.2d 881 (9th Cir. 1988) (per curiam), but these cases are not analogous. In *Demarest* and *Aiken*, experts questioned the state's evidence first in federal court, *Demarest*, 130 F.3d at 930; *Aiken*, 941 F.2d at 883; here, Brown questioned the State's evidence first in state court. As demonstrated above, the factual basis for the Mueller report was contained within Brown's state court claims.[19]

The Nevada Supreme Court considered and rejected Brown's argument that the State's presentation of the DNA evidence violated due process, rendering the claim exhausted as required by § 2254(c). See *supra* note 14. Despite Brown's arguments that the DNA testimony was unreliable and prejudicial, the court referenced the DNA evidence and held there was sufficient evidence to convict him. Pet. App. 83a. Notably, even when constitutional issues are raised for the first time on appeal, the Nevada Supreme Court may address

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[19] Brown's attorney also objected to the DNA evidence at trial, although his objection was not effectively stated or argued. J.A. 460-61 (objecting to prosecutor's request that Romero agree that "the likelihood that the DNA extracted from the semen in the panties and the DNA extracted from the blood that the likelihood that it's not Troy Brown, that it's not a match is .000033" as not scientifically valid and thus not relevant).

them;[20] in fact the court has held that when an "appellant's contentions are grounded on constitutional questions this court is *obligated* to consider them on appeal." *Hardison* v. *State*, 437 P.2d 868, 870 (Nev. 1968) (emphasis added). Having had his claim rejected by the state's highest court on direct appeal, Brown was left without a remedy in Nevada, thereby fulfilling AEDPA's requirements for exhaustion.

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[20] *See, e.g., Somee* v. *State*, 187 P.3d 152, 159 (Nev. 2008) ("this court has the discretion to review constitutional or plain error"); *Grey* v. *State*, 178 P.3d 154, 161 (Nev. 2008) ("Failure to object below generally precludes review by this court; however, we may address plain error and constitutional error *sua* sponte."); *Walch* v. *State*, 909 P.2d 1184, 1189 (Nev. 1996) (waiver occurs when "asserted error is neither plain nor constitutional in magnitude"); *Sterling* v. *State*, 834 P.2d 400, 402 (Nev. 1992) (per curiam) ("we may address plain error and constitutional error *sua sponte*"); *Emmons* v. *State*, 807 P.2d 718, 723 (Nev. 1991) (per curiam) ("we may address plain error or issues of constitutional dimension *sua sponte*), *abrogated on other grounds*, *Harte* v. *State*, 13 P.3d 420 (Nev. 2000); *McCullough* v. *State*, 657 P.2d 1157, 1158 (Nev. 1983) (per curiam) ("when constitutional questions are raised on appeal, we have the power to address them"); *Dias* v. *State*, 601 P.2d 706, 708 (Nev. 1979) (per curiam) ("when constitutional questions are raised this court has the power to address them").

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed. Alternatively, the judgment should be vacated and the case remanded to the Ninth Circuit for analysis under *Brecht*, or the writ of certiorari should be dismissed as improvidently granted.

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REPLY BRIEF

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E. K. MCDANIEL, WARDEN and THE ATTORNEY GENERAL OF THE STATE OF NEVADA,
Petitioners,

v.

TROY BROWN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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TABLE OF CONTENTS

A. Troy Has Not Responded To The Questions Before This Court. 1

B. Procedural Deficiencies. 4

C. *Manson* Has No Applicability To The Questions Before This Court. 16

D. Federal Court Decisions On The Admissibility Of DNA Evidence In Federal Criminal Trials Do Not Provide A Basis For Habeas Relief. 19

E. Petitioners Are Not Estopped. 20

F. The Mueller Report Was Improperly Admitted And Considered By The Federal Courts. 22

Conclusion 25

Supplemental Appendix

Appendix 1: Appellee's Answering Brief, filed in the Ninth Circuit on June 18, 2007 . . . . . 1b

Appendix 2: Appellant's Opposition to Rehearing by Panel or En Banc, filed in the Ninth Circuit on June 12, 2008 . . . . . 64b

TABLE OF AUTHORITIES

CASES

Bean v. Calderon,
163 F.3d 1073 (9th Cir. 1998) 10

Boumediene v. Bush,
128 S.Ct. 2229 (2008) 22, 23

Brecht v. Abrahamson,
507 U.S. 619 (1993) 2

Carey v. Musladin,
549 U.S. 70 (2006) 19, 20

Coleman v. Thompson,
501 U.S. 722 (1991) 16

Daubert v. Merrell Dow Pharms.,
509 U.S. 579 (1993) 4, 15, 16, 20

Dowling v. United States,
493 U.S. 342 (1990) 20

Edwards v. Aetna Life Ins. Co.,
690 F.2d 595 (6th Cir. 1982) 8

Ford v. Wainwright,
477 U.S. 399 (1986) 14

Frazier v. New York,
156 Fed. Appx. 423 (2nd Cir. 2005) (*per curiam*) 11

Frye v. United States,
293 F. 1013 (D.C. Cir. 1932) 4

Gideon v. Wainwright,
372 U.S. 335 (1963) 14

Glover v. United States,
531 U.S. 198 (2001) 7

Gray v. Netherland,
518 U.S. 152 (1996) 15

Holbrook v. Flynn,
475 U.S. 1340 (1986) 20

Jackson v. Virginia,
443 U.S. 307 (1979) ..... *passim*

Lockhart v. Nelson,
488 U.S. 33 (1988) 10

Manson v. Brathwaite,
432 U.S. 98 (1977) ..... *passim*

National Collegiate Athletic Ass'n v. Smith,
525 U.S. 459 (1999) 7

Neil v. Biggers,
409 U.S. 188 (1972) 11, 18, 19

New Hampshire v. Maine,
532 U.S. 742 (2001) 8, 9, 21, 22

Pacific Bell Tel. Co. v. Linkline Communications, Inc.,
129 S.Ct. 1109 (2009) 3, 4

Panetti v. Quarterman,
127 S.Ct. 2842 (2007) 14

Pegram v. Herdrich,
530 U.S. 211 (2000) 8

Potts v. Commonwealth,
172 S.W.3d 345 (Ky. 2005) 11

Puckett v. United States,
129 S.Ct. 1423 (2009) 13

Roberts v. Galen of Virginia, Inc.,
525 U.S. 249 (1999) (*per curiam*) 7

Rose v. Lundy,
455 U.S. 509 (1982) 15

Saffle v. Parks,
494 U.S. 484 (1994) 12, 13

Seminole Tribe of Florida v. Florida,
517 U.S. 44 (1996) 23

State v. Mathieu,
980 So.2d 716 (La. Ct. App. 2008) 11

State v. McNeal,
765 So.2d 1113 (La. Ct. App. 2000) 12

State v. Stewart,
909 So.2d 636 (La. Ct. App. 2005) 11

State v. Young,
839 So.2d 186 (La. Ct. App. 2003) 12

Stovall v. Denno,
388 U.S. 293 (1967) 17, 18

Teague v. Lane,
489 U.S. 288 (1989) 12, 16

Tibbs v. Florida,
457 U.S. 31 (1982) 9, 10

United States v. Bibbero,
749 F.2d 581 (9th Cir. 1985) 9

United States v. Chischilly,
30 F.3d 1144 (9th Cir. 1994) 19, 20

United States v. McCaskey,
9 F.3d 368 (5th Cir. 1993) 8

United States v. Morrow,
374 F. Supp. 2d 51 (D.D.C. 2005) 19, 20

United States v. Scheffer,
523 U.S. 303 (199[illegible] 15

United States v. Shea,
957 F. Supp. 331 (D.N.H 1997), *aff'd*, 159 F.3d
37 (1st Cir. 1998) 19, 20

Vasquez v. Hillary,
474 U.S. 254 (1986) 23

Wainwright v. Sykes,
433 U.S. 72 (1977) 13

Whorton v. Bockting,
549 U.S. 406 (2007) 12, 13, 14

STATUTES

28 U.S.C. § 2254(b)(1) 15
28 U.S.C. § 2254(d) 1
28 U.S.C. § 2254(d)(1) 1, 3, 19
28 U.S.C. § 2254(e)(1) 23
28 U.S.C. § 2254(e)(2) 23
La. Rev. Stat. § 15:438 12
Nev. Rev. Stat. § 34.726(1) 16
Nev. Rev. Stat. § 34.800 16
Nev. Rev. Stat. § 34.810 16
Nev. Rev. Stat. § 56.020 4

RULES

Sup. Ct. R. 14(1) 2

OTHER

18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4477 (1981) 8

Anti-Terrorism and Effective Death Penalty Act of 1996 ..... 1, 22

A. Troy Has Not Responded To The Questions Before This Court.

This Court granted certiorari on two issues:

1. What is the standard of review for a federal habeas court for analyzing a sufficiency-of-the-evidence claim under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)?

2. Does analysis of a sufficiency-of-the-evidence claim pursuant to *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979), under 28 U.S.C. § 2254(d)(1) permit a federal habeas court to expand the record or consider nonrecord evidence to determine the reliability of testimony given at trial?

Because Troy does not address the issues in his brief, he apparently concedes that when a defendant challenges the sufficiency of the evidence presented at trial, "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Likewise, Troy apparently concedes that when a federal court reviews a state *Jackson* claim, the federal court must review the state court decision under the deferential prism 28 U.S.C. § 2254(d) mandates. Troy also apparently concedes that review of a *Jackson* claim is limited to the evidence presented at trial.

Troy makes these apparent concessions because, we are told, *his* claim is not based on *Jackson* at all,

despite his repeated reassurances to the courts below, and indeed this Court, that he was presenting a *Jackson* claim. This Court should not countenance such gamesmanship.

Instead of addressing the issues upon which this Court granted *certiorari*, Troy attempts to transmogrify the issues, asserting that his claim has been misconstrued. He now claims that the DNA evidence was improperly admitted during the state trial, apparently in violation of the Due Process Clause, and his claim is governed by *Manson v. Brathwaite*, 432 U.S. 98 (1977). Further, he claims that this Court should apply the harmless-error analysis to his claim, citing *Brecht v. Abrahamson*, 507 U.S. 619 (1993). Respondent's Answering Brief at 1-4, 18-20. Troy's claim is not a subsidiary question fairly included within the purview of the questions upon which this Court granted *certiorari*. This Court should not consider Troy's claim. Sup. Ct. R. 14(1). Rather, this Court should grant Petitioner's relief and reverse the decision of the Court of Appeals.

Troy further argues that the District Court properly expanded the record and considered the Mueller letter. However, Troy makes that argument in a context completely different from that presented in the issues upon which this Court granted *certiorari*. Respondent's Answering Brief at 1-4, 18-20, 35-40. Troy wrote, "Therefore, even if the report would not be properly considered in evaluating a *Jackson* claim (which Brown does not assert here), it was nonetheless properly admitted to inform Brown's DNA due process and ineffective assistance of counsel claims." Respondent's Answering Brief at 35. Consequently, Troy has not responded to the second question upon

which this Court granted *certiorari*.[1] Troy does not dispute that the Mueller letter was not properly before either the District Court or the Court of Appeals in the resolution of Troy's sufficiency-of-the-evidence claim. Therefore, those courts erred in considering the letter in the context that is presently before this Court.

The District Court and the Court of Appeals erred in excluding the DNA evidence from consideration in analyzing the *Jackson* claim, improperly considered the Mueller letter in analyzing the *Jackson* claim, did not apply the deferential *Jackson* standard in assessing the evidence, and failed to apply the additional deference required by 28 U.S.C. § 2254(d)(1). This Court should reverse the decision of the Court of Appeals.

Troy now argues that his sufficiency-of-the-evidence claim is not governed by *Jackson*, but rather, by *Manson v. Brathwaite*, 432 U.S. 98 (1977). Troy argues that he did not actually present a sufficiency-of-the-evidence claim at all. There are several problems with Troy's argument, both procedural and substantive. The Warden will address the procedural problems first.[2]

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[1] The Warden does not concede that the Mueller letter was properly before the District Court or the Court of Appeals in any context.

[2] Troy argues that the petition is now moot. Respondent's Answering Brief at 19-20. In a footnote, Troy states he also agrees with Amicus NACDL that certiorari should be dismissed as improvidently granted. Respondent's Answering Brief at 3 n.2. Troy is mistaken on both counts. First, the case is not moot. *Pacific Bell Tel. Co. v. Linkline Communications, Inc.*, 129 S.Ct.

B. Procedural Deficiencies.

First, Troy has consistently argued in federal court that his sufficiency-of-the-evidence claim is governed by *Jackson v. Virginia*, 443 U.S. 307 (1979). On direct appeal, Troy argued that DNA evidence was not scientifically accepted under Nevada evidentiary law. Pet. App. 112a-20a. In doing so, Troy relied on Nev. Rev. Stat. § 56.020 and the interplay between *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1932) (the Nevada evidentiary test), and *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993) (the federal evidentiary test). Troy did not make a due process argument anywhere in that claim. In the same brief, identified as a wholly separate claim, Troy also argued, after noting evidentiary inconsistencies, "Appellant submits that there was insufficient evidence to convict Troy Brown of these crimes." Pet. App. 120a.

In his state post-conviction petition, Troy claimed that he received ineffective assistance of counsel for a variety of reasons and that there was a due process violation based on the police investigation. JA 1043-46. However, his state petition contained no argument

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1109, 1117 (2009). The Warden believes that *Jackson* governs; that there was sufficient record evidence to sustain Troy's conviction; that the Court of Appeals failed to apply the deferential standard required by the AEDPA; and that the decision of the Court of Appeals should be reversed. Thus, each party continues to seek different relief despite Troy's putative confession of error. *Id.* Instead, as in *Pacific Bell*, Troy seeks a "mulligan" so that he can posture the case in a manner more to his current pleasing. Second, *certiorari* was not improvidently granted. If *certiorari* was dismissed, a legal analysis and conclusion that *Troy* now acknowledges to be unsound would survive as the controlling authority within the Ninth Circuit.

regarding a due process violation of any kind due to the admission at trial of the DNA evidence.

When Troy turned to the federal courts, he argued that he "was denied his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution because there was insufficient evidence presented at trial to support a finding of guilty of the sexual assault crimes beyond a reasonable doubt." Pet. App. 147a. Troy further argued that if the DNA evidence was set aside, then, once the evidence was reweighed, there was insufficient evidence. Pet. App. 157a-63a.

The Warden filed a Motion to Dismiss, arguing the claim was unexhausted, presciently anticipating the very argument Troy makes now:

> In this case, Ground 1 of Brown's petition is unexhausted. While Ground 1 is similar to the issue Brown raised on direct appeal, the claim is assuredly unexhausted. On direct appeal, Brown did argue sufficiency of the evidence. If that was the sole basis for Ground 1, Respondents would agree exhaustion has occurred. However, that is not what happened.
>
> After reciting part of the Nevada Supreme Court's decision, Brown then attacks the reliability of the DNA evidence used to convict him. The reliability of this evidence *was not* challenged on direct appeal in the same way Brown challenges it now. Respondents note that Brown did argue on direct appeal in part, that "the total failure [of evidence] as trustworthy in this particular case," this

> argument is not the same as the one he raised in the habeas corpus context.

Pet. App. 182a-83a. Troy responded by arguing that *Jackson* governed.[3] JA 1521, 1522, 1524. The District Court subsequently denied the Warden's Motion and ordered the Warden to file an Answer, which he did. Troy filed a Reply, again citing *Jackson*. JA 1546.

The District Court subsequently granted the Writ of Habeas Corpus and the Warden appealed. In his brief to the Court of Appeals, Troy argued that *Jackson* was "the controlling Supreme Court precedent." Supplemental Appendix 51b.

After the Court of Appeals ruled in Troy's favor, the Warden sought rehearing and suggested rehearing *en banc*. Troy again cited *Jackson* as the controlling authority. Supplemental Appendix 69b.[4]

The Warden then sought *certiorari* in this Court. In his opposition to the *Petition for Writ of Certiorari*,

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[3] While various counsel have represented both Troy and the State of Nevada's interests in various proceedings, the same attorney has represented Troy at all times in the federal courts, and is *counsel of record* in this Court.

[4] This Court should note that Troy's counsel took different positions in the District Court and the Court of Appeals, when he argued in response to the Warden's Motion to Dismiss that the Nevada Supreme Court equated its test with *Jackson*, and shared his agreement with the Court of Appeals that the standards are different. *Compare* JA 1524 (argument regarding exhaustion) *with* Supplemental Appendix 71b (quoting Court of Appeals' opinion and opposing rehearing).

Troy again argued *Jackson* was the controlling authority. Opp. to Pet. for Cert. 2.

Only *now*, after *certiorari* has been granted by this Court, and after the Warden has filed his brief arguing *Jackson*'s applicability, does Troy argue that *Manson* applies instead of *Jackson*. However, this Court has consistently held, "In the ordinary course, we do not decide questions neither raised nor resolved below. As a general rule furthermore, we do not decide issues presented outside the questions presented by the petition for certiorari." *Glover v. United States*, 531 U.S. 198, 205 (2001) (citation omitted). *Accord National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999) ("[W]e do not decide in the first instance issues not decided below"); *Roberts v. Galen of Virginia, Inc.*, 525 U.S. 249, 253 (1999) (*per curiam*) ("Although respondent presented two alternative grounds for the affirmance of the decision below, we decline to address these claims at this stage in the litigation").

While Troy may argue he addressed the issue presented in Question 1, the *Manson* argument was neither raised in, nor resolved by, any other court, state or federal. Indeed, Troy did not cite *Manson* in any of his prior pleadings. As a result, Troy's argument should not be considered for the first time in this Court.[5]

Additionally, Troy is judicially estopped from making his *Manson* argument.

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[5] Likewise, Troy's argument regarding the "prosecutor's fallacy" should not be considered for the same reason.

"Judicial estoppel generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Pegram v. Herdrich*, 530 U.S. 211, 227 n.8 (2000). *See* 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4477, p. 782 (1981) ("absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory").

A year after *Pegram*, this Court recognized that the doctrine of judicial estoppel serves "to protect the integrity of the judicial process . . . by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001) (internal punctuation omitted) (*quoting Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir. 1982), and *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993)).

New Hampshire also set forth a number of factors to determine whether judicial estoppel should be imposed as an equitable remedy:

> First, a party's later position must be "clearly inconsistent" with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations, and thus

> poses little threat to judicial integrity. A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

532 U.S. at 750-51 (citations and internal punctuation omitted). In this case, all three *New Hampshire* factors are present. With respect to the first factor, Troy clearly cited *Jackson* as the controlling authority at all stages and at all levels of federal review until now. In this Court, Troy states he "agrees with the Solicitor General that this case should not be decided under *Jackson*." Respondent's Answering Brief at 3.[6]

Under the second factor, Troy has clearly prevailed, both at the District Court and Court of Appeals level, by arguing that *Jackson* provides the correct test. Finally, the third factor is present as well.

Furthermore, as Troy acknowledges in his own brief, a successful *Jackson* claim prohibits retrial under the Double Jeopardy Clause. *Tibbs v. Florida*, 457 U.S. 31, 41, 45 (1982). Respondent's Answering Brief at 3. Troy *never*, in any proceeding before now, acknowledged *Tibbs* or that the remedy the District Court ordered, and the Court of Appeals endorsed, was contrary to this Court's and the Court of Appeals' precedent.[7] Instead, he waited until the Solicitor

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[6] This is a baffling assertion, since the Solicitor General argued that the Court of Appeals misapplied *Jackson* and erred in the process. Brief of United States at 19-21, 27.

[7] The Court of Appeals held in 1985 that a successful *Jackson* claim bars re-trial. *United States v. Bibbero*, 749 F.2d 581, 586

General pointed to this Court's governing precedent and conceded what is now obvious.

It seems highly probable that Troy was preparing to argue to the Nevada state courts, once the mandate issued from the Court of Appeals, that *Tibbs* prohibited his re-trial, despite the federal courts' insistence that he could be re-tried. Now, Troy seeks a remedy from this court that allows re-trial. Troy's conduct—knowing that the District Court had fashioned an unconstitutional remedy but saying nothing so that he could seek unconditional release—should not be rewarded. The Warden must assume that Troy did this based on his ready acknowledgement that the federal courts ordered an invalid remedy and suggestion that this Court craft a valid one.[8]

Even if Troy was not judicially estopped from raising his *Manson* argument, he is most assuredly proposing that this Court craft a new rule—one that essentially would hold that it is constitutional error if the prosecutor makes a misstep in presenting DNA evidence, even if there was not a contemporaneous

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(9th Cir. 1985). The Court of Appeals extended this rule to habeas cases in 1998. *Bean v. Calderon*, 163 F.3d 1073, 1086 (9th Cir. 1998).

[8] The District Court and the Court of Appeals *may* have thought that a re-trial was possible pursuant to *Lockhart v. Nelson*, 488 U.S. 33 (1988). However, *Lockhart* is most assuredly *not* mentioned by either court in their decisions while *Jackson* assuredly is—which would allow Troy to argue that *Tibbs* and *Bean* govern rather than *Lockhart*.

objection. To this end, Troy argues that *Manson* controls the discussion.

As will be discussed *infra,* however, *Manson* involves suggestive pre-trial photographic identification, a very different issue than the one before this Court. *Manson*, 432 U.S. at 114-15. It has nothing to do with DNA and its admissibility in the courtroom. Indeed, Troy does not cite a single case where a court has undertaken the kind of due process analysis regarding DNA evidence that he claims the Nevada Supreme Court was required to take. Not one. A Westlaw database search finds none, either.

In fact, in the only federal case the Warden has discovered where a petitioner argued that *Manson*, as opposed to *Jackson*, applied for certain sufficiency-of-the-evidence claims (in that case the petitioner objected to an actual photographic lineup and not DNA evidence), the Court of Appeals held that *Jackson* applied. *Frazier v. New York*, 156 Fed. Appx. 423, 425 (2nd Cir. 2005) (*per curiam*).

The Kentucky Supreme Court expressly disagreed with the gravamen of Troy's contention in this Court. "Neither opinion contains language suggesting that the Due Process Clause's standards for admissibility of identification testimony should be extended to govern appellate review of claims of insufficiency of evidence." *Potts v. Commonwealth*, 172 S.W.3d 345, 349 (Ky. 2005) (*citing Manson* and *Neil v. Biggers*, 409 U.S. 188 (1972)). *But see State v. Mathieu*, 980 So.2d 716, 725 (La. Ct. App. 2008) (analyzing sufficiency-of-the-evidence under *Jackson* but applying *Manson* standards for reliability of photographic identification in making analysis); *State v. Stewart*, 909 So.2d 636,

639 (La. Ct. App. 2005) (same); *State v. McNeal*, 765 So.2d 1113, 1116-17 (La. Ct. App. 2000) (same).[9]

Since no court (other than those in this case) has applied a rule even resembling the one Troy proposes, Troy's argument that *Manson* must apply to DNA cases would constitute a new rule under this Court's precedent. "[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague v. Lane*, 489 U.S. 288, 301 (1989). Additionally, this Court has clearly stated, "Under the *Teague* framework, an old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review." *Whorton v. Bockting*, 549 U.S. 406, 416 (2007).

Whorton also explained, "A new rule applies retroactively in a collateral proceeding only if (1) the rule is substantive or (2) the rule is a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." 549 U.S. at 416 (internal punctuation omitted) (*quoting Saffle v. Parks*, 494 U.S. 484, 495 (1994)).

In this case, Troy suggests a rule, based on an extension of *Manson*, that certain errors in the

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[9] Louisiana is apparently alone in using *Manson* as part of a *Jackson* analysis. However, Louisiana law also states that "When circumstantial evidence forms the basis for the conviction, such evidence must exclude every reasonable hypothesis of innocence." La. Rev. Stat. § 15:438. *State v. Young*, 839 So.2d 186, 193 n.7 (La. Ct. App. 2003). Consequently, Louisiana provides more protection than the Constitution requires, which might explain why it conducts *Jackson* analyses in the manner it does.

presentation of DNA evidence at trial constitute such a substantial violation of due process that they be considered in a manner separate and distinct from other trial errors since a state defendant would not be required to make a contemporaneous objection to have his claim considered in federal court. *See Puckett v. United States*, 129 S.Ct. 1423, 1428 (2009) (explaining purpose of contemporaneous objection rule); *Wainwright v. Sykes*, 433 U.S. 72, 89-90 (1977) (requiring contemporaneous objection for habeas review). Such a rule is procedural and not substantive. This rule has never before been applied in any decision by any court.

As *Saffle* discussed:

> The 'new rule' principle therefore validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions. Under this functional view of what constitutes a new rule, our task is to determine whether a state court considering Parks' claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule Parks seeks was required by the Constitution.

494 U.S. at 488 (citation and internal punctuation omitted). Since no court has ever followed the rule Troy claims the Nevada Supreme Court should have followed, it clearly constitutes a "new rule."

Whorton also noted that this Court has *never* found that any "new rule" constituted a watershed rule of criminal procedure requiring retroactive application

and has expressed doubt that any such rules lie undiscovered. *Whorton*, 549 U.S. at 417-18. Certainly, the rule that Troy proposes does not qualify—since *Whorton* noted the last such rule to qualify as "watershed" was the rule announced in *Gideon v. Wainwright*, 372 U.S. 335 (1963). *Whorton*, 549 U.S. at 419.

Because Troy's conviction is indisputably final, the rule he proposes is barred from federal court review of habeas corpus cases, including his.

Not surprisingly, Troy misconstrues this Court's precedent in arguing that the rule is not "new" but rather "required." Respondent's Answering Brief at 27-28. To this end, Troy cites this Court's precedent for the proposition that "AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." *Id.* at 27 (*quoting Panetti v. Quarterman*, 127 S.Ct. 2842, 2858 (2007)) (internal punctuation omitted). Troy is wrong.

In 2007, this Court held that a prisoner's claim that he is incompetent to be executed does not constitute a "second or successive" habeas corpus petition under federal law. *Panetti*, 127 S.Ct. at 2853. *Panetti* further concluded that this Court clearly established the rights afforded a prisoner claiming incompetency to be executed in *Ford v. Wainwright*, 477 U.S. 399 (1986). 127 S.Ct. at 2856.

From *Panetti*, a case dealing with a prisoner's competency to be executed, and its interplay with *Ford*, a case dealing with a prisoner's competency to be executed, Troy argues that it is clearly established that

his case, dealing with the prosecutor's use of DNA evidence, is governed by *Manson*, a case dealing with suggestive pre-trial identification by witnesses. Such an assertion is illogical. Nothing in *Manson* mandated the Nevada Supreme Court to conduct the analysis Troy now demands.

Additionally, from a procedural standpoint, Troy's legal theory is unexhausted. This Court has consistently held that for a federal court to review a claim, it must first be exhausted in state court. *Rose v. Lundy*, 455 U.S. 509, 522 (1982). As *Rose* itself observed, "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation." *Id.* at 518. Of course, the exhaustion requirement has been codified at 28 U.S.C. § 2254(b)(1).

Subsequent to *Rose*, this Court held that a petitioner must provide a factual basis and an underlying theory in order to satisfy the exhaustion requirement. *Gray v. Netherland*, 518 U.S. 152, 162 (1996). *Gray* specifically emphasized that "it is not enough to make a general appeal to a constitutional guarantee as broad as due process to present the 'substance' of such a claim to a state court." *Id.* at 163.

As the Warden has consistently argued, Troy did not even do that. On direct appeal, Troy challenged the admission of DNA evidence, but on statutory grounds. Pet. App. 112a-20a. While Troy did cite a case from this Court, *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993), *Daubert* is a case about the Federal Rules of Evidence, not the United States Constitution. *See, e.g., United States v. Scheffer*, 523

U.S. 303, 311 n.7 (1998) (identifying *Daubert* as a case addressing the Federal Rules of Evidence). As a result, the "underlying theory" that Troy presents is unexhausted, even if it was otherwise properly before this Court.

Furthermore, Troy's new claim is procedurally barred. When a federal habeas petitioner failed to meet the exhaustion requirement and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred, in such a case there is a procedural default for purposes of federal habeas regardless of the decision of the last state court to which the petitioner actually presented his claims. A federal court is bound to bar the claim where, as in this case, application of the bar is clear. *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991); *Teague v. Lane*, 489 U.S. 288, 297-99 (1989). Under Nevada law, Troy's claim would be untimely, barred by laches, and successive. *See* Nev. Rev. Stat. § 34.726(1) (timeliness); § 34.800 (laches); and § 34.810 (successive state petitions).

C. *Manson* Has No Applicability To The Questions Before This Court.

Recognizing that any argument contrary to those presented in the Warden's opening brief is untenable, Troy has attempted to transmogrify the issue before this Court into a claim that the use of purportedly unreliable DNA evidence violates due process and, therefore, he is entitled to habeas relief. Respondent's Answering Brief at 19, 27 (*citing Manson v. Brathwaite*, 432 U.S. 98 (1977)).

In *Manson*, Nowell Brathwaite was convicted of two counts of possession and sale of heroin. A trained undercover state police officer, Jimmy Glover, purchased heroin from a person later identified as Brathwaite. After hearing Officer Glover's description of the person who had sold him heroin, another officer suspecting that Brathwaite might be the seller, left a photograph of Brathwaite at Officer Glover's office. Two days later, Officer Glover, when alone, viewed the photograph and identified the person as the person from whom he had purchased the narcotics. At trial the photograph was admitted into evidence without objection. Glover testified that there was no doubt in his mind that the person shown in the photograph was the person from whom he had purchased the narcotics. In court, Glover also made a positive identification of Brathwaite without objection. *Manson*, 432 U.S. at 100-104.

Following an unsuccessful state appeal, Brathwaite filed a federal habeas petition alleging that the admission of the identification testimony at his trial deprived him of due process of law under the Fourteenth Amendment. The District Court dismissed the petition. However, the Court of Appeals reversed because it believed that the photographic evidence should have been excluded, regardless of reliability, because the examination of the single photograph was unnecessary and suggestive. Additionally, the Court of Appeals also believed the evidence was unreliable. *Manson*, 432 U.S. at 99-104.

This Court reversed the Court of Appeals, finding that its prior precedent did not establish a strict exclusionary rule or a new standard of due process. *Manson*, 432 U.S. at 104-05, 113 (*citing Stovall v.*

Denno, 388 U.S. 293 (1967), and *Neil v. Biggers*, 409 U.S. 188 (1972)). This Court concluded, "[R]eliability is the linchpin in determining the admissibility of identification testimony for both pre-and post-Stovall confrontations." *Manson*, 432 U.S. at 114.

As Troy acknowledges, *Manson* does not address the issue before this Court: the standard of sufficiency-of-the-evidence under *Jackson* as it relates to the AEDPA. Indeed, it does not. Additionally, *Manson* does not address whether a federal habeas court may expand the record or consider non-record evidence to determine the reliability of testimony and evidence given at trial when analyzing a sufficiency-of-the-evidence claim under *Jackson*.

The most obvious distinction between *Manson* and this case is the fact that this case does not deal with eye-witness identification. Troy errs by equating the circumstances and the analysis in *Manson* with the admissibility of DNA evidence.

Troy, relying on *Manson*, seeks a per se rule that DNA evidence is subject to collateral attack, and that DNA evidence is subject to exclusion from the consideration of the evidence presented at trial, if its accuracy or reliability is belatedly questioned in a federal habeas action, regardless of the lack of a contemporaneous objection. *Manson* rejected a per se rule of inadmissibility. *Manson*, 432 U.S. at 112-13.

Manson recognized that an earlier case protected a limited evidentiary interest in our adversary system. *Manson*, 432 U.S. at 113 n.14 (*citing Stovall*). DNA evidence is still only evidence and is not a factor that goes to the integrity of the adversary process. At trial,

defense counsel can, as Troy's counsel did, cross-examine the witnesses. JA 384-404, 407-409, 440-456, 466-469, 472. Defense counsel also can argue in summation, as Troy's counsel did, the factors causing doubts as to the accuracy of the evidence. JA 702-722. In this case, the fact that Troy chose not to present his own DNA expert or seek to further challenge the DNA evidence at trial beyond what he did does not mean that the DNA evidence was inadmissible or that his trial was unfair.

Finally, even if the question before this court were converted to that which Troy belatedly wants this Court to consider, federal habeas relief is precluded because this Court has not mandated that the state courts examine, using the *Biggers* factors, the reliability of DNA evidence presented at trial and exclude it if it was "unreliable." *Carey v. Musladin*, 549 U.S. 70, 79 (2006). No such rule is clearly established. 28 U.S.C. § 2254(d)(1).

D. Federal Court Decisions On The Admissibility Of DNA Evidence In Federal Criminal Trials Do Not Provide A Basis For Habeas Relief.

Troy attempts to rely on one Court of Appeals decision and two District Court cases to suggest that commission of the "prosecutor's fallacy" is a federal due process violation requiring federal habeas relief. *United States v. Chischilly*, 30 F.3d 1144 (9th Cir. 1994), *United States v. Morrow*, 374 F. Supp. 2d 51 (D.D.C. 2005), and *United States v. Shea*, 957 F. Supp. 331 (D.N.H 1997), *aff'd*, 159 F.3d 37 (1st Cir. 1998). However, as noted in the Warden's opening brief, Troy presented no such claim to the Nevada Supreme Court and any such claim is unexhausted.

All three decisions discuss the "prosecutor's fallacy" only as part of their analysis of whether DNA evidence is admissible at trial. These cases addressed the issue of the admissibility of DNA evidence under the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). *Chischilly*, 30 F.3d at 1152-1158; *Morrow*, 374 F. Supp. 2d at 64; *Shea*, 957 F. Supp. at 337.

Moreover, those three cases are not binding on the state courts because they are cases in which the Court of Appeals was acting in a supervisory capacity and the District Courts were ruling on the admissibility of evidence in a federal criminal trial. *See Holbrook v. Flynn*, 475 U.S. 1340, 1347 (1986) (contrasting what is constitutionally required with what the Court might order in its supervisory capacity). The Federal Rules of Evidence are not constitutionally based and, therefore, cases under the Federal Rules are not constitutionally mandated and cannot dictate a constitutional result. *See Dowling v. United States*, 493 U.S. 342, 352 (1990) (describing the Federal Rules of Evidence as "nonconstitutional"). Additionally, no court, including this one, has held that commission of the "prosecutor's fallacy" constitutes a violation of due process requiring habeas corpus relief. Thus, federal habeas relief is precluded. *Carey v. Musladin*, 549 U.S. 70, 79 (2006).

E. Petitioners Are Not Estopped.

Respondent's attempt to rely on purported concessions by Petitioners that the evidence remaining upon removal of the DNA evidence is insufficient to support the guilty verdicts as judicial estoppel is

misguided. This Court should apply its three-part test for judicial estoppel:

> First, a party's later position must be "clearly inconsistent" with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations, and thus poses little threat to judicial integrity. A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

New Hampshire v. Maine, 532 U.S. 742, 750-51 (2001) (citations and internal punctuation omitted).

None of the three *New Hampshire* factors apply. First, the Warden has not taken a position clearly inconsistent with their earlier position. On direct appeal, the State argued there was sufficient evidence to convict Troy, describing the evidence as "overwhelming." JA 876-77. Later, in the context of state post-conviction proceedings, when the issue before the court was ineffective assistance of counsel, the Elko County District Attorney made the statements at issue. JA 1173, 1176, 1483. It cannot be said that Petitioners took inconsistent positions before the Nevada Supreme Court when the sufficiency-of-the-evidence issue was being considered. It is also

clear that the Nevada Supreme Court did not rely on the statements made by counsel years later during the state post-conviction litigation. The Warden has never taken an inconsistent position with respect to the DNA or the non-DNA evidence.

The second *New Hampshire* factor is not present either. The Elko County District Attorney's statements were not necessary to persuade the state district court to find that counsel was not ineffective.

Finally, the Warden has gained no unfair advantage nor has Troy suffered any unfair detriment through the position the Warden has taken in this Court.

F. The Mueller Report Was Improperly Admitted And Considered By The Federal Courts.

Troy argues that Dr. Mueller's letter helped "explain the DNA information that was presented to the Nevada Supreme Court and was before the federal District Court." Respondent's Answering Brief at 35. This is a most puzzling statement, since Dr. Mueller's letter does nothing to clarify the evidentiary argument that Troy made on direct appeal. Rather, as the Warden previously noted, the Mueller letter criticizes Rene Romero's testimony, not DNA evidence in general. Petitioners' Opening Brief at 50.

Interestingly, in defense of Rule 7 and expansion of the record, Troy cites *only one case* that postdates the adoption of the Anti-terrorism and Effective Death Penalty Act on April 24, 1996. *Boumediene v. Bush*, 128 S.Ct. 2229 (2008). Of course, as this Court is well aware, *Boumediene* was not a case brought pursuant

to 28 U.S.C. § 2254, but rather, the constitutional right to habeas corpus found in Article I, Section 9 of the Constitution. *Id.* at 2240. As a result, the passing reference to federal habeas petitioners having the "means to supplement the record" found in *Boumediene* is little more than obiter dicta. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 66-67 (1996) (contrasting "dicta" with "holdings").

Troy makes no coherent argument as to how *Vasquez v. Hillary*, 474 U.S. 254 (1986), survives the recodification of 28 U.S.C. § 2254(e)(2) under the AEDPA. As a result, this Court should take the opportunity to expressly limit *Vasquez* to federal habeas corpus petitions filed before April 24, 1996.

Nor does Troy provide a satisfactory explanation for his lack of diligence. Troy claims that he *was* diligent in bringing forth Dr. Mueller's opinions. Troy also claims that he did object to the DNA evidence in his trial, but provides no record citation to this claim. Rather, he provides a record citation going *only* to his opening brief before the Nevada Supreme Court. Respondent's Answering Brief at 38.

Troy does not explain how, if he "objected to the DNA evidence during the state court proceedings," the Nevada Supreme Court could have possibly stated as a factual matter, "Troy made no objection to either the lack of a pretrial evidentiary hearing or to qualifying Romero as an expert witness on DNA evidence." Pet. App. 82a. This statement about the failure to object is entitled to a presumption of correctness. 28 U.S.C. § 2254(e)(1).

Additionally, Troy claims he could not bring forth evidence criticizing Romero's testimony at the state post-conviction evidentiary hearing, since the issue had already been decided on direct appeal. As previously discussed, the issue was not decided on direct appeal. But again, that is something of a red herring. In his state post-conviction petition Troy raised the following claims regarding the purported ineffectiveness of trial counsel, all DNA related:

1. Trial counsel failed to file a Motion or otherwise object to exclude all DNA evidence.

2. Trial counsel failed to obtain testing by an independent DNA expert, instead utilizing an expert who had a conflict of interest and failed to be present during the testing.

3. Trial counsel failed to prevent testing of DNA by the State in the absence of a defense expert in violation of a stipulation and order resulting in test results that were not reliable.

* * *

10. Trial counsel failed to object to the lack of pre-trial evidentiary hearing or to qualifying Rene Romero as an expert witness thereby precluding appellate review of the DNA evidence.

JA 1043-45.[10] Thus, Dr. Mueller's letter, or something similar, could have been presented, as relevant evidence, in the state evidentiary hearing. It was not. Rather, the focus at the evidentiary hearing was Troy's theory that Jane Doe's attacker was her stepfather. Because Troy was not diligent, the District Court should not have allowed expansion of the record with Dr. Mueller's letter.

CONCLUSION

This Court should reverse the decision of the Court of Appeals.

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[10] The Warden notes that the District Court granted habeas relief on two claims of ineffective assistance of trial counsel, one of which was based on the DNA evidence. Pet. App. 46a. The Court of Appeals did not address the ineffective assistance of counsel issues. Pet. App. 21a.

Respectfully Submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CA NO. 07-15592
D.C. NO. 3:03-cv-0712-PMP-VPC
(Nevada, Reno)

[Filed June 18, 2007]

TROY DON BROWN,	)
	)
Plaintiff-Appellee,	)
	)
vs.	)
	)
CRAIG FARWELL, *et. al.*,	)
	)
Defendant-Appellant.	)
	)

Appeal from the United States District Court
for the District of Nevada

APPELLEE'S ANSWERING BRIEF

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TABLE OF CONTENTS

Page

I. ISSUES PRESENTED FOR REVIEW 6

II. BAIL STATUS OF APPELLANT 7

III. STATEMENT OF JURISDICTION 7

IV. STATEMENT OF THE CASE 8

A. Procedural History 8

B. Statement of Facts 13

V. LEGAL ARGUMENT 19

A. THE DISTRICT COURT CORRECTLY FOUND THE CLAIM ASSERTED IN GROUND ONE TO BE EXHAUSTED 19

B. THE DISTRICT COURT'S ORDER ALLOWING EXPANSION OF THE RECORD TO INCLUDE EXHIBITS 196-96 (EOR 936-960) WAS CORRECT 28

1. 28 U.S.C. §2245(e)(2) 28

b. The Facts Set Forth In Exhibits 196-98 (EOR 936-960) Have Been Exhausted 32

C. The District Court's Determination As To Ground One "That The Nevada Supreme Court's Determination Of The Sufficiency Of The Evidence Claim Involved An Objectively Unreasonable Factual Finding As Well As A Legal Determination That Was Contrary To Clearly Established Federal Law." Factually Clearly Erroneous nor Legally Incorrect 34

1) Summary of Argument 34

2) Standard of Review 35

3) Facially Inaccurate General Population DNA Random Match Probability Evidence: Prosecutor's Fallacy. 36

4) Absence Of Relevant Sibling DNA Random Match Probability Evidence. 38

a. Use Of Incomplete Assumption Offering Evidence Most Disfavorable To Defendant. 39

b. Incorrect Probability Figures. . . 42

4. Use Of The Unreliable And Incomplete DNA Evidence Rendered The Evidence Insufficient To Prove Brown's Guilt. 44

5. The *Jackson v. Virginia* test. 45

6. Application Of The AEDPA To The *Jackson v. Virginia*] Test 48

D. THE DISTRICT COURT'S DETERMINATION THAT "PETITIONER'S SECOND CLAIM IS MERITORIOUS AND THE NEVADA SUPREME COURT 'S HANDLING OF IT ON POST- CONVICTION APPEAL RESULTED IN AN OBJECTIVELY UNREASONABLE FACTUAL DETERMINATION" IS NEITHER FACTUALLY CLEARLY ERRONEOUS NOR LEGALLY INCORRECT 53

E. THE DISTRICT COURT'S DETERMINATION THAT "AS WITH GROUND 2, THE NEVADA SUPREME COURT'S HANDLING OF [GROUND THREE] RESULTED FROM AN UNREASONABLE DETERMINATION OF THE FACTS" IS NEITHER FACTUALLY CLEARLY ERRONEOUS NOR LEGALLY INCORRECT. 55

VI. CONCLUSION 56

VII. STATEMENT OF RELATED CASES 56

VIII. CERTIFICATE OF COMPLIANCE 57

CERTIFICATE OF SERVICE 58

TABLE OF AUTHORITIES

Anderson v. Harless,
459 U.S. 4, 6 (1982) 18

Bell v. Cone,
535 U.S. 685, 694 (2002) 50

Burkett v. Cunningham,
826 F.2d 1208, 1218 (3d Cir. 1987) 2, 18, 49

Chein v. Shumsky,
373 F.3d 978, 983 (9th Cir. 2004) 47

Cooper-Smith v. Palmateer,
397 F.3d 1236, 241 (9th Cir. 2005) 27

Garcia v. Carey,
395 F.3d 1099 (9th Cir. 2005) 45

Golden v. Hayes,
444 F.3d 1062, 1071 (9th Cir. 2006) 45

Humphrey v. Cady,
405 U.S. 504, 516 n. 18 (1972) 18

Jackson v. Virginia,
443 U.S. 307 (1979) 35, 45-48

Landrigan v. Schriro,
441 F.3d 638, 648 (9th Cir. 2006) 32

McClure v. Thompson,
323 F.3d 1233, 1240 (9th Cir. 2003) 35

Morris v. Dretke,
413 F.3d 484, 498 (5th cir. 2005) 31

Ramirez v. Castro,
365 F.3d 755, 762 (9th Cir. 2004) 35

Robinson v. Ignacio,
360 F.3d 1044, 1055 (9th Cir. 2004) 35

Sarausad v. Porter,
479 F.3d 671, 678-79 (9th Cir. 2007) 48

Ticey v. Peters,
8 F.3d 498, 500 (7th Cir. 1993 44

Thompson v. Louisville,
362 U.S. 199 (1960 ..... 45, 46

U.S. Chischilly
30 F.3d 1144, 1155 n.14 (9th Cir. 1994) .. 13, 35, 36

United States v. Hicks,
103 F.3d 837, 844 n.7 (9th Cir. 1996) 36

United States v. Moree,
897 F.2d 1329, 1332 (5th Cir. 1990 46

United States v. Morrow,
374 F.Supp.2d 51, 66 (D.D.C. 2005 37

United States v. Shonubi,
895 F.Supp. 460, 516 (E.D.N.Y. 1995) 14, 38

United States v. Shea,
957 F. Supp. 331, 345 & n.44 (D.N.H. 1997 37

Vasquez v. Hillery,
474 U.S. 254, 258 (1986) 19, 26, 32, 33

Watson v. Dugger,
945 F.2d 367, 372 (11th Cir. 1991) 19

Williams v. Taylor,
529 U.S. 420 (2000) 29, 30, 34

STATE CASES

State v. Jones,
610 So.2d 782, 784-85 (La. 1992 46

Brown v. State,
113 Nev. 275, 284, 934 P.2d 235 (1997) 54

Brown v. State,
934 P.2d 235, 241-42 (Nev. 1997) 9, 49, 50

Cunningham v. State,
575 P.2d 936, 937 (Nev. 1978) 50

Edwards v. State,
524 P.2d 328, 331 (Nev. 1974) 50

Kazalyn v. State,
108 Nev. 67, 71, 825 P.2d 578, 581 (1992) . . . 49, 50

People v. Brown,
110 Cal.Rptr.2d 750 (2001) 41

People v. Pizarro,
3 Cal.Rptr.3d 21, 49-50 (Cal. App. 2003) 41

Sterling v. State,
109 Nev. 391, 394, 834 P2.d 400, 402 (1992) 54

FEDERAL STATUTES

28 U.S.C. § 2254(e)(2) 28

18 U.S.C. § 3231 8

28 U.S.C. § 2254 35

28 U.S.C. § 2254(e)(2) 29, 30, 34

28 U.S.C. § 1291 8

28 U.S.C. § 2253 8

U.S.C. § 2254(d)(1) 47

STATE STATUTES

Nev. Rev. Stat. § 200.364 50

NRS 193.330 8

NRS 200.366 8

NRS 200.508 8

FEDERAL RULES

3 Mod. Sci. Evidence § 25-2.6.2[2 39

76 Judicature 222 (1993) 27, 28, 30

OTHER AUTHORITIES

D. Filocomo, "Unraveling The DNA Controversy: People V. Wesley, A Step In The Right Direction," 3 J.L. & Pol'y 537, 564 & n.151 (1995) 40

Lempert, Caveats Concerning DNA, 13 Cardozo L.Rev. 303, 306 (1991) 14-17

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I.

ISSUES PRESENTED FOR REVIEW

A. WHETHER THE DISTRICT COURT CORRECTLY DENIED RESPONDENTS' MOTION TO DISMISS GROUND ONE AS UNEXHAUSTED?

B. WHETHER THE DISTRICT COURT CORRECTLY GRANTED PETITIONER'S MOTION TO EXPAND THE RECORD?

C. WHETHER THE DISTRICT COURT CORRECTLY GRANTED THE WRIT OF HABEAS CORPUS AS TO PETITIONER'S GROUND ONE SUFFICIENCY OF THE EVIDENCE CLAIM BY PROPERLY APPLYING BOTH CLAUSES OF 28 U.S.C. § 2254(D)(1) TO "CLEARLY ESTABLISHED FEDERAL LAW," E.G. JACKSON V. VIRGINIA?

D. WHETHER THE DISTRICT COURT CORRECTLY GRANTED THE WRIT OF HABEAS CORPUS AS TO PETITIONER'S GROUND TWO INEFFECTIVE ASSISTANCE OF COUNSEL ("IAC") CLAIM?

E. WHETHER THE DISTRICT COURT CORRECTLY GRANTED THE WRIT OF HABEAS CORPUS AS TO PETITIONER'S GROUND THREE IAC CLAIM?

II.

BAIL STATUS OF APPELLANT

Appellee Troy Don Brown [hereinafter "Brown"] is in the custody of the State of Nevada at Lovelock Correctional Center, Lovelock, Nevada, serving consecutive life sentence imposed in this case. Excerpts of Record (EOR) 699 (Amended Judgment of Conviction).[1] Brown has no projected release date.

III.

STATEMENT OF JURISDICTION

This is an appeal filed by State of Nevada officials following an Order On Merits (Clerk's Record (CR) 66, EOR 996) and Judgment In A Civil Case (CR 67, EOR 1014), granting the writ as to Grounds One through Three of the First Amended Petition (EOR 34) and denying as to Grounds Four and Five. Respondents' Notice Of Appeal (CR 68) and Motion For Stay (CR 69) were filed January 3, 2007. Brown responded to the motion and moved for his release pending final resolution of the case on January 22, 2007 (CR 70). Respondents filed a reply (CR 73) to Brown's response to the motion for stay and their response (CR 74) to Brown's motion for release on February 23, 2007, to which Brown replied. CR 76. During a telephonic motion hearing on March 22, 2007[2], the district court

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[1] Excerpts Of Record (EOR) citations refer to the Excerpts filed by appellants concomitantly with their Opening Brief.

[2] The transcript of the March 22 hearing is attached as Exhibit G to the motion for release filed with this Court April 23, 2007.

granted the motion to stay (CR 77). This Court has jurisdiction pursuant to 28 U.S.C. § 1291 and 28 U.S.C. §2253.

IV.

STATEMENT OF THE CASE

A. Procedural History

On July 20, 1994, the state filed an Information in the Fourth Judicial District Court, Elko County, Nevada, charging Brown with the following crimes: Sexual Assault on a Child Under the Age of 14 Years, Resulting in Substantial Bodily Harm, a felony as defined by NRS 200.366 (Count I), Sexual Assault on a Child Under the Age of 14 Years, a felony as defined by NRS 200.366 (Count II), Attempted Murder, a felony as defined by NRS 193.330, 200.010 and 200.020 (Count III), and Abuse of Neglect of a Child Less Than Eighteen (18) Years of Age, Resulting in Substantial Mental Harm, a felony as defined by NRS 200.508, 432B.020 and 432B.070 (Count IV). (EOR 76-791.)

The case proceeded to trial on September 27-30, 1994 (EOR 80-514.) On September 30, 1994, the jury found Brown guilty of Counts I, II and IV and not guilty of Count III as listed in the Information. (EOR 515-16, 518.) The jury imposed a sentence of life with the possibility of parole after ten years has been served as to Count I, Sexual Assault on a Child Under the Age of 14 Years, Causing Substantial Bodily Harm. Sentencing by the court on Counts II and IV was to be held later. The jury acquitted Brown of the attempted murder charge (EOR 517). The sentencing hearing on

Counts II and IV ultimately took place on June 23, 1995. The court sentenced Brown to life with the possibility of parole after ten years on Counts I and Count II and twenty years on Count IV, all three sentences to run consecutive to the other. The Judgment of Conviction was filed on June 28, 1995. (EOR 544-49.)

Following a timely notice of Appeal (EOR 550), Brown filed his Opening Brief (Case No. 27426) on November 20, 1995. (EOR 552) The Nevada Supreme Court filed its Opinion on February 26, 1997 (EOR 674)[3], finding in part "that the district judge abused his discretion during the sentencing phase of the trial and the case must be remanded to the district court for a new sentencing hearing on the remaining sexual assault conviction (Count II)." In addition, it vacated the child abuse/ sexual assault conviction (Count IV) as barred by the Double Jeopardy Clause.

On March 6, 1998, "Defendant's Motion For A New Trial; And, Motion To Vacate And Continue Sentencing" was filed in the state district court It was denied on March 9, 1998. The resentencing hearing ordered by the Nevada Supreme Court was held on March 13, 1998. The district court sentenced Brown to a term of life in prison with the possibility of parole after 10 years on Count II consecutive to the sentence in Count I. The Amended Judgment of Conviction was filed on March 18, 1998. (EOR 699.)

On March 20, 1998, Brown filed a timely Notice of Appeal (EOR 703) with respect to the March 9, 1998,

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[3] The opinion is reported at 934 P.2d 235 (Nev. 1997).

order and his amended judgment. A Docketing Statement was duly filed in appeal Case No. 32025.

On October 19, 1998, the district court entered an "Order Denying Motion for New Trial" respecting his "Pre-Sentencing Motion For a New Trial" (SEOR 28, 33[4].) On November 9, 1998, Brown filed a timely Notice of Appeal of that denial which was docketed as appeal Case No. 33325. (SEOR 36.)

On January 29, 1999, Brown filed a "Motion to Consolidate Appeals No's. 32035 and 33325", which was granted. (SEOR 48.) Following briefing by the parties the Nevada Supreme Court filed its Order Dismissing Appeal in appeal No's. 32025 and 33325 on September 8, 2000. (EOR 706.)

On August 30, 2001, Brown filed a Petition for Writ of Habeas Corpus (EOR 710) and Points and Authorities in Support of Petition for Writ of Habeas Corpus (Ex. 159) in the Fourth Judicial District Court. Following an evidentiary hearing held February 21, 2002 (EOR 791-813) the district court denied Brown's petition. See Findings of Fact, Conclusions of Law, and Order Denying Writ of Habeas Corpus filed on March 7, 2002. (EOR 787.) Brown filed a timely Notice of Appeal on April 8, 2002 (EOR 788), which was docketed as appeal No. 39475. On October 10, 2002, Appellant's Opening Brief was filed (SEOR 112) asserting the following assignment of error:

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[4] Appellee's Supplemental Excerpts Of Record (SEOR) are being filed concomitantly with this Answering Brief.

I. THE DISTRICT COURT ERRED IN DENYING BROWN'S WRIT OF HABEAS CORPUS.

The Nevada Supreme Court filed its Order of Affirmance on November 21, 2003. (EOR 861.)

Following appointment of the Office of the Federal Public Defender to represent petitioner, Clerk's Record (CR) 10, the First Amended Petition was filed (CR 19, EOR 34) wherein Brown asserted five grounds for relief. On October 19, 2005, respondents filed their Answer (EOR 900). Brown thereafter filed a Reply (EOR 919) and a Motion to Expand the Record (EOR 933), which was granted. EOR 979. Respondents thereafter filed a supplemental answer. See CR 61 & 65.

By Order On Merits (CR 66, EOR 996) and Judgment In A Civil Case (CR 67, 1014), the writ was granted as to Grounds One through Three of the First Amended Petition and denied as to Grounds Four and Five. Respondents' Notice Of Appeal (CR 68, EOR 1015) and Motion For Stay (CR 69) were filed January 3, 2007. Brown responded to the motion and moved for his release pending final resolution of the case on January 22, 2007 (CR 70, EOR 1017). Respondents filed a reply (CR 73) to Brown's response to the motion for stay and their response (CR 74) to Brown's motion for release on February 23, 2007, to which Brown replied. CR 76. During a telephonic motion hearing on March 22, 2007[5], the district court granted the motion

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[5] The transcript of the March 22 hearing is attached hereto as Exhibit __ to Brown's motion for release filed with this Court on April 23, 2007. See Case Summary, 4/23/2007.

to stay (CR 77) and thereafter on March 30, 2007, denied Brown's release pending appeal. CR 78. The notice of appeal, docket sheet and certificate of record were transmitted to this Court on April 4, 2007. CR 80. On April 11, 2007, Brown transmitted by overnight mail (Federal Express) his Motion To Expedite Briefing and Hearing. That same day this Court set a briefing schedule and filed the certificate of record on appeal. See General Docket, 4/11/07 entries.

Brown then renewed his request for release pending completion of respondents' appeal as previously presented to the district court. General Docket, 4/23/07 entry. After further briefing by the parties, see General Docket, 4/23 and 4/24 entries, the Court denied the motion for release setting and expedited schedule. See General Docket entries 4/26/07 and 4/30/07. On June 6, 2007, respondents' Opening Brief was filed. Brown now files his Answering Brief.

B. Statement of Facts

In this federal post conviction proceeding the district court made the following factual findings:

> The science of human DNA is highly complex and difficult to understand, even for the well educated and patient student. It involves the matching of human genome materials or alleles and a statistical calculation of how often that match might occur in a chosen population. An allele is "an alternative form of a gene that can occupy a particular chromosomal locus. In humans and other diploid organisms there are two alleles, one on each chromosome of homologous pair." Dorland's *Illustrated Medical*

Dictionary 48 (27th ed. 1988). Forensic DNA tests compare allele combinations at loci where the alleles tend to be highly variable across individuals and ethnic groups. If there is no match between the alleles from the evidence DNA and the potential suspect's DNA, the suspect is generally ruled out as the source of the evidence, unless the failure is attributed to in adequate test conditions or contaminated samples. If there is a match, analysts use the frequency of the alleles' appearance in the relevant population to calculate the probability that another person could have the same pattern of allele pairs. *See* Georgia Sargeant, *DNA Evidence Finding Stricter Scrutiny, New Uses, Trial,* Apr. 1993, at 15. Under the product rule the probabilities of find a match at each given locus on te samples satisfying statistical criteria for a match are multiplied together to calculate the random probability that the trace DNA found at the crime scene could have come from another member of the population represented by the defendant." *U.S. Chischilly* 30 F.3d 1144, 1155 n.14 (9th Cir. 1994)

"The prosecutor's fallacy' occurs when a prosecutor presents statistical evidence tot suggest that the [DNA] evidence indicates the indicates that likelihood of the defendant's guilt rather than the odds of the evidence having been found in a randomly selected samples." United *States v. Shonubi,* 895 F.Supp. 460, 516 (E.D.N.Y. 1995). The prosecutor's fallacy is present when the jury accepts the DNA evidence as a statement of the source probability (i.e. the likelihood that hte

defendant is the source of the evidentiary sample). *See Chischilly* 30 F.3d at 1155-1157 (9th Cir. 1994), *citing* Lempert, *Caveats Concerning* DNA, 13 Cardozo L.Rev. 303, 306 (1991)(posting that "[u]nfortunately, the careless presentation of evidence. . . may make it look as if the question of the rareness of the evidence DNA profile and the probability that the defendant's matching DNA is the source of the evidence profile are identical"), and Koehler, *Error and Exaggeration in the Presentation of DNA Evidence at Trial,* 34 Jurimetrics 21, 27 n.24 (documenting instances where courts, commentators and expert witnesses have committed such source probability errors).

In this instance, according to the report prepared by Laurence Dochez Mueller, a professor in Ecology and Evolutionary Biology at the University of California, Irvine, the .000033 percent likelihood that the perpetrator was not Troy Brown, as testified to by Ms. Romero, falls directly into the prosecutor's fallacy. *See* Exhibit 197.[2] However, this misstatement is not the only one made by Romero, according to Petitioner.[3] The most egregious misstatement relates to the probability of the DAN evidence coming from one of Petitioner's four brothers, two of which were in Carlin, Nevada at te time of the assault and two of which were within the region, residing in Loa, Utah. *See* Exhibit 198, Affidavit of Ed Heddy.

At trial, Romero testified that there is a 25 percent chance that tow bothers, "shar[e] both

alleles at a single locus in common," which she calculated as a 1 in 6500 chance that these two brothers' DNA would match at five loci. Exhibits 31, p. 343. According to the report prepared by Mueller, this statistical probability represented the lowest probability possible among siblings, assumes that the parents are heterozygotes, sharing only one allele in common and is incorrectly calculated. See exhibit 197, p. 1. Furthermore, if the parents are not heterozygotes, and no evidence was presented at trial as to Petitioner's parents' DNA, the probability of two siblings matching could be 50% or 100%. *Id.* Significantly, Romero's calculations did not take into account that Petitioner had four brothers living in the general vicinity at the time of the attack. Given this fact, Mueller opines that even taking the least likely chance for a match, 25%, the chance that one or more brothers would match at a single loci on the DNA chain is 1 in 256, not 1 in 6500. *Id.*

Applying a formula provided by the second National Research Council report on DNA typing, and using the FBI Caucasian database, Mueller calculates that the chance of a single sibling matching Troy Brown's DNA profile is 1 in 263 and the chance that among two brothers, one or more would match is 1 in 132. Applying the formula to four brothers, the chance increases to 1 in 66. *Id.*, p. 2. A 1 in 66 probability is significantly different than a 1 in 6500 probability.

Romero's testimony was inaccurate and, therefore, unreliable. Taking into account the State's own admission that absent the DNA evidence, there with insufficient evidence to convict Petitioner, the state court's factual determinations are called into question.[4] Moreover, the state court's application of law to the facts also presents grave concern.

In considering Petitioner's claims on direct appeal, the Nevada Supreme Court set out a lengthy and detailed finding and facts. *See* Opinion and Order, Exhibit 70, pp. 2-11. Because of their detail, the facts will not be repeated in their entirety here. However, absent the DNA testimony and even after weighing the evidence in favor of the prosecution, there are sufficient conflicting testimony to raise a reasonable doubt in the mind of any rational trier of fact. For example, there was conflicting testimony about the time the Petitioner actually left he bar and headed home. *See e.g.* Exhibit 70, testimony of the victim's mother, and compare the testimony of the two bartenders at CG;s Bar, pp. 3, 5 and 6.

There is also conflict between the victim's description of her assailant and Petitioner's apparel and appearance. The victim testified that her assailant wore a watch that scratched her face and that his jacket definitely had a zipper. *Id.* p. 5. She testified her attacker did not wear a hat, might have had a small moustache, and had a longish sandy blond hair that twas curly at the ends and thinning on top. *Id.* When asked, the victim told police that the

attacker reminder her of Petitioner, but then said it was Trent Brown, who is Petitioner's brother. She told police at least two times that her attacker was Trent Brown and she could not identify Petitioner Tony Brown as her attacker in a photo lineup. *See id.*, pp. 5, 7. Other evidence showed that Petitioner did not own a watch and his jacket, although similar in some respects to victim's description, did not have a zipper.

Petitioner's other brother and roommate Travis, testified that he was awakened by Petitioner's return home at 1:32 a.m. on the night of the attack. He testified that he did not see anything unusual about Petitioner and that he did not see any blood on Petitioner or anywhere in the house. *Id.*, p. 6. Officer Terry testified that at five a.m. the morning of the attack, when he awakened Petitioner to question him, he did not observe any evidence of bite marks on Petitioner's hands and observed no blood on his body or on his boots. *Id.* The officer had an opportunity to view much of Petitioner's body, as he was sleeping in only a pair of boxer shorts. *Id.*

According to his own, Petitioner had laundered the shirt and jeans he was wearing the night of the attack because he was leaving for a week in Utah early the next morning and needed all of his clothes for the trip. *Id.* He testified the shirt and jeans were soiled because he was so drunk that night that he had vomited several times during his walk from the bar to his house.[5] *Id.*

While in Utah, Petitioner call the Carlin police to see if he was wanted for arrest, being told no. Id. While in Utah, Petitioner also went to a nurse for a full body examination because the victim reported that she had bitten and scratched her attacker and Petitioner wanted a record of his condition. *Id.*

None of Petitioner's fingerprints were found in the victim's home and he surrendered his jacket and cowboy hat to the police for their examination. He repeatedly denied any involvement in the crime, including at the time of sentencing even though the judge made it very clear that, unless Petitioner accepting responsibility for the attack, the sentence would be very severe. *Id.*, pp. 7, 10-11.

The police took Petitioner's bedding when they executed a search warrant for his residence. However, the bedding was never tested for DNA evidence. Police found no evidence of blood on Petitioner's boots and did not process pubic hairs found in a fleece jacket recovered form the victim's bedroom. A single fingerprint found on the nightlight in the victim's bedroom was not Petitioner's. *Id.*, pp. 8-9. At trial, Rene Romero of the Washoe Crime Lab testified that she identified Petitioner's DNA in the victim's underwear. *Id.* However, there was no inquiry about how the DNA might have gotten into the underwear, considering that the victim testified that the attacker had removed her underwear prior to the sexual assault. Moreover, at the preliminary hearing, Romero had testified that there was insufficient

stain sample in the panties to the RFLP type testing. *See* Exhibit 19, pp. 172-176. Then, shortly before trial, the RFLP testing was done. At trial, Romero testified that she had found sufficient sample in the panties to conduct the testing. The defense did not call it's own expert to testify about the DNA evidence.

[2] Mueller's report admitted to supplement the record in these proceedings, was not presented to the Nevada Supreme Court during Petitioner's post-conviction proceedings. However, the thesis of the report was argued during post-conviction and the report was accepted on the basis.

[3] Respondents present no scientific evidence or information to counter Mueller's conclusions.

[4] See Exhibit 161, p. 13.

[5] Testimony indicated that Petitioner had consumed at least twenty alcoholic beverages at the various bars he visited that night.

EOR 1001, l. 17 - EOR 1006, l. 14.

V.

LEGAL ARGUMENT

A. THE DISTRICT COURT CORRECTLY FOUND THE CLAIM ASSERTED IN GROUND ONE TO BE EXHAUSTED.

Brown responds as follows to the state's argument that he never presented his challenge to the sufficiency of the DNA evidence asserted in Ground One of the First Amended Petition to the Nevada courts. Opening Brief (OB) 17-19.

A petitioner must "present the substance of his claim to the state courts." Vasquez v. Hillery, 474 U.S. 254, 258 (1986). See also Anderson v. Harless, 459 U.S. 4, 6 (1982) (petitioner must "'fairly present [ ]' to the state court the 'substance' of his federal habeas corpus claim."); Humphrey v. Cady, 405 U.S. 504, 516 n. 18 (1972) ("question. . . is whether any of petitioner's claims is so clearly distinct from the claims he has already presented to the state courts that it may fairly be said that the state courts have had no opportunity to pass on the claims"). Although a state prisoner seeking federal habeas relief must first exhaust the remedies available in the courts of the state, "[i]t is the legal issues that are to be exhausted, not the petitioner." Burkett v. Cunningham, 826 F.2d 1208, 1218 (3d Cir. 1987) (emphasis added) (quoting U.S. ex rel. Geisler v. Walters, 510 F.2d 887, 893 (3d Cir. 1975)); see Watson v. Dugger, 945 F.2d 367, 372 (11th Cir. 1991) ("When a federal habeas petitioner presents what amounts to 'a mere variation in the same claim rather than a different legal theory,' . . . he has presented the state courts with the substance of his claims and thus has properly exhausted them.").

In Ground One of the First Amended Petition Brown challenges the sufficiency of the evidence admitted at trial to convict him of the sexual assault, focusing primarily on the deoxyribonucleic acid ("DNA") evidence admitted against him. In doing so Brown addresses (a) the treatment of pertinent crime scene evidence, (b) presentation of the DNA evidence at trial, (c) violation of the court ordered DNA testing protocol and (d) expertise of the Washoe County Crime Lab. EOR 48-52. These same subjects are addressed in Brown's Opening and Reply Briefs on direct appeal to the Nevada Supreme Court. See, e.g.:

(a) Sufficiency of the evidence.

"Given the plethora of evidence that the assailant was not Troy Brown, include the hair which did not match, the coat which was different, the lack of watch and zipper, the fact that Megan repeatedly named Trent every time the police brought up Troy to her, the lack of blood on Troy when he first came back home at 1:32 a.m., the absence of scratches or bites from Megan on Troy's body and the total failure of the DNA evidence to be established as trustworthy and reliable in this particular case, Appellant submits that there was insufficient evidence to convict Troy Brown of these crimes. Opening Brief, EOR 590, ll. 11-20 (emphasis added).

(b) Treatment of pertinent crime scene evidence.

". . . Romero testified that she did not think she had enough vaginal stain sample in the panties to do an RFLP type DNA test [citation omitted], although, by the time of trial, sufficient stain sample had materialized casting suspicion on the entire process [citation omitted]." Opening Brief, EOR 585, ll. 16-20.

. . . . .

"[Washoe Lab serologist Maria] Fassett also testified that in this case, the Carlin police appeared to lack knowledge on evidence labeling for lab work. She said she was told that the suspect never went back to his own bed

after the attack, thus there was no point in examining the bedding taken from Troy's bedroom. Of course, the evidence from Troy, Travis, Dave Prescott and Officer Terry all disproved that statement. There was also testimony about the 'lost' teeth scrapings from Megan, who claimed to have bitten her assailant. Given these kinds of evidentiary problems with this particular case, it is incomprehensible that no pre-trial evidentiary hearings were held to establish the integrity of the evidence gathering, the lab techniques, and the overall scientific process, before the court would allow the jury to hear expert testimony. There was a poor showing of expertise, a total lack of appropriate foundation and virtually a non-existent cross-examination of the experts and evidence custodians in this case. That was prejudicial to Troy Brown, and in the face of the other evidence which strongly indicated Troy was not the assailant and that there were other likely suspects, the effect of these evidentiary failing [sic] was fatal to Troy." Opening Brief, EOR 588, l. 24 - EOR 589, l. 17.

. . . . .

"When one criminalist Maria Fassett, expressed concern over the inexperience in evidence collection methods of the Carlin police, Defense counsel failed to delve into that, and its potential effect on the ultimate lab results. Even when Ms. Fassett testified she was mislead about bedding and other evidence and would have investigated and examined it further had she not been, Defense Counsel

failed to stress that or capitilize on it in argument or cross-examination of others." Reply Brief, EOR 650, l. 26 - EOR 651, l. 7.

(c) Presentation of the DNA evidence at trial.

"She [Renee Romero] further testified that the national technical working group (TWG-DAM) which is working on DNA analysis methods, is trying to set standards for quality control or quality assurance in the area of DNA testing and reporting, but that so far, they've only issued non-mandatory guidelines. [citation omitted]. She further testified that the population database used by her lab was the FBI's Roche Molecular Systems database, which was not yet even published as of that date. ('I have a pre-publication and it will be published in the Journal of Forensic Science in July.') [citation omitted]).

Romero acknowledged that there are several different population databases in the field and that she was using the FBI's and would be looking at additional information at the end of the month. . . . While some databases have gained acceptance in DNA work, the FBI database has been criticized compared to that of other specialized agencies like Cellmark and Lifecodes, and their DNA results have even been declared inadmissible [citations omitted]. Opening Brief, EOR 584, l. 20 - EOR 585, l. 26.

. . . . .

"Even with the myriad scientific and technical errors that occur in DNA analysis, the one thing about which most scientific and legal commentators agree is that experts disagree on the accuracy of the various methods used to determine the reference population databases used to compute the random match probabilities (RMP) once DNA evidence is found and analyzed.

The RMP is the figure which is usually quoted to the jury, by the DNA expert, the prosecutor, and often the judge, in an attempt to give some significance to the DNA findings. The findings are often couched in terms of the 'frequency of the defendant's genetic traits in the reference population' and the 'likelihood or probability that someone other than the defendant has these genetic traits'. For example, in the present case, Renee Romero variously told the Court at Preliminary Hearing that the frequency of Troy Brown's PCR polymarkers was 1 in 22 in the Caucasian race; his DQ Alpha traits was 1 in 18,900 in the Caucasian population; and using the 'interim ceiling method' devised by the NCR,she could place the RMP that it was someone other than Troy at 1 in 3 million. Reply Brief, EOR 642, p. 17, l. 8 – EOR 643, l. 3.

. . . . .

"When a jury is told that the 'chances that the DNA in the panties and blood is not Troy's is 1 in 3 million' [citation omitted] and that is 3 times the entire population of Nevada, this

effectively relieves the jury of its decision-making task by replacing the jury's function of weighing all the evidence with considering instead the probability of guilt." Reply Brief, EOR 647, p. 22, l. 21 – EOR 648, l. 3 (emphasis in original).

. . . . .

"In our case, Romero told the jury that the percent of likelihood that the DNA in the panties is the same as the defendant's DNA is 99.99967% [citation omitted]. That is improper exaggeration and source error, according to the experts. It is also extremely prejudicial to the accused." Reply Brief, EOR 650, p. 25, ll. 10-15.

(d) Violation of court ordered DNA protocol mandating coordination with outside laboratory.

"Some courts have found that the testimony of a single expert on DNA and population [sic] genetics is insufficient to pass muster for scientific acceptance. [citation omitted]. Romero was the only witness to testify on DNA methods or statistics, and the defense, even though it had been provided with funds for a DNA expert at trial (ROAD 2, 285-295), produced no expert to challenge anything at trial and virtually no cross-examination about population genetics or statistics took place, even though this is the single biggest area of substantial controversy in this field." Opening Brief, EOR 586, l. 20 – EOR 587, l. 3.

. . . . .

"The prejudice to Troy from the lack of challenge to the DNA evidence is evident in comparing the earliest DNA testimony at Preliminary Hearing, and the later, more developed theories and results and methods used by the time of trial. Either the lab was incredibly inexpert and deficient in July, 1994, or it drastically changed its methods and databases, and perhaps techniques, by the time of trial. That change alone should have been thoroughly explored but instead was virtually ignored." Opening Brief, EOR 589, p. 32, ll. 18-25.

(e) Expertise of the Washoe County Crime Lab.

"At the Preliminary Hearing held July 6, 1994, Washoe County Crime Lab DNA specialist Renee Romero testified that her lab had just begun doing DQ Alpha testing in October, 1993, [citation omitted] and had only started reporting PCR DNA test results two months earlier and they were still evaluating the system and completing proficiency tests [citation omitted]." Opening Brief, EOR 584, ll. 15-20.

. . . . .

"Clearly Romero's Preliminary Hearing testimony alone established the infancy of the Washoe County Crime Lab in conducting DNA work and that, alone, should have prompted the defense counsel to seek, and the trial court to

> require, a pretrial hearing on DNA before admitting the evidence at trial in this case. But not only was that not done, Romero's own credentials were barely discussed and instead, her curriculum vitae was simply introduced into evidence with little or no discussion." Opening Brief, EOR 586, ll. 12-19.
>
> . . . . .
>
> "In the present case, Renee Romero testified that exclusions occur in about 30% of DNA analysis cases, [citation omitted] but she did not testify to the lab error rate in Washoe County, nor could she have, as they had not completed any proficiency testing yet. [citation omitted] In fact, they had only been doing DQ Alpha testing for less than 9 months [citation omitted] and only started PCR analysis two months earlier [citation omitted]. She had only testified twice, in Elko and Washoe Counties, on DNA before [citation omitted]. Reply Brief, EOR 649, ll. 14-22.

Brown's First Amended Petition was filed in November, 2004. EOR 34. His direct appeal briefs were filed in late 1995 and early 1996 with the Nevada Supreme Court. Admittedly, there are some additional facts in the present claim, which is hardly surprising in light of advancements in understanding DNA over the last decade. However, since the substance of the current Ground One federal claim is the same as that of the prior state court claim, as found by the district court, the Ground One claim has been exhausted.

> New factual allegations do not render a claim unexhausted unless they 'fundamentally alter the legal claim already considered by the state courts.' Vasquez v. Hillery, 474 U.S. 254, 260, 160 S.Ct. 617, 622, 88 L.Ed. 2d 598 (1986). In this instance, the discussion of the DNA evidence was so in-depth and expansive that it cannot be said that the Nevada Supreme Court did not have an opportunity to address the claim. Any new facts or arguments presented here merely enhance the presentation, clarifying, rather than changing the nature of the legal claim.
>
> Ground One of the petitior has been fairly presented to the Nevada Supreme Court and is exhausted. The motion to dismiss shall be denied.

EOR 898-99; See also Picard v. Connor, 404 U.S. 270, 278 (1971)(fair presentation requires "that the substance of a federal habeas corpus claim must first be presented to the state courts")(emphasis added). None of the above presentations of DNA claims by Brown to the Nevada courts considered by the district court in finding exhaustion, including the references to various random match probability (RMP) statistics such as the 99.99967% chance it was Brown's DNA (0.000033% chance it was not), are mentioned in the Opening Brief. Instead, respondents simply acknowledge that Brown argued in a footnote in a state court reply brief, as he does now, that

> [t]he impact of brothers in the suspect population is an important consideration that bears on the Random Match Probabilities

> (RMP). 'But the probability that the suspect and his biological brother will share a set of alleles on each of the three probe sites is approximately (1/4)3 = 1/64.' – See Jonathan J. Koehler, DNA Matches and Statistics: Important Questions. Surprising Answers. 76 Judicature 222 (1993). In the present case, that factor is critically important, not only because the victim constantly referred to Trent' instead of 'Troy', but also because Renee Romero, the State's DNA 'expert' quoted the odds of two brothers sharing the same alleles as **1 in 6500!**

EOR 636-37 and n. 1 (emphasis in original); see OB 18. Brown had a right to reply to address DNA evidence in his respondents' defense of the DNA evidence. Although respondents correctly note that the footnote is in a section of a reply brief addressing sentencing issues, its application to the DNA evidence submitted at trial is obvious to the reader in light of the "in depth and expansive" DNA argument otherwise presented to the Nevada Supreme Court (see EOR 898, l. 17) as set forth above and the reference in the footnote to the trial transcript, i.e. "TR 344."

Also, after his case was remanded to the state district court for resentencing, Brown renewed his insufficiency of the evidence claim by way of a Motion For New Trial filed March 6, 1998 (EOR 14), citing Jackson v. Virginia, supra, for the proposition that the "Due Process Clause prohibits conviction upon evidence insufficient to establish every element of the charged crime[.]" See EOR 14, ll.14-18. The Motion To Dismiss was denied by order of March 9, 1998 (EOR 25), which ruling was appealed. See Ex. 93, p. 1, ll. 13-18. In its Order Dismissing Appeal (ODA) in

consolidated Cases No. 32025 and 33325 the Nevada Supreme Court initially notes that "[t]his is an appeal from an amended judgment of conviction entered after resentencing and from a denial of a motion for a new trial." Ex. 153, p. 1 (emphasis added). Therefore, in addition to Brown's exhaustion of his Ground One claim on direct appeal, he exhausted the claim by his appeal of the denial of the Motion For New Trial (Ex. 86) to the Nevada Supreme Court. The district court's finding that Ground One is exhausted should be affirmed.

B. THE DISTRICT COURT'S ORDER ALLOWING EXPANSION OF THE RECORD TO INCLUDE EXHIBITS 196-96 (EOR 936-960) WAS CORRECT

1. 28 U.S.C. §2254(e)(2)

In Cooper-Smith v. Palmateer, 397 F.3d 1236, 1241 (9th Cir. 2005), this Court held that to expand the record under Rule 7 of the "Rules Governing Section 2254 Cases In The United States District Court" (hereinafter the "Habeas Rules") a petitioner must satisfy 28 U.S.C. § 2254(e)(2). In Williams v. Taylor, 529 US. 420 (2000), the Supreme Court identified two tests under 28 U.S.C. § 2254(e)(2).[6] Under the first

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[6] If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that-

(A) the claim relies on-

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

test, as set forth in the opening clause, the statute applies only "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings . . . ." The second § 2254(e)(2) test precludes expanding the record unless (1) "the claim relies on a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court that was previously unavailable" or (2) the petitioner is pursuing "a factual predicate that could not have been previously discovered through the exercise of due diligence . . . ." See § 2254(e)(2)(A)(i) and (ii). The district court correctly found that,

> [i]n state court, petitioner presented a comprehensive discussion of DNA evidence's deficiencies, particularly related to probability testimony and how the presence of Brown's two brothers in the area impacted the erroneous DNA probability analysis given at trial. The proposed supplemental exhibits shall be admitted into the record. The matter shall be submitted to the court for consideration of the merits of the petition.

EOR 981, ll. 3-7. The district court's ruling should be affirmed. Since Brown did not fail to develop the facts under section 2254(e)(2)'s opening clause, he was

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> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

Section 2254(e)(2)(emphasis added)

properly excused from showing compliance with the remainder of the subsection's requirements. See Williams, supra, at 437.

As set forth in Argument A supra, Brown presented in detail his DNA claims to the Nevada courts, including references to various random match probability (RMP) statistics such as the 99.99967 % chance it was Brown's DNA (0.000033% chance it was not) addressed in the motion to expand the record. Compare EOR 880-81, with Exhibit 197, p. 2, EOR 956. In asserting that the district court wrongly expanded the record respondents do not mention such arguments. See OB 32-34. Instead they point solely to Brown's additional argument that

> [t]he impact of brothers in the suspect population is an important consideration that bears on the Random Match Probabilities (RMP). 'But the probability that the suspect and his biological brother will share a set of alleles on each of the three probe sites is approximately **(1/4)3** = 1/64.' See – Jonathan J. Koehler, DNA Matches and Statistics: Important Questions. Surprising Answers. 76 Judicature 222 (1993). In the present case, that factor is critically important, not only because the victim constantly referred to Trent' instead of 'Troy', but also because Renee Romero, the State's DNA 'expert' quoted the odds of two brothers sharing the same alleles as **1 in 6500!**

EOR 636-37 and n.1 (emphasis in original); OB 34. The district court previously found that Brown's state court "discussion of the DNA evidence was so in-depth and expansive that it cannot be said that the Nevada

Supreme Court did not have an opportunity to address the claim." EOR 898, ll. 16- 19. Therefore, since Brown did not failed to develop the factual basis of his DNA claims, Grounds One and Two of the First Amended Petition, in state court, the second § 2254(e)(2) test is inapplicable and the statute is no bar to expanding the record with Exhibits 196-98 (EOR 936-960). See Morris v. Dretke, 413 F.3d 484, 498 (5th cir. 2005)(petitioner "having met the § 2254(b)(1)(A) exhaustion requirement on the IQ evidence presented for the first time on federal habeas, need not additionally overcome the obstacles of § 2254(e)(2)"). The district court correctly found that

> [i]n state court, petitioner presented a comprehensive discussion of DNA evidence's deficiencies, particularly related to probability testimony and how the presence of Brown's two brothers in the area impacted the erroneous DNA probability analysis given at trial. The proposed supplemental exhibits shall be admitted into the record. The matter shall be submitted to the court for consideration of the merits of the petition.

The district court's ruling should be affirmed.

b. The Facts Set Forth In Exhibits 196-98 (EOR 936-960) Have Been Exhausted.

The statistical analysis set forth in Exhibits 196-98 (EOR 936-960) merely supplement and clarify the DNA claims previously raised in the state-court proceedings. In Vasquez v. Hillary, 474 U.S. 254 (1986), the Supreme Court analyzed the issue of whether expansion of the state court record to include

statistical figures related to an equal protection claim altered the petitioner's claim. In his state court proceedings Vasquez had raised an equal protection challenge to the discriminatory selection of the grand jury. Seeing a need to "supplement and clarify" the state court record, the district court ordered the state to provide statistical figures regarding juror eligibility at the time of Vasquez' trial and directed the parties to present their views regarding the application of statistical probability analysis to the facts of the case. The Supreme Court rejected the argument that the district court's order had drastically altered Vasquez' claim, thereby rendering it unsuitable for review without prior consideration before the state courts, explaining that the statistical estimates added "nothing new to the case" that was not already intrinsic to the consideration of the grand jury discrimination claim. Id. at 259. The Court further noted that the district court's request for further information was "evidently motivated by a responsible concern that [the court] provide the meaningful federal review of constitutional claims that the writ of habeas corpus has contemplated throughout its history." Id. at 259-60; accord, Landrigan v. Schriro, 441 F.3d 638, 648 (9th Cir. 2006) ("additional information offered by Landrigan in support of the federal habeas claim does not 'fundamentally alter' the ineffective assistance claim presented to the state court [but] simply provides additional evidentiary support for the claim . . .").

Exhibits 196-98 (EOR 936-960) likewise merely supplement Brown's claims that he was convicted by the state's presentation of unreliable, untrustworthy and uncomplete DNA evidence to the jury. As set forth in Dr. Mueller's report, Renee Romero's 1/6500 ratio

was incorrect and grossly understated the probability of a random match of two siblings at five loci. The correct figure is 1/1024 (EOR 955, Ex. 197, p. 1), more than six times the likelihood of a random match than the 1/6500 figure provided to the jury by Romero. Furthermore, Romero's calculation for two brothers was inaccurate and incomplete because she never considered the fact that a third brother was in Carlin, Nevada, the night in question and that Brown had two other brothers in Utah. Since it was at least 6 to 12 times more likely that the DNA matched one of the two brothers living in Carlin the evening in question than the 1/6500 probability opined by Ms. Romero, materially inaccurate and incomplete evidence was provided to the jury. Dr. Mueller's report merely supports and clarifies Brown's claim that the DNA evidence, which included the mathematical calculations and testimony presented at trial through Romero, was unreliable and incomplete.[7]

Exhibits 196-98 (EOR 936-960) satisfy Habeas Rule 7 since "relat[ed] to" Grounds One and Two of Brown's petition and are not barred by 28 U.S.C. 2254(e)(2). The district court's rejection of respondents' argument that such expansion of the record renders Ground One unexhausted should be affirmed since the proposed exhibits do not fundamentally alter the legal claim already considered by the state courts in this case. See also the exhaustion discussion in Argument A supra.

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[7] The same is true for the scientific commentary cited in the district court opinion (see EOR 1002).

C. The District Court's Determination As To Ground One "That The Nevada Supreme Court's Determination Of The Sufficiency Of The Evidence Claim Involved An Objectively Unreasonable Factual Finding As Well As A Legal Determination That Was Contrary To Clearly Established Federal Law." Factually Clearly Erroneous nor Legally Incorrect

1) Summary of Argument

Troy Don Brown ("Brown") was convicted of sexual assault and sentenced to life in prison on the basis of an expert witness's mathematically incorrect, incomplete and unreliable DNA testimony and conflicting lay evidence acknowledged by the prosecutor in a state post-conviction pleading as insufficient to convict Brown apart from the DNA evidence. Applying the Antiterrorism and Effective Death Penalty Act's ("AEDPA's") standard of review under 28 U.S.C. § 2254 (d)(1) and "clearly established Federal law" as set forth in Jackson v. Virginia, 443 U.S. 307 (1979), and related cases, the district court correctly held that there was insufficient evidence to convict Brown, granting the writ of habeas corpus as to Ground One of Brown's First Amended Petition. In addition, the district court correctly granted the writ as to Brown's ineffective assistance of counsel ("IAC") claims set forth in Grounds Two and Three of the First Amended Petition, finding that counsel, while having expert resources, did not effectively challenge the DNA evidence and, notwithstanding the conflicting lay testimony, wrongly elected not to apprise the jury of another suspect, the victim's stepfather.

2) **Standard of Review**

A district court's decision to grant a 28 U.S.C. § 2254 habeas petition is reviewed de novo. See Leavitt v. Arave, 371, F.3d 663, 668 (9th Cir. 2004); Ramirez v. Castro, 365 F.3d 755, 762 (9th Cir. 2004). Findings of fact "made by the district court are reviewed for dear error." Robinson v. Ignacio, 360 F.3d 1044, 1055 (9th Cir, 2004). McClure v. Thompson, 323 F.3d 1233, 1240 (9th Cir. 2003).

3) **Facially Inaccurate General Population DNA Random Match Probability Evidence: Prosecutor's Fallacy.**

This is a Restriction Fragment Length Polymorphism (RFLP) case with results reported from five loci. A few months before Brown's trial this Court approved the admission of RFLP evidence in federal trials. See United States v. Hicks 103 F.3d 837, 844 n.7 (9th Cir. 1996); United States v. Chischilly, 30 F.3d 1144 (9th Cir. 1994). In doing so it warned against using RFLP DNA evidence for "source probability (i.e., the likelihood that the defendant is the source of the evidentiary sample . . . [,]" 30 F.3d at 1156, which was precisely what the state did in this case.

Based on the chosen genetic population database, Rene Romero of the Washoe County Forensic Science Division opined that there was a 1 in 3,000,000 ratio for finding a random match between the perpetrator's DNA and Brown's. EOR 404. Not satisfied with that calculation, the prosecutor pressed Ms. Romero to convert those figures to mathematical percentages as to whether Brown was the source of the semen found on the victim's panties, a calculation with which Ms.

Romero was not comfortable. EOR 419-22. Nevertheless, she grudgingly did so, ultimately accepting a 99.99967 percent "likelihood" that the perpetrator was Brown (or .000033 percent that he was not the source). EOR 420-430; SEOR ___. As this Court found in Chischilly supra, such mathematical calculations are wrong.

> . . . The [Washoe County Forensic Science Division] matching statistic does not represent source probability. Rather, the test results reflect the statistical probability that a match would occur between a randomly selected member of the database group and either the evidentiary sample or the defendant. To illustrate, suppose the . . . evidence establishes that there is a one in 10,000 chance of a random match. The jury might equate the likelihood with source probability by believing that there is a one in 10,000 chance that the evidentiary sample did not come from the defendant. This equation of random match probability with source probability is known as the prosecutor's fallacy.

30 F.3d at 1157 (emphasis added); accord, United States v. Morrow, 374 F.Supp.2d 51, 66 (D.D.C. 2005)(prosecutor's fallacy characterized as a "very real danger"); United States v. Shea, 957 F. Supp. 331, 345 & n.44 (D.N.H. 1997)("[t]his type of incorrect reasoning is often referred to as the fallacy of the transposed conditional, or the prosecutor's fallacy"); see R. Lempert, "Some Caveats Concerning DNA As Criminal Identification Evidence : With Thanks To The Reverend Bayes," 13 Cardoza L. Rev. 303, 305-06

(1991). See also letter report of Laurence D. Mueller, Ph.D. (Ex. 197, p. 2).[8]

> The 'prosecutor's fallacy' occurs when a prosecutor presents statistical evidence to suggest that the evidence indicates the likelihood of the defendant's guilt rather than the odds of the evidence having been found in a randomly selected sample.

United States v. Shonubi, 895 F. Supp. 460, 516 (E.D.N.Y. 1995), quoting from M. Berger, "Evidentiary Framework," Federal Judicial Center, Reference Manual On Scientific Evidence, pp. 95, 97 (1994), rev'd on other grounds, 103 F.3d 1085 (2d Cir. 1997).

Relying on this mathematically incorrect evidence, at closing the prosecutor told the jury that such calculations meant that they could be "99.999967 percent sure" that Brown committed the crime. Ex. 34, p. 546, l. 18. Such grossly unreliable evidence was insufficient to support the jury's guilty verdict against Brown.

4) Absence Of Relevant Sibling DNA Random Match Probability Evidence.

At the time of the incident in question Troy Brown had four brothers, Trent, Travis, Trace and Lance, ages 23, 21, 16 and 13, respectively. Two of them, Trent and Travis, were known to be in Carlin, Nevada, the evening in question in close proximity to the crime

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[8] Petitioner submitted Exhibits 196-98 (EOR 936-960)with his Motion To Expand The Record as discussed in Argument B, supra.

scene. See SEOR 959-60. Only Troy Brown's DNA was analyzed, and the state provided the following inaccurate mathematical calculations at trial to distinguish Troy Brown from his brothers.

a. Use Of Incomplete Assumption Offering Evidence Most Disfavorable To Defendant.

In computing the random match probability of brothers at five loci as "1/6500" Ms. Romero relied solely on the following formula set forth in the National Research Council, DNA Technology in Foresnsic Science (1992)(hereinafter "NRC I"), publication:

> Indeed, two sibs will often have matching genotypes at a locus – they have a 25% chance of inheriting the same pair of alleles from their parents and a 50% chance of inheriting one allele in common (which will result in identical genotypes if their other alleles happen to match by chance).

EOR 427, l. 19 – EOR 428, l. 12. As summarized by Ms. Romero at trial,

> [w]ith a brother, there would be some genetic relationship. They have a 25 percent chance of sharing both alleles - - both bands, and 50 percent chance of sharing one band.

EOR 427, ll. 22-24. Such evidence is unreliable since (1) it presents an incomplete picture of DNA among siblings and (2) the 1/6500 random match probability figure grossly understates the probabilities of matches

among siblings. Cf. 3 Mod. Sci. Evidence § 25-2.6.2[2] n. 153 (2d ed.)(NRC I formula used by Ms. Romero is "an incorrect formula for siblings").

Since siblings inherit DNA from their parents, their random match probability is extremely high compared to the general population.

> It is well established that relatives, especially siblings, have very similar DNA patterns and can have identical patterns at various sites. Thus, if a defendant has 10 brothers, there is an increased likelihood that more than one brother would match the DNA evidence sample exactly.
>
> D. Filocomo, "Unraveling The DNA Controversy: People v. Wesley, A Step In The Right Direction," 3 J.L. & Pol'y 537, 564 & n.151 (1995).
>
> . . . . .
>
> The jury must be informed about the fact that the probability of two relatives having the same DNA profile for a number of loci is much greater than two randomly chosen people.
>
> Plainly, the best solution is to obtain DNA from the relatives who are plausible suspects and either include or exclude them. If prosecutors do not make adequate efforts to conduct DNA tests on relatives who are plausible suspects, but offer DNA evidence against a defendant, courts should seriously consider instructing the jury, in a fashion similar to a missing witness charge, that it may

> draw a negative inference that the result would not have been favorable to the prosecution.
>
> B. Scheck, "DNA And Daubert," 15 Cardoza L. Rev. 1959, 1974-75 (1 994); accord, S. Rosenthal, "My Brother's Keeper: A Challenge To The Probative Value Of DNA Fingerprinting," 23 Am. J. Crim. L. 195, 212-13 (1995).

With respect to the incompleteness of Ms. Romero's sibling calculations, siblings' parents may be homozygotes, i.e. have matching alleles at various loci, or heterozygous, i.e. have different alleles at various loci.

> "The genetics of a human cell . . . is compiled by the owner's parents, each of whom contributes . . . 23 paired sets inside the sacrosanct edifice of the *nucleus* . . . . [Genetic information within the paired sets] are called *alleles*. If. . .at a particular region or locus on the DNA . . . the allele from the mother is A and the corresponding allele from the father is B, the *genotype* at that locus is designated AB. The text of two corresponding alleles at any locus may be identical (a *homozygous* genotype, e.g., AA) or different (a *heterozygous* genotype, e.g., AB)."

People v. Pizarro, 3 Cal.Rptr.3d 21, 49-50 (Cal. App. 2003), quoting from People v. Brown, 110 Cal.Rptr.2d 750 (2001). The 25% figure utilized in this case for sibling random match probability at one loci, and which mistakenly (see discussion below) was used as the foundation for the state's 1/6500 figure, lies at one extreme where "both parents are heterozygotes and

share at most one allele in common[,]" the most unfavorable possible alternative for a criminal defendant sibling. "For other possible parental pairs the probability of two sibs matching could be 50% or 100%." Ex. 197, 1, second ¶. The jurors never knew this.

As summarized by Dr. Mueller, "in this portion of Ms. Romero's testimony she has chosen a special case which suggests that sibs have the lowest chance of matching that is biologically possible." EOR 955, Ex. 197, p. 1. Such presentation of scientific evidence based on the most negative assumption possible as to the defendant has been soundly condemned. Cf. People v. Pizarro, Cal.Rptr.3d 21 (Cal. App. 2003), a DNA case where, as here, there was "insufficient evidentiary foundation" for the conviction. Id. at 540.

> If the description of the perpetrator is instead based on evidence of the *defendant's* traits - - which are simply assumed to be the same as the perpetrator's - - the defendant no longer enjoys the presumption of innocence. It is as though the sketch artist sits with the defendant, sketches him as the perpetrator, and the prosecution introduces the sketch at trial as evidence that the defendant looks exactly like the perpetrator. The defendant's traits fill out the perpetrator's description with *facts that are not in evidence*, and the perpetrator's traits are 'proved' by what is in effect a *presumption* that because the defendant possesses certain traits, the perpetrator also possesses those traits. Such a presumption operates as a substitute for proper evidence of the perpetrator's traits, thereby lightening the prosecution's burden of

affirmatively proving the defendant's identity as the perpetrator and undermining the defendant's presumption of innocence.

b. Incorrect Probability Figures.

As set forth in Dr. Mueller's report (EOR 955), even accepting the 25% figure as proper to calculate the chance of a random match of two brothers at a single loci, Ms. Romero's 1/6500 ratio is incorrect and grossly understates the probability of a random match of two siblings at five loci. The correct figure is 1/1024 (Ex. 197, p. 1), which is more than six times the likelihood of a random match than the 1/6500 figure provided the jury by Ms. Romero. As noted previously Brown had four brothers, Trent (23), Travis (21), Trace (16) and Lance (13), at the time of the incident, two of whom (Trent and Travis) were known to be in Carlin, Nevada, the evening of the crime and two of whom resided in the adjacent state of Utah. Dr. Mueller calculates the probability of any one of the brothers matching the DNA profile:

(1)One or more brothers (three were known to be in Carlin the evening in question): 1/512, more than 12 times the likelihood of a random match than the 1/6500 figure provided the jury by Ms. Romero;

(2)Total of five brothers (including the two brothers residing in Utah at the time of the incident): 1/256, more than 25 times the likelihood of a random

match of one of the five brothers than the 1/6500 figure provided by Ms. Romero.[9]

Ms Romero's figure for two brothers was inaccurate; she never considered the fact that a third brother was in Carlin the night in question and that Brown had two other brothers in Utah. Since it was at least six to 12 times more likely that the DNA matched one of Brown's two brothers in Carlin the evening in question than the 1/6500 probability opined by Ms. Romero, materially inaccurate evidence was provided to the jury.

4. Use Of The Unreliable And Incomplete DNA Evidence Rendered The Evidence Insufficient To Prove Brown's Guilt.

In summary, the state's DNA random match probability evidence was facially inaccurate. The so-called "prosecutor's fallacy" was used to wrongly convert the chance of a random match of DNA from the general population to the chance of Troy Brown being the perpetrator of the crime. Such classic fallacy, recognized by this Court and by numerous other courts and legal authorities, rendered the DNA evidence as presented to the jury unreliable. Moreover, the sibling

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[9] Applying a formula found in National Research Council, "The Evaluation of Forensic DNA Evidence" (1996)("NRC II"), page 113 (4.9a & 4.9b), he finds that the "chance of a single sib matching Brown's profile is 1 and 263. The chance that among two brothers one or more would match is 1 and 132 and the chance that among four brothers one or more would match is 1 and 66." EOR 955-56, Ex. 197, pp. 1-2. These probabilities of sibling matches are dramatically greater than Ms. Romero's 1/6500 figure presented to the Brown jury.

issue central to this case was mishandled in several particulars:

> (1) The incomplete mathematical calculations were based on two brothers, not the three known to be in Carlin that night or the additional two residing in Utah;
>
> (2) The record contained only a partial picture of sibling DNA science, i.e. 25% figure for sibling's DNA matching at one loci, based on the most extreme case of heterozygous parents, was used exclusive of other mathematically correct possibilities, i.e. 50% or even 100% for parents' DNA ranging from heterozygous to homozygous. The state unfairly placed its sole reliance on the alternative possibility most disfavorable to the defendant.
>
> (3) Accepting the 25% figure for sibling random match probability at one loci, the state erred by a factor of six in miscalculating the probability at five loci as 1/6500 instead of the 1/1024 figure. This error was compounded by the failure to consider at least the third brother in Carlin the evening in question, which increases the probability to 1/512 from the state's 1/6500, an error by a factor of 12.

Finally, in its Answer In Opposition to Brown's state post-conviction petition, the state conceded that, exclusive of the DNA, the evidence presented to the jury was insufficient to convict Brown.

> There was insufficient evidence to convict the Defendant unless the DNA evidence established guilt . . . .

This statement was made by the prosecutor who prepared and tried the case in a state post-conviction pleading. As such, it is a highly reliable assessment of the no-DNA evidence. EOR 759, ll. 22-23.

Since the DNA evidence was incomplete and mathematically incorrect and was, therefore, highly unreliable, it was insufficient to establish Brown's guilt. The DNA evidence provided no support for distinguishing Brown from his brothers. Affirming guilt on such evidence constitutes an unreasonable application of the controlling Supreme Court precedent, i.e. Jackson v. Virginia, 443 U.S. 307 (1979).

5. The Jackson v. Virginia test.

To meet the fourteenth amendment's due process test for sustaining a guilt finding the evidence must be of sufficient quality to be reliable.

> When considering a due process challenge to the sufficiency of the evidence to support a conviction, we determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307. . . (1979). This inquiry focuses on the quantity and quality of the evidence [citation omitted].

Ticey v. Peters, 8 F.3d 498, 500 (7th Cir. 1993)(emphasis added). In other words, as found by the district court, "if the evidence is not reliable, then due process requires it be excluded." See EOR 1000, l. 25 - EOR 1001, l. 8, and cases cited therein; cf. State v. Jones, 610 So.2d 782, 784-85 (La. 1992)(emphasis

added)(court "not precluded from inquiring into the reliability of the result for due process purposes under Jackson v. Virginia" and Jackson "does not permit jurors to speculate when the evidence at trial would leave any rational factfinder with a reasonable doubt of guilt"); United States v. Moree, 897 F.2d 1329, 1332 (5th Cir. 1990)(emphasis added)(under Jackson v. Virginia prosecution must "produce[d] sufficient evidence to form a rational basis for the jury's adjudication of [the defendant's] guilt").

In summary, underlying the Thompson v. Louisville, 362 U.S. 199 (1960), "no evidence" rule and the Jackson v. Virginia "sufficiency" of the evidence jurisprudence is the due process right of "freedom from a wholly arbitrary deprivation of liberty." See 443 U.S. at 314. As this Court has held, if a petitioner can show that

> there is no factual basis for [his] conviction . . . it follows inexorably that [he] has been denied due process of law. Thompson v. Louisville, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960); Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Golden v. Hayes, 444 F.3d 1062, 1071 (9th Cir. 2006), quoting from Dretke v. Haley, 541 U.S. 86, 397 (2004). See also Garcia v. Carey, 395 F.3d 1099 (9th Cir. 2005).

> Because there was *no* testimony or other evidence to support a rational inference that the robbery of Bojorquez was committed with the intent to further other criminal activity of E.M.F., the ruling of the California Court of Appeal meets the deferential AEDPA standard

> for federal habeas corpus relief: the ruling is 'an unreasonable application of [ ] clearly established Federal law, as determined by the Supreme Court of the United States.' 28 U.S.C. § 2254(d)(1). The clearly established law, as we have already stated, is Jackson v. Virginia, 443 U.S. at 324, 99 S.Ct. 2781. To uphold the jury's finding in the circumstances of this case and in the absence of any evidence at all of specific intent is not only an inaccurate, but an unreasonable, application of Jackson.

Id. at 1104.

In light of the incomplete and inaccurate mathematical calculations undermining the reliability of the DNA evidence presented to the jury and the admitted absence of sufficient additional evidence to prove guilt, the district court correctly found that "the Nevada Supreme Court's determination of the sufficiency of the evidence claim involved an objectively unreasonable factual finding [check in light of new case] as well as a legal determination that was contrary to clearly established federal law" and that "a reasonable doubt would exist in the mind of any rational trier of fact, preventing them from finding each and every element of the crimes for which Petitioner presently stands convicted" (EOR 1007, ll. 2-7) under the "clearly established Federal law" set forth in Thompson v. Louisville and Jackson v. Virginia and its granting of the writ on Ground One should be affirmed.

Accordingly, the Nevada Supreme Court decision did not preclude the district court from issuing the

writ, as it properly did in this case. See 28 U.S.C. § 2254(d)(1).

6. Application Of The AEDPA To The *Jackson v. Virginia* Test.

As this Court recently reaffirmed in Sarausad v. Porter, 479 F.3d 671, 678-79 (9th Cir. 2007), quoting from Chein v. Shumsky, 373 F.3d 978, 983 (9th Cir. 2004), "[t]he Jackson standard 'must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law.'" In compliance with the Supreme Court's direction that the [Jackson] standard must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law[,]" Jackson v. Virginia, 443 U.S. 307, 324 n. 16 (1979), the Chein opinion includes extensive analysis of the crime's, i.e. perjury's, key elements under California law, i.e. materiality and falsity, before addressing the jury's specific findings count by count. See 373 F.3d at 983-85. In stark contrast the Nevada Supreme Court addresses whether "[s]ufficient evidence existed to convict Troy" in summary fashion with no reference at all to the elements of sexual assault. The entire sufficiency section of its opinion is set forth below.

> ****285 Sufficient evidence existed to convict Troy.***
>
> [3] The standard of review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt. *Kazalyn v.* State, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992). We conclude that a jury, acting

reasonably could have been convinced of Troy's guilty beyond a reasonable doubt. Testimony indicted that Tory left the bar around 12:15 a.m., that Troy lived relatively close to the bar, and that Tory live very close to Jane Doe. Troy had enough time to get from the bar to Jane Doe's house to assault Jane Doe before she made the telephone call to her mother at approximately 1:00 a.m. While Jane Doe could not identify her assailant, her description of his clothing was similar to what Troy was wearing; she also said that her assailant smelled like beer ro vomit and testimony indicated that Troy had been drinking beer and had vomited several times that night. Furthermore, testimony indicated that Troy got home at approximately 1:30 a.m., which gave him enough time to assault Jane Doe. Additionally, the Dokes testified that they saw someone resembling Troy in a black jacket and black hat stumbling in the road near Jane Doe's house at 1:05 a.m. Troy also washed his pants and shirt when he got home, arguably to remove blood evidence from his clothes. Finally the DNA evidence indicated that semen collected from Jane Doe's underwear matched Troy's and that only 1 in 3,000,000 other people had matching DNA (the second DNA test indicated that 1 in 10,000 people had matching DNA).

Brown v. State, 934 P.2d 235, 241-42 (Nev. 1997) (EOR 687). This is not a Jackson v. Virginia analysis. Indeed, the only reference to the crime of sexual assault's elements under Nevada law is found in the opinion's following section addressing a double jeopardy issue. Id. at 242 (EOR 686-87). Even that

reference is incomplete since the definition of the element of "sexual penetration" found in Nev. Rev. Stat. § 200.364 is not even mentioned.

As found by the district court (EOR 1006), the Nevada Supreme Court does not even purport to apply Jackson v. Virginia's constitutional test for sufficiency of the evidence to Brown's case. Instead it relies solely on Kazalyn v. State, 825 P.2d 578, (Nev. 1992). In Kazalyn the court mentions neither Jackson nor its constitutional underpinnings in the Fourteenth Amendment's Due Process Clause. Instead it relies on two Nevada cases predating Jackson. In finding sufficient evidence to convict for burglary in Edwards v. State, 524 P.2d 328, 331 (Nev. 1974), the court does not even cite Nevada's burglary statute much less mention that crime's elements. Likewise, in Cunningham v. State, 575 P.2d 936, 937 (Nev. 1978)(emphasis added), while summarily finding "substantial evidence to support a verdict[,]" the court mentions neither Nevada's murder statute nor the elements of first degree murder.

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA")

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of State court shall not be granted with respect any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of,

> clearly established Federal law, as determined by the Supreme Court of the United States . . . .

28 U.S.C. § 2254(d)(1)(emphasis added). As defined by the Supreme Court, this provision has two components.

> A federal habeas court may issue the writ under the 'contrary to' clause if the state court applies a rule different from the governing law set forth in our cases [citation omitted]. The court may grant relief under the 'unreasonable application' clause if the state court correctly identifies the governing legal principle from our decisions but unreasonably applies it to the facts of the particular case.

Bell v. Cone, 535 U.S. 685, 694 (2002). The district court correctly applied both components to this case. First, as noted above, the Nevada Supreme Court did not apply the "clearly established Federal law" set forth in Jackson v. Virginia to Brown's sufficiency of the evidence claim. Therefore, the district court correctly held that "the Nevada Supreme Court's determination of the sufficiency of the evidence claim . . . was contrary to clearly established federal law" (EOR 1007, ll. 2-5, emphasis added), and its analysis of Brown's Ground One claim was not restricted in any manner under the AEDPA. Second, even if the Nevada Supreme Court had applied the holding in Jackson v. Virginia to Brown's sufficiency claim, its affirmance on direct appeal would constitute an "unreasonable appli[cation of Jackson] to the facts of [Brown's] case[,]" a conclusion reached by the district court.

> Moreover, the state court's application of law to the facts also presents grave concern.
>
> . . . . .
>
> [T]he Court finds that the Nevada Supreme Court's determination of the sufficiency of the evidence claim involved an objectively unreasonable factual finding[.]

EOR 1004, ll. 7-8; EOR 1007, ll. 2-4. Accordingly, Brown meets the test under both 2254 (d)(1) clause for granting a habeas petition devoid of any AEDPA restriction.[10]

Accordingly, it is clear that the district court correctly granted the writ as to Ground One. The DNA evidence's incompleteness and unreliability has never been challenged. See, e.g., EOR 1003 n.3 ("Respondents present no scientific evidence or information to counter Mueller's conclusions"). As analyzed in detail by the district court, the remaining evidence was conflicting and inconclusive (see EOR 1004, l. 9 – EOR 1006, l. 14), a conclusion consistent with that of the person perhaps most knowledgeable of the evidence's strength, the prosecutor himself. See EOR 759, ll. 22-23.[11]

---

[10] Respondents' emphasis on § 2254(d)(2) does not applying to a Jackson v. Virginia AEDPA analysis, see OB at 41-42, is misplaced since the district court did not apply §2254(d)(2) in its Jackson v. Virginia analysis granting the writ.

[11] Respondents suggest that the state is not bound by such candid comments as to the weakness of the case against Brown. However, the prosecutor is the state's agent for prosecuting criminal cases.

D. THE DISTRICT COURT'S DETERMINATION THAT "PETITIONER'S SECOND CLAIM IS MERITORIOUS AND THE NEVADA SUPREME COURT 'S HANDLING OF IT ON POST-CONVICTION APPEAL RESULTED IN AN OBJECTIVELY UNREASONABLE FACTUAL DETERMINATION" IS NEITHER FACTUALLY CLEARLY ERRONEOUS NOR LEGALLY INCORRECT.

The state has acknowledged that absent the DNA evidence it presented to the jury Brown would not have been convicted. EOR 759, ll. 22-23. On the virtual eve of trial, the state produced new RFLP test results. Despite the last minute production of the new testing results trial counsel made no effort to continue the trial. As set forth in the discussion of Ground One supra, and found by the district court the DNA evidence and expert testimony admitted at trial was "Unreliable," "Petitioner stands convicted on evidence that misrepresented to an untrained and perhaps unsophisticated jury that the likelihood of a random occurrence of matching DNA in a particular population is the same thing as the probability that the DNA at the crime scene was Petitioner's . . . [,] The uncontradicted expert testimony leaving the jury with false information that was highly prejudicial and which could have been and should have been challenged by the defense's own expert." EOR 1008, ll. 10-16. Yet this false and incomplete DNA evidence was never challenged.

Surely, his conclusions in a formal pleading filed in court is binding on the state.

When appellate counsel on direct appeal attempted to challenge the DNA evidence, the Nevada Supreme Court refused to consider appellate review of the DNA evidence, finding that the defendant had waived such claim:

> Troy argues that the district judge erred in not conducting a pretrial hearing to determine whether the DNA results were trustworthy and reliable. However, Troy made no objection to either the lack of a pretrial evidentiary hearing or to qualifying Romero as an expert witness on DNA evidence. Failure to object in the district court precludes consideration of the issues on appeal; however, this court may address plain error sua sponte. Sterling v. State, 109 Nev. 391, 394, 834 P2.d 400, 402 (1992). Because we conclude that the failure to conduct an evidentiary hearing was not plain error, we will not consider this issue.

Brown v. State, 11 3 Nev. 275, 284, 934 P.2d 235 (1997).

The evidentiary and foundational problems with the collection, testing and presentation of the DNA evidence should have prevented admission of the DNA evidence and/or, if properly challenged, produced an accurate and fair presentation of the evidence to the jury. Moreover, as found by the district court, "[h]ad an effective defense expert participated in the testing and appeared at trial to counter the unreliable information, it is more likely than not that the outcome of the trial would have been different." EOR 1008, ll. 3-5. Brown was prejudiced by admission of this unreliable and incomplete DNA evidence acknowledged by the state

to be essential to a conviction. In failing to challenge the DNA evidence at trial and preserve valid issues for appeal, trial counsel performed ineffectively The district court's determination that the Nevada Supreme Court (see EOR 863-64) failed to apply the "clearly established Federal law [Strickland v. Washington]" to the facts underlying this claim was "objectively unreasonable" and that "Petitioner's second claim is meritorious" (see EOR 1109, ll. 22-24) should be affirmed.

E. THE DISTRICT COURT'S DETERMINATION THAT "AS WITH GROUND 2, THE NEVADA SUPREME COURT'S HANDLING OF [GROUND THREE] RESULTED FROM AN UNREASONABLE DETERMINATION OF THE FACTS" IS NEITHER FACTUALLY CLEARLY ERRONEOUS NOR LEGALLY INCORRECT.

In Ground Three Brown asserted an ineffective assistance of counsel (IAC) claim with respect to his counsel's failure to investigate the case in general and the victim's stepfather, Wayne Henley, in particular. EOR 54-56. The district court agreed with Brown's assertions and granted the writ on this ground. EOR 1010-1011. Respondents' principal argument on appeal is that the district court did not expressly find prejudice. See OB at 52-53. Prior to addressing Ground Three the district court had already noted in its analysis of Ground One "the State's own admission that absent the DNA evidence, there was insufficient evidence to convict Petitioner" (EOR 1004, ll. 4-6) and had found in addressing Ground Two that "[h]ad an effective defense expert participated in the testing and appeared at trial to counter the unreliable information, it is more likely than not that the outcome of the trial

would have been different." EOR 1008, ll. 3-5. Given the district court's findings of such inherent weakness in the prosecution's case, prejudice from failing to inform the jury of an obvious suspect, i.e. the victim's stepfather, who had been arrested for sexual assault in Utah, was suspected of another incident in Carlin, Nevada, where the crime in question occurred and had been "identified by the victim's mother on the night of the attack as someone who had threatened to rape the victim in order to get back at her mother" (EOR 1010 n.6), is obvious. That such conclusion may be implicit rather than explicit in the court's opinion does not diminish the court's Strickland analysis. The district court's granting of the writ on this ground should be affirmed.

VI.

CONCLUSION

For the reasons set forth above and in the Order On Merits the district court's findings that Grounds One through Three of Brown's petition are meritorious and order granting the writ should be affirmed.

VII.

STATEMENT OF RELATED CASES

Counsel for the Appellant is unaware of any related cases at the trial or appellate level.

VIII.

CERTIFICATE OF COMPLIANCE

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Respectfully submitted,

/s/
PAUL G. TURNER
Assistant Federal Public Defender

* * *

[Certificate of Service omitted in printing of this appendix]

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CA NO. 07-15592

D.C. No. 3:03-cv-0712-PMP(VPC)
(Nevada, Reno)

[Filed June 12, 2008]

TROY DON BROWN,	)
	)
Plaintiff-Appellee,	)
	)
vs.	)
	)
CRAIG FARWELL, et. al.,	)
	)
Defendant-Appellant.	)
	)

Appeal from the United States District Court for the District of Nevada

APPELLANT'S OPPOSITION TO REHEARING BY PANEL OR EN BANC

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TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. ARGUMENT 1

A. The Panel Majority Correctly Held That The Nevada Supreme Court Did Not Apply The Jackson v. Virginia Test. 1

B. The Panel Majority Properly Excluded Evidence Found To Be False And Unreliable From Its *Jackson v. Virginia* Analysis And Analyzed The Remaining Evidence In The Light Most Favorable To The Prosecution . 4

C. Brown's Sufficiency Of The Evidence Claim (Ground One) Was Presented To The Nevada Courts. 5

D. Appellants Misconstrue The Panel Majority's Burden Of Proof Reference. 8

E. The District Court's Order Allowing Expansion Of The Record To Include Exhibits 196-96 (EOR 936-960) Was Correct 9

F. The Panel's Enforcement Of The Prosecutor's Concessions That "There Was Insufficient Evidence To Convict The Defendant Unless The DNA Evidence Established Guilt" Was Consistent With

This Court's And The Supreme Court's Prior Rulings. 10

III. CONCLUSION 14

IV. CERTIFICATE OF COMPLIANCE 15

CERTIFICATE OF SERVICE 16

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Brown v. Farwell,
525 F.3d 787 . . . . . passim

Chein v. Shumsky,
373 F.3d 978 (9th Cir. 2004) 1

Cooper-Smith v. Palmateer,
397 F.3d 1236 (9th Cir. 2005) 9

Dretke v. Haley,
541 U.S. 86 (2004) 4

Goldyn v. Hayes,
444 F.3d 1062 (9th Cir. 2006) 12

Helfand v. Gerson,
105 F.3d 530 (9th Cir. 1997) 12, 13

In Re Winship,
397 U.S. 358 (2970) 3, 8

Morris v. Dretke,
413 F.3d 484 (5th cir. 2005) 10

Russell v. Rolfs,
893 F.2d 1033 (9th Cir. 1990) 12

Sarausad v. Porter,
479 F.3d 671 (9th Cir. 2007) 1

Singh v. Prunty,
142 F.3d 1157 (9th Cir. 1998) 14

Smith v. Mitchell,
437 F.3d 884 (9th Cir. 2006) 4

United States v. Castillo,
483 F.3d 890 (9th Cir. 2007) 13

Vasquez v. Hillery,
474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) 9

Waddington v. Sarausad,
128 S.Ct. 1650 (2008) 1

Williams v. Taylor,
529 U.S. 420 (2000) 9, 10

Zedner v United States,
547 U.S. 489 (2006) 12

STATE CASES

Brown v. State, 113 Nev. 275,
934 P.2d 235 (Nev. 1997) 1, 3-5, 8, 10, 12

Kazalyn v. State,
108 Nev. 67, 71, 825 P.2d 578, 581 (1992) 2, 3

FEDERAL STATUTES

28 U.S.C. § 2254(e)(2) 9, 10

28 U.S.C. § 2254(d)(1) 3

FEDERAL RULES

76 Judicature 222 (1993) 7

I.

INTRODUCTION

On May 5, 2008, this Court issued an opinion, reported at 525 F.3d 787, affirming the district court's grant of Troy Don Brown's ("Brown's") writ of habeas corpus and reversing his conviction. On May 16, 2008, Appellants' "Petition For Rehearing And Suggestion For Rehearing *En Banc*" (the "Petition For Rehearing") was filed. By Order of May 23, 2008, Appellee Brown was directed to file a response not exceeding 15 pages. Brown now responds seriatim to appellants' arguments, opposing panel rehearing or en banc review.

II.

ARGUMENT

A. The Panel Majority Correctly Held That The Nevada Supreme Court Did Not Apply The Jackson v. Virginia Test.

As this Court reaffirmed in Sarausad v. Porter, 479 F.3d 671, 678-79 (9th Cir. 2007), cert. granted on other ground sub. nom. Waddington v. Sarausad, 128 S.Ct. 1650 (2008), quoting from Chein v. Shumsky, 373 F.3d 978, 983 (9th Cir. 2004), "[t]he Jackson standard 'must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law.'" The proper Jackson analysis exemplified by Chein, 373 F.3d at 983-85, stands in stark contrast to the following Nevada Supreme Court summary analysis devoid of references to the elements of sexual assault.

**285 Sufficient evidence existed to convict Troy.*

[3] The standard of review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt. *Kazalyn v.* State, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992). We conclude that a jury, acting reasonably could have been convinced of Troy's guilty beyond a reasonable doubt. Testimony indicted that Troy left the bar around 12:15 a.m., that Troy lived relatively close to the bar, and that Troy lived very close to Jane Doe. Troy had enough time to get from the bar to Jane Doe's house to assault Jane Doe before she made the telephone call to her mother at approximately 1:00 a.m. While Jane Doe could not identify her assailant, her description of his clothing was similar to what Troy was wearing; she also said that her assailant smelled like beer or vomit and testimony indicated that Troy had been drinking beer and had vomited several times that night. Furthermore, testimony indicated that Troy got home at approximately 1:30 a.m., which gave him enough time to assault Jane Doe. Additionally, the Dokes testified that they saw someone resembling Troy in a black jacket and black hat stumbling in the road near Jane Doe's house at 1:05 a.m. Troy also washed his pants and shirt when he got home, arguably to remove blood evidence from his clothes. Finally the DNA evidence indicated that semen collected from Jane Doe's underwear matched Troy's and that only 1 in 3,000,000 other people had matching DNA (the

> second DNA test indicated that 1 in 10,000 people had matching DNA).

Brown v. State, 934 P.2d 235, 241-42 (Nev. 1997) (EOR 687). The panel majority correctly found that this analysis, based on Kazlyn v. State, 825 P.2d 578, 581 (1992), which does not cite Jackson and does not address the elements of the crime reviewed, is not a Jackson analysis.

> Moreover, under *Kazalyn*, a reviewing court assesses whether the jury could have been "convinced of the defendant's guilt"; the *Jackson* standard is different, requiring the reviewing court to assess "the essential elements of the crime." The Nevada Supreme Court failed to analyze each of the essential elements of the substantive state crime. Instead, it merely recited all of the facts cumulatively without analyzing whether each or any of those facts established an essential element of the counts of conviction beyond a reasonable doubt, and that a rational juror could have so found. . . .

525 F.3d at 794-95. This analysis is consistent with this Court's prior emphasis under Jackson on a crime's elements.

> But a state court is not free to define an element out of existence, or to ignore the element entirely when upholding a criminal conviction. Such a ruling is contrary to clearly established *federal* law, namely *Jackson v. Virginia*. *See* 28 U.S.C. § 2254(d)(1). Indeed, the quintessence of a *Jackson* claim-the very meaning of *In re*

> *Winship*-is that every element of a crime must be proven beyond a reasonable doubt.

Goldyn v. Hayes, 444 F.3d 1062, 1070 (9th Cir. 2006). The Petition For Rehearing should be denied.

2. The Panel Majority Properly Excluded Evidence Found To Be False And Unreliable From its *Jackson v. Virginia* Analysis And Analyzed The Remaining Evidence In The Light Most Favorable To The Prosecution.

The panel majority characterized the testimony "that Troy was 99.99967 percent likely to be guilty" as "misleading, as it improperly conflated random match probability with source probability[,]" was "scientifically flawed" and "false, but highly persuasive evidence." 525 F.3d at 796. Likewise, it found that such testimony "inaccurately minimized the likelihood that Troy's DNA would match one of his four brothers, thus underestimating the likelihood that one of Troy's brothers could have been the perpetrator" and was "misleading because it presented the narrowest interpretation of the DNA evidence." Id. The district court's exclusion of such false, unreliable evidence from its Jackson analysis is consistent with this Court's prior holding that a Jackson analysis must be predicated on a "factual basis." See Golden Hayes, supra, at 1071, quoting from Dretke v. Haley, 541 U.S. 86, 97 (2004); Smith v. Mitchell, 437 F.3d 884, 890 (9th Cir. 2006)("expert's testimony as to a theoretical conclusion or inference does not rescue a case that suffers from an underlying insufficiency to convict beyond a reasonable doubt").

False evidence is by definition not "factual," and it cannot be part of the Jackson analysis.

As found by the panel majority, the district court correctly "weighed the sufficiency of the remaining evidence in the light most favorable to the prosecution." See 525 F.3d at 797. Even assuming that Brown left the bar in time to commit the crime, the remaining evidence did not support a guilty verdict. For example, it is undisputed that the victim "could not identify her assailant[,] 525 F.3d at 799 (O'Scannlain, J., dissenting), had twice previously identified Troy's brother Trent, as the assailant and had described the assailant's jacket as having a zipper while Troy's jacket was zipperless. Understandably, the prosecutor twice conceded in state post-conviction proceedings that the remaining, non-DNA evidence was insufficient to prove Brown guilty beyond a reasonable doubt. See Argument F. infra. No one has ever asserted that the prosecutor misunderstood the strengths and weaknesses of his own case. The Petition For Rehearing should be denied.

C. Brown's Sufficiency Of The Evidence Claim (Ground One) Was Presented To The Nevada Courts.

In Ground One of the First Amended Petition, Brown challenged the sufficiency of the evidence admitted at trial to convict him of the sexual assault, focusing primarily on the deoxyribonucleic acid ("DNA") evidence admitted against him. Respondents assert in the Petition For Rehearing, page 13, that "Petitioner did not complain of the reliability of the DNA evidence as he does in this action." To the contrary, Brown addressed the presentation of the

DNA evidence at trial, including the DNA evidence's lack of reliability, in his Opening and Reply Briefs on direct appeal to the Nevada Supreme Court. See, e.g.:

(a) Sufficiency of the evidence.

"Given the plethora of evidence that the assailant was not Troy Brown, include the hair which did not match, the coat which was different, the lack of watch and zipper, the fact that Megan repeatedly named Trent every time the police brought up Troy to her, the lack of blood on Troy when he first came back home at 1:32 a.m., the absence of scratches or bites from Megan on Troy's body and the total failure of the DNA evidence to be established as trustworthy and reliable in this particular case, Appellant submits that there was insufficient evidence to convict Troy Brown of these crimes. Opening Brief, EOR 590, ll. 11-20 (emphasis added).

(b) Presentation of the DNA evidence at trial.

"She [Renee Romero] further testified that the national technical working group (TWG-DAM) which is working on DNA analysis methods, is trying to set standards for quality control or quality assurance in the area of DNA testing and reporting, but that so far, they've only issued non-mandatory guidelines. [citation omitted]. She further testified that the population database used by her lab was the FBI's Roche Molecular Systems database, which was not yet even published as of that date. ('I have a pre-publication and it will be published

in the Journal of Forensic Science in July.') [citation omitted]). Opening Brief, EOR 584, l. 20 - EOR 585, l. 3 (emphasis added).

. . . . .

"When a jury is told that the 'chances that the DNA in the panties and blood is not Troy's is 1 in 3 million' [citation omitted] and that is 3 times the entire population of Nevada, this effectively relieves the jury of its decision-making task by replacing the jury's function of weighing all the evidence with considering instead the probability of guilt." Reply Brief, EOR 647, l. 21 - EOR 648, l. 3 (emphasis in original).

. . . . .

"In our case. Romero told the jury that the percent of likelihood that the DNA in the panties is the same as the defendant's DNA is 99.99967% [citation omitted]. That is improper exaggeration and source error, according to the experts. It is also extremely prejudicial to the accused." Reply Brief, EOR 650, ll. 10-15 (emphasis added).

[T]he impact of brothers in the suspect population is an important consideration that bears on the Random Match Probabilities (RMP). 'But the probability that the suspect and his biological brother will share a set of alleles on each of the three probe sites is approximately (1/4)3 = 1/64.' See - Jonathan J. Koehler, DNA Matches and Statistics: Important Questions,

> Surprising Answers. 76 Judicature 222 (1993). In the present case, that factor is critically important, not only because the victim constantly referred to Trent' instead of 'Troy', but also because Renee Romero, the State's DNA 'expert' quoted the odds of two brothers sharing the same alleles as **1 in 6500!** Reply Brief EOR 636-37 and n. 1 (emphasis in original).

The panel majority correctly affirmed the district court's finding that Ground One was exhausted.

> Respondents erroneously contend that Troy failed to exhaust his insufficiency claim in the Nevada Courts. Troy in fact raised this claim on direct appeal, and the Nevada Supreme Court concluded that the totality of the evidence-considering both the DNA and non-DNA evidence together-was sufficient to uphold the conviction. *Brown v. State,* 113 Nev. 275, 934 P.2d 235, 240-42 (Nev. 1997). . . .

525 F.3d at 793. The Petition For Rehearing should be denied.

D. Appellants Misconstrue The Panel Majority's Burden Of Proof Reference.

Appellants characterize the panel majority's statement that "it is Respondents' burden to establish guilt beyond a reasonable doubt for each and every element of the offense" as a new standard foreign to Jackson. That language, of course, refers to the state's burden of proof under In Re Winship, 397 U.S. 358 (1970), which is the basis of the Jackson analysis. See

443 U.S. at 315-16. In the last paragraph of the legal analysis the panel majority concludes that the evidence is insufficient for "any rational trier of fact to believe that Troy was the assailant beyond reasonable doubt." See 525 F.3d 798 (O' Scannlain, J., dissenting)(citing both Winship and Jackson). This is precisely the Jackson standard. See 443 U.S. at 324. The language of the decision clearly shows that the panel majority is simply referring to the state's burden of proof at trial, which is reviewed in Jackson under the aforementioned standard. This is no new rule. The Petition For Rehearing should be denied.

E. The District Court's Order Allowing Expansion Of The Record To Include Exhibits 196-96 (EOR 936-960) Was Correct

In Cooper-Smith v. Palmateer, 397 F.3d 1236, 1241 (9th Cir. 2005), this Court held that to expand the record under Rule 7 of the "Rules Governing Section 2254 Cases In The United States District Court" (hereinafter the "Habeas Rules") a petitioner must satisfy 28 U.S.C. § 2254(e)(2). In Williams v. Taylor, 529 U.S. 420 (2000), the Supreme Court identified two tests under 28 U.S.C. § 2254(e)(2). Under the first test, as set forth in the opening clause, the statute applies only "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings . . ." The panel majority correctly affirmed on the following basis:

> The district court correctly found that Troy 'presented a comprehensive discussion of the DNA evidence before the Nevada Supreme Court. This finding is supported by numerous challenges to the DNA evidence raised in Troy's

> state court briefs. Troy's attempts were reasonable and therefore diligent. See *Williams v. Taylor*, 529 U.S. 420, 435, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000) ("Diligence for purposes of [§ 2254(e)(2)] depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court."). Moreover, as the district court found, the Mueller Report merely clarifies, rather than fundamentally alters, the DNA evidence and expert testimony that was already before the Nevada courts. See *Vasquez v. Hillery*, 474 U.S. 254, 260, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) ("We hold merely that the supplemental evidence presented by respondent did not fundamentally alter the legal claim already considered by the state courts, and, therefore, did not require that respondent be remitted to state court for consideration of that evidence."). Therefore, the district court did not err by admitting the Mueller report.

525 F.3d at 794.

Since Brown did not fail to develop the factual basis of his DNA claims (Grounds One and Two of the First Amended Petition) in state court the second § 2254(e)(2) test is inapplicable. The statute is no bar to expanding the record with Exhibits 196-98 (EOR 936-960). See Morris v. Dretke, 413 F.3d 484, 498 (5th cir. 2005)(petitioner "having met the § 2254(b)(1)(A) exhaustion requirement on the 1Q evidence presented for the first time on federal habeas, need not additionally overcome the obstacles of § 2254(e)(2)").

Exhibits 196-98 (EOR 936-960) satisfy Habeas Rule 7 since they are "relat[ed] to" Grounds One and Two of Brown's petition and are not barred by 28 U.S.C. § 2254(e)(2).

F. The Panel's Enforcement Of The Prosecutor's Concessions That "There Was Insufficient Evidence To Convict The Defendant Unless The DNA Evidence Established Guilt" Was Consistent With This Court's And The Supreme Court's Prior Rulings.

In state post-conviction proceedings, Brown asserted that trial counsel was ineffective for failing to properly investigate a possible alibi. See, e.g., EOR 717, ¶5. The State of Nevada, represented by the District Attorney who prosecuted Brown, thereafter filed an answer. Supremely confident in the DNA evidence, the prosecutor found it strategically advantageous to defend the ineffectiveness of counsel (IAC) claim by candidly conceding the remaining evidence's insufficiency and focusing the inquiry on the DNA.

> There was insufficient evidence to convict the Defendant unless the DNA evidence established his guilt, but the insufficiency of the evidence established at trial, combined with the alleged evidence not discovered by trial counsel is simply not enough to make the DNA evidence suspect.

EOR 759, ll. 22-25. Consistent with this approach in closing argument at the state post-conviction

evidentiary hearing the prosecutor conceded that the defense counsel

> created a reasonable doubt. And everybody concedes, everybody - -I think, concedes that but for the DNA there was reasonable doubt. How much reasonable doubt does [the defense counsel] have to keep piling up when the problem is the DNA?

Errata To Excerpt Of Record, filed 7/12/07, at 256, ll. 5-9. The state ultimately obtained the IAC claim's denial by focusing on the DNA and crediting the defense counsel with exposing the insufficiency of the remaining evidence.

> THE COURT: All right, . . . [t]he Court is going to deny the Petition for Writ for Habeas Corpus . . . . The DNA evidence there is no grounds presented to the satisfaction of the Court to overturn the verdict of the jury. And with respect to the rest of the issues the Court agrees with the States analysis. So, the Petition for Writ of Habeas Corpus is denied.

Id. at 260, ll. 4-14.

The state changed course in federal post-conviction proceedings. Rather than rely solely on the DNA, the state asserted that the remaining evidence was sufficient to convict Brown. Answer, EOR 909, ll. 17-19 ("even if the DNA evidence was excluded, the remaining evidence was sufficient by which the jury could find each element of the crime beyond a reasonable doubt"; Respondents-Appellants' Opening Brief, p. 24, last two lines) and "sought to distance

[itself] from this concession at oral argument. . . ." 525 F.3d at 789 n.1. Consistent with the United States Supreme Court's position, see generally Zedner v United States, 547 U.S. 489, 504 (2006)(judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradicting argument to prevail in another phase") and this Court's prior rulings, the panel majority correctly found the appellants judicially estopped from doing so. See 525 F.3d at 789-90 & n. 1, citing Helfand v. Gerson, 105 F.3d 530, 534-36 (9th Cir. 1997); Russell v. Rolfs, 893 F.2d 1033, 1037-39 (9th Cir. 1990).

> Indeed, the Assistant United States Attorney who tried the illegal reentry case and who handled the double jeopardy hearing below, speaking on behalf of the government, conceded in district court that the jury in the illegal reentry case 'absolutely ... made a determination that [the government] did not prove beyond a reasonable doubt that [Castillo-Basa] had gone before an immigration judge. They definitely made that determination that the government's evidence did not meet the burden of beyond a reasonable doubt on that single element.' Regrettably, the AUSA who made this truthful and accurate concession in the district court was replaced with another AUSA for purposes of this appeal. The government, through the new AUSA, completely reversed its position and argued on appeal that 'Castillo-Basa cannot meet his burden to show that the jury's not guilty verdict in his [illegal reentry] trial necessarily decided the question of whether he was present at the ... deportation

> hearing.' Although we do not reach the issue, we note that this troubling reversal of position may violate our established judicial estoppel doctrine. That doctrine precludes a party from taking; a position in a legal proceeding, that directly contradicts an earlier position it took in the same or earlier proceeding.

United States v. Castillo, 483 F.3d 890, 898 & n.5 (9th Cir. 2007)(emphasis added); Helfand v. Gerson, 105 F.3d at 1534 (judicial estoppel involves "gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position").

It was advantageous in the state district court to focus entirely on the DNA evidence and credit the defense attorney with exposing the remaining evidence as insufficient. In federal court appellants found it advantageous to take the opposite position, i.e. to argue that the remaining evidence exclusive of the DNA evidence was sufficient to convict Brown. Under almost identical circumstances, this Court has recognized the prosecutor's unique understanding of the strengths and weaknesses of the state's evidence.

> During the evidentiary hearing on Singh's state habeas petition, [the prosecutor] conceded it might have been 'the kiss of death' to the State's case if the jury heard Copas was in essence being rewarded for his testimony with some kind of benefits. With all due respect to the state court of appeal, which felt otherwise, we deem [the prosecutor's] candid concession to be highly significant. In the adversarial process, the prosecutor, more than neutral jurists, can

better perceive the weakness of the state's case

. . . .

Singh v. Prunty, 142 F.3d 1157, 1163 (9th Cir. 1998). The panel majority was correct in applying the rule of judicial estoppel here. The Petition For Rehearing should be denied.

III.

CONCLUSION

For the reasons stated in this Opposition, Brown respectfully asks this Court to decline to rehear this case by panel or en banc.

IV.

CERTIFICATE OF COMPLIANCE

The typeface used in this brief is proportionately spaced 14-point. The total number of words is 3,660.

Respectfully submitted,

/s/ _____
PAUL G. TURNER
Assistant Federal Public Defender

* * *

[Certificate of Service omitted in printing of this appendix]

AMICUS CURIAE BRIEF

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No. 08-559

In the Supreme Court of the United States

E. K. MCDANIEL, WARDEN, ET AL., PETITIONERS

v.

TROY BROWN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

The United States will address the following question:

Whether a court, in evaluating the sufficiency of the evidence under *Jackson* v. *Virginia*, 443 U.S. 307 (1979), may disregard evidence presented to the jury if the court concludes that additional evidence submitted after trial demonstrates that the trial evidence was inaccurate or unreliable.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of the argument 14
Argument:
Claims of evidentiary insufficiency under *Jackson* v. *Virginia* must be evaluated only on the evidence adduced at trial and not on post-trial submissions 16
A. *Jackson*'s rationality test turns on the evidence that was before the factfinder 16
B. The evidence presented at trial was sufficient to find respondent guilty beyond a reasonable doubt 19
C. Due process concerns do not warrant the Ninth Circuit's approach to evidentiary insufficiency 27
Conclusion 33

TABLE OF AUTHORITIES

Cases:

Ake v. *Oklahoma*, 470 U.S. 68 (1985) 29, 30
Banks ex rel. Banks v. *Sunrise Hosp.*, 102 P.3d 52 (Nev. 2004) 25
Bean v. *Calderon*, 163 F.3d 1073 (9th Cir. 1998), cert. denied, 528 U.S. 922 (1999) 17
Brady v. *Maryland*, 373 U.S. 83 (1963) 31
Burks v. *United States*, 437 U.S. 1 (1978) 17, 19, 22
Colorado v. *Connelly*, 479 U.S. 157 (1986) 28
Crawford v. *Washington*, 541 U.S. 36 (2004) 29
Daubert v. *Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) 4, 29

Cases—Continued: Page

Delaware v. *Fensterer*, 474 U.S. 15 (1985) 29, 30, 31
Dowling v. *United States* 493 U.S. 342 (1990) 28, 29
Fagan v. *Washington*, 942 F.2d 1155 (7th Cir. 1991) 17
Hallmark v. *Eldridge*, 189 P.3d 646 (Nev. 2008) 25
Herrera v. *Collins*, 506 U.S. 390 (1993) 17, 18, 19, 21, 23
House v. *Bell*, 547 U.S. 518 (2006) 18
Giglio v. *United States*, 405 U.S. 150 (1972) 31
Jackson v. *Virginia*, 443 U.S. 307 (1979) ..... *passim*
Kansas v. *Ventris*, No. 07-1356 (Apr. 29, 2009) 28
Kumho Tire Co. v. *Carmichael*, 526 U.S. 137 (1999) 24
Lockhart v. *Nelson*, 488 U.S. 33 (1988) 15, 22, 23, 28, 33
Manson v. *Brathwaite*, 432 U.S. 98 (1977) 30
Metro-North Commuter R.R. v. *Buckley*, 521 U.S. 424 (1997) 25
Monge v. *California*, 524 U.S. 721 (1998) 22
Mooney v. *Holohan*, 294 U.S. 103 (1935) 31
Napue v. *Illinois*, 360 U.S. 264 (1959) 31
Salem v. *United States Lines Co.*, 370 U.S. 31 (1962) 25
Schlup v. *Delo*, 513 U.S. 298 (1995) 17, 19
Smith v. *Mitchell*, 437 F.3d 884 (9th Cir. 2006), vacated, 550 U.S. 915, and reinstated, 508 F.3d 1256 (9th Cir. 2007) 24
Spencer v. *Texas*, 385 U.S. 554 (1967) 28
Strickland v. *Washington*, 466 U.S. 668 (1994) 29, 31
Taylor v. *Illinois*, 484 U.S. 400 (1988) 29
Tibbs v. *Florida*, 457 U.S. 31 (1982) 17, 19, 20
Townsend v. *State*, 734 P.2d 705 (Nev. 1987) 25
United States v. *Cruz*, 363 F.3d 187 (2d Cir. 2004) 28

Cases—Continued: Page

United States v. *Miller*, 146 F.3d 274 (5th Cir. 1998) 28
United States v. *Owens*, 484 U.S. 554 (1988) 30
United States v. *Scheffer*, 523 U.S. 303 (1998) 25
United States v. *Simpson*, 910 F.2d 154 (4th Cir. 1990) 17, 28

Constitution, statutes and rule:

U.S. Const.:
Amend. V:
Double Jeopardy Clause 1, 17, 22
Due Process Clause 28, 29, 31
Amend. XIV (Due Process Clause) 28, 29, 31
Nev. Rev. Stat. § 50.275 25
Fed. R. Evid.:
Rule 702 24
Rule 702 advisory committee's note 25

Miscellaneous:

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Miscellaneous—Continued: Page

4 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* (Joseph M. McLaughlin ed., Matthew Bender 2d ed. 2009) 25

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case presents the question whether a federal court sitting in habeas review of a state conviction may, in evaluating a sufficiency-of-the-evidence claim under *Jackson* v. *Virginia*, 443 U.S. 307 (1979), disregard evidence presented to the jury if the court determines that additional evidence submitted after trial shows that the trial evidence was inaccurate or unreliable. Because criminal defendants regularly challenge federal convictions under *Jackson*, which establishes a due process standard that applies to all prosecutions, and because the Double Jeopardy Clause precludes retrial after a finding of evidentiary insufficiency, resolution of that question will have substantial implications for direct and collateral review of federal convictions. The United

States therefore has a significant interest in the Court's disposition of this case.

STATEMENT

In the early morning hours of January 29, 1994, nine-year-old Jane Doe (a pseudonym) was raped in her home. Pet. App. 3a & n.3. Circumstantial evidence linked respondent to the crime, and forensic analysis of semen recovered from Jane's underwear showed that the semen's deoxyribonucleic acid (DNA) matched respondent's DNA profile. After a Nevada state jury convicted respondent of the sexual assault and the conviction was affirmed on appeal, the District Court for the District of Nevada granted respondent habeas relief. *Id.* at 31a-62a. The Ninth Circuit affirmed, concluding that evidence submitted after trial showed that the State's DNA expert gave inaccurate and misleading trial testimony and, without that testimony, the remaining trial evidence was constitutionally insufficient under *Jackson*. *Id.* at 3a, 10a, 13a-21a.

1. DNA is a complex molecule that contains the genetic code of organisms. See David H. Kaye & George F. Sensabaugh, Jr., Federal Judicial Center, *Reference Guide on DNA Evidence*, in *Reference Manual on Scientific Evidence* 485, 491, 508 (2d ed. 2000) (*DNA Guide*) <http://www.fjc.gov/public/pdf.nsf/lookup/sciman09.pdf/$file/sciman09.pdf>. Most human DNA is contained in chromosomes located within the nuclei of most cells. *Ibid.* Those cells normally have 23 pairs of chromosomes, which are formed by joining 23 chromosomes from each parent. *Ibid.*

Roughly 99.9% of the chromosomal DNA in every human is identical. *DNA Guide* 491-492. The remaining 0.1% reflects genetic variability unique to each individ-

ual (except for identical twins). *Ibid.* A chromosomal location at which the DNA sequence will vary between individuals is known as a polymorphic locus. There is a discrete number of potential, alternative genetic sequences (known as alleles) found at any such locus, and, at those loci, individuals inherit one allele from each biological parent. *Id.* at 492-494 & n.36, 508.

Forensic DNA testing compares the genetic material in biological samples by examining the alleles in those samples at specific, strategically selected polymorphic loci. *DNA Guide* 493; see, *e.g.*, *id.* at 494, 500-502, 506-507 (discussing Restriction Fragment Length Polymorphism (RFLP) analysis); *id.* at 493-494 & n.32, 497-500, 506-507 (discussing Polymerase Chain Reaction (PCR) analysis); National Inst. of Justice, U.S. Dep't of Justice, *The Future of Forensic DNA Testing* 14-19 (2000) <http://www.ncjrs.gov/pdffiles1/nij/183697.pdf>. Normally, DNA profiles developed from crime-scene evidence are compared to the profiles of suspect(s) and others (*e.g.*, the victim or a spouse) who may have left biological evidence at the crime scene.

If any allele at any tested loci of an individual's DNA clearly does not match the corresponding allele from the crime-scene evidence, the individual can be excluded as the source of that evidence. *DNA Guide* 516. Alternatively, if all the tested loci show identical alleles, the genetic profiles will match and the individual will be a possible source of the crime-scene DNA. *Ibid.* Such a forensic "match," however, reflects only that the individual's DNA matches the crime-scene DNA at the tested loci. *Ibid.* It does not necessarily show that the individual's DNA is the same as the crime-scene DNA, and the possibility remains that another individual also could

have a matching profile for the tested loci. *Ibid.*; see *The Future of Forensic DNA Testing* 20.[1]

Forensic DNA experts traditionally explain the significance of matching a suspect's DNA profile to a crime-scene DNA sample by calculating and testifying to the sample's "random-match probability," *i.e.*, the probability that an individual would have the same DNA profile as the crime-scene sample *if* that individual were selected at random from a relevant population. *The Future of Forensic DNA Testing* 20; *DNA Guide* 524-525. Once the alleles from crime-scene DNA are identified, the frequency of each allele's occurrence in the population (based on large-scale population studies) may be used to estimate the probability that an individual selected at random from that population would have a genotype with the same alleles at all the tested loci. *Id.* at 525; *The Future of Forensic DNA Testing* 20, 23; cf. David H. Kaye *et al.*, *The New Wigmore: A Treatise on Evidence* § 12.4.1, at 457 n.5 (2004) (It is "no longer * * * seriously disputed" that "the computations associated with most DNA evidence satisfy *Daubert* [v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)]." (citing *DNA Guide*)). That random-match probability, if sufficiently small, will show that it is implausible that the profiles of the suspect and the crime-scene DNA have matched based on mere coincidence. *Id.* at 457; *DNA Guide* 524-525.[2]

---

[1] Forensic scientists do not develop full DNA sequences because of a variety of practical and technological limitations.

[2] When the DNA profile of crime-scene evidence is based on a sufficient number of loci with sufficiently rare alleles, the probability of a random match can be small enough that an expert can testify to a reasonable degree of scientific certainty that matching an individual's profile to the forensic sample will show that the individual is, in fact, the

2. On the evening of January 28, 1994, Pamela Doe, the mother of Jane Doe, went to a bar with her neighbors, Trent and Raquel Brown. Pet. App. 4a, 70a. While they were out, Jane and her four-year-old sister went to Trent and Raquel's trailer home to babysit Raquel's children. *Id.* at 4a, 70a. Raquel and Trent returned home around 7:30 p.m. and Raquel took Jane and her sister back to their own trailer around 9:30 p.m. *Ibid.* Because Pamela remained at the bar and the girls' stepfather was at work, the girls were at home alone. *Ibid.*

Jane telephoned local bars to find her mother, eventually reaching respondent, the brother of Trent Brown. Pet. App. 4a, 70a. Respondent told Jane he would find her mother and deliver the message that the girls were home safely. Respondent did so and subsequently had drinks with Pamela at another bar. *Id.* at 4a, 71a. Pamela last saw respondent between 11:00 p.m. and midnight. One bartender said respondent left by 12:20 a.m., while another put him in the bar at 1:30 a.m. *Ibid.*

Sometime in the early morning of January 29, Jane was sexually assaulted in her bedroom. Between midnight and 1:00 a.m., Jane called her mother at the bar and said that a man who had been at the trailer looking for Pamela had hurt her. Pet. App. 4a-5a, 71a. Pamela hurried home to find her daughter covered in blood from the waist down, with bruises on her neck and scratches on her face. *Ibid.* Hospital personnel determined that Jane had been penetrated both vaginally and anally. Jane lost about 15% of her blood, required vaginal reconstruction, was hospitalized for 12 days, and acquired post-traumatic stress disorder. *Id.* at 5a, 72a-73a.

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source of the forensic sample. See *The Future of Forensic DNA Testing* 25-26; *The New Wigmore* § 12.5.3, at 503-505. Analytical techniques currently in use often enable source attribution in this manner.

Jane described her attacker as hatless with blonde or sandy-colored hair and perhaps a small moustache. Pet. App. 5a. She stated that he wore dark jeans, a black jacket with a zipper, a western-type shirt, boots, and a watch which scraped her face. *Ibid.* Jane indicated that she had bitten her assailant's hands and that he had smelled "awful," like "beer or puke or something." *Ibid.*

That night, respondent was wearing a cowboy hat, dark jeans, boots, and a black jacket with an orange and yellow logo on the back. Pet. App. 5a. Two witnesses testified that they saw a man wearing such an outfit (but with a green emblem on the back) near Jane's trailer around 1:05 a.m. Respondent lived on the same street as Jane, approximately ten trailers away. *Id.* at 5a-6a, 76a; J.A. 603.

Respondent stated that he consumed 20 alcoholic drinks that night and vomited multiple times, soiling his pants and shirt. He denied wearing a watch. Pet. App. 6a, 73a-74a. When respondent arrived at his trailer—at 1:32 am, according to his second brother and roommate, Travis Brown—respondent washed his clothes. Respondent claimed he did this because he was leaving on a trip the next day and his other clothes were packed. *Ibid.* A police officer who arrived at 5:00 a.m. to question respondent did not see bite marks on his hands and found no blood on respondent or his boots. Although Jane speculated that her assailant must have turned off her night light, a fingerprint on that light did not belong to respondent, nor were his fingerprints found elsewhere in Jane's trailer. *Ibid.*

When the police asked Jane who the attacker reminded her of, she vacillated between respondent and his brother Trent. Pet. App. 6a-7a, 75a. Days later, Jane saw a TV report on respondent's arrest and identi-

fied him as her assailant. She also stated that the man she had seen on TV had sent her flowers. The flowers, however, had come from Raquel and Trent. *Ibid.* When the police showed Jane pictures that included a likeness of respondent, Jane could not identify him as her attacker. *Id.* at 7a, 75a-76a.

3. a. On February 7, 1994, respondent was charged with sexual assault and attempted murder. Pet. App. 76a-77a, 187a. In February and June 1994, Renee Romero, a forensic scientist at the Washoe County Crime Lab, completed reports concluding that Polymerase-Chain-Reaction (PCR)-based testing revealed that respondent's alleles at six loci matched those of DNA from semen collected from Jane's underwear. J.A. 746-751.

The state trial court provided respondent with funding for his own DNA expert, and respondent's counsel retained Jennifer Mihalovich to assist in respondent's defense. Pet. App. 78a; J.A. 1184, 1424-1425. Respondent's counsel had numerous conversations with Mihalovich, who advised him that the Washoe County Crime Lab was "fully capable of performing accurate DNA testing," that Romero's expertise qualified her as a DNA expert, and that she found Romero's testing procedures appropriate and was satisfied with the accuracy of Romero's results. J.A. 1185, 1425-1428, 1492.

On July 6, 1994, Romero testified as a DNA expert at respondent's preliminary hearing. Pet. App. 131a; 7/6/94 Tr. 151-180. On cross-examination, Romero agreed that Restriction Fragment Length Polymorphism (RFLP) analysis had greater discriminatory power than the PCR-based tests previously completed but that she did not believe she had enough evidence to perform RFLP testing, which required larger samples of non-degraded DNA. *Id.* at 172-176.

Romero subsequently located additional semen on Jane's underwear and performed RFLP testing. J.A. 432, 446, 464-465. Her report, dated September 15, 1994, explained that respondent's DNA matched the semen sample at five (additional) tested loci and that "the frequency of this matching pattern is rarer than 1 in 3,000,000 in the Caucasian, Black, and Hispanic populations." J.A. 752-753.

Repondent's expert, Michalovich, reviewed Romero's RFLP results and was satisfied they were accurate. J.A. 1185, 1438-1439, 1492. When respondent's counsel asked whether additional time to perform independent testing would be useful, Michalovich advised that "any and all further DNA testing would do nothing but further provide devastating in[crimin]atory evidence against [respondent]." J.A. 1439. Respondent's counsel later explained that he "[a]bsolutely [did] not" want DNA testing of yet-untested vaginal fluid collected from Jane after her rape. J.A. 1430-1431. He also did not ask Mihalovich for written reports, which could be "extremely damaging" and "haunt [respondent's] file" if they were later subject to discovery on collateral review. J.A. 1469.

b. Respondent's jury trial began on September 27, 1994, and ended four days later. Pet. App. 132a; J.A. 60-687. The State presented numerous witnesses, including Romero. See J.A. 411-474 (Romero testimony). The trial court recognized Romero "as an expert in DNA analysis and comparison," and admitted into evidence Romero's RFLP forensic report (J.A. 752-753) and her resume (J.A. 755-760), all without objection. J.A. 414-415, 463, 1186.

Romero described the process of DNA analysis with RFLP testing, J.A. 415-424, and explained that this test-

ing showed that respondent's genetic profile as determined by five DNA probes matched the semen recovered from Jane Doe's underwear. J.A. 425-439. Romero further explained that population studies reveal the frequency of occurrence for each DNA band (allele) identified in the test and that scientists "us[e] a statistical calculation" developed by the National Research Council as a "conservative method" of estimating the likelihood of a match in the population. J.A. 437; see J.A. 422-423, 428. Romero testified that she employed this statistical method and determined that roughly one in three million people in the general population would have a DNA profile matching the semen evidence. J.A. 437-440.

The State's prosecutor asked Romero if there were a way of expressing the one-in-three-million statistic as "the likelihood that the DNA found in the panties is the same as the DNA found in [respondent's] blood." J.A. 458. Romero eventually acceded to the prosecutor's request to express this likelihood as a percentage and concluded that "[i]t would be 99.999[9]67 percent." *Ibid.*[3] The prosecutor had Romero use a blackboard to subtract that percentage from 100% and admitted her written calculation into evidence. J.A. 459-460. The prosecutor then asked Romero if it "would * * * be fair to say" based on her subtraction that "the chances that the DNA found in the panties * * * is not [respondent's] would be .000033?" J.A. 460. Romero agreed that the statement was "not inaccurate." J.A. 461-462. The judge asked whether "it's the same math just expressed differently," and Romero responded: "Yes. Exactly." *Ibid.*

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[3] The transcript's omission of a "9" appears to be erroneous. Cf. J.A. 754.

Romero admitted in cross-examination that the statistical probability would change if the suspect had brothers and that, "in this case," based on National Research Council data, the probability that a brother would have the same DNA profile as respondent would be "one in 6,500." J.A. 468-469.

Respondent did not call his own DNA expert at trial, and the jury convicted respondent of felony sexual assault of a child under the age of 14 causing substantial bodily harm, felony sexual assault of a child under the age of 14, and abuse or neglect of a child under the age of 18. Pet. App. 78a; J.A. 783-786.

c. Before sentencing, the trial court granted respondent's request to have his own DNA expert test vaginal fluid recovered from Jane Doe. Pet. App. 133a; J.A. 797-800. After conducting a PCR-based test (with less discriminatory power than RFLP testing), Mihalovich and a colleague submitted a report (J.A. 910-922) concluding that respondent's DNA matched the forensic evidence at the tested alleles and that only "approximately 0.01% [one out of 10,000] of the Caucasian population" shared those genetic markers. J.A. 917 (brackets in original). At sentencing, the court stated that "there is no doubt in my mind whatsoever of [respondent's] guilt" and that respondent's own DNA testing was "further proof of what we already knew from the first DNA testing, that this vicious crime was committed by [respondent]." J.A. 797, 800.

d. The Nevada Supreme Court concluded that the trial evidence, including the State's DNA evidence, was sufficient to permit "a jury, acting reasonably," to find respondent guilty beyond a reasonable doubt. Pet. App. 82a-83a. The court, however, reversed respondent's abuse-and-neglect conviction on double-jeopardy

grounds, identified sentencing errors, and remanded for resentencing. *Id.* at 83a-96a. Respondent was resentenced to two consecutive terms of life imprisonment, each with the possibility of parole after ten years. *Id.* at 63a-67a. Respondent's subsequent appeal was dismissed. J.A. 1077-1080.

e. In 2001, respondent filed a state habeas-corpus petition, which was denied after an evidentiary hearing. J.A. 1489-1499; J.A. 1036-1047, 1202-1488. The habeas court, *inter alia*, rejected petitioner's argument that his counsel was ineffective, and the Nevada Supreme Court affirmed. J.A. 1492-1506.

4. a. In December 2003, respondent filed a federal habeas petition in district court. J.A. 1. In 2006, the court granted respondent's request to supplement the record with a report (J.A. 1581-1584) by Dr. Lawrence Mueller, a professor of Ecology and Evolutionary Biology at the University of California, Irvine. J.A. 1595-1598.

Mueller's February 2006 report criticized two aspects of Romero's 1994 trial testimony. First, it stated that the "accepted meaning" of the statistics for a DNA match is that they "represent the chance that a single person chosen at random from the suspect population would match the evidence." J.A. 1583. Mueller opined that Romero was "not correct" in suggesting that there was only a 0.000033% likelihood of "anyone other than [respondent] matching the evidence sample" and that her error reflected "erroneous phraseology * * * so common" that it is known as "the prosecutor's fallacy." *Ibid.*

Mueller opined that Romero also incorrectly testified to a one-in-6500 chance that one brother would match respondent's DNA profile and that the probability was,

at worst, one in 1024. J.A. 1582. Mueller stated that he had "been told" that respondent had two brothers who lived near the crime scene and two others at "a greater distance away." *Ibid.* Mueller opined that, if two of respondent's brothers are considered, "the chance that one or more brothers would match the evidence is 1 in 512" under Romero's assumptions and, if all four are considered, the odds increase to one in 256. *Ibid.* Mueller added that, under his own analysis, the probability of at least one of those four brothers matching the DNA profile was "1 in 66." J.A. 1583. The State did not submit evidence disputing Mueller's opinions.

b. The district court granted habeas relief and ordered a new trial. Pet. App. 29a-54a. It concluded that the Nevada Supreme Court failed to apply the correct legal standard in evaluating respondent's sufficiency-of-the-evidence claim, and that Romero's trial testimony must be "set[] aside" because it was "inaccurate and, therefore, unreliable." *Id.* at 37a-46a. Absent that testimony, the court found the trial evidence insufficient under *Jackson* and held that the Nevada Supreme Court's contrary ruling violated clearly established federal law. *Id.* at 46a, 54a. The court additionally held that respondent was denied the effective assistance of counsel because his attorney failed to object to the admission of the State's DNA evidence, to present a defense expert at trial, and to ensure that a defense expert observed Romero's DNA testing. *Id.* at 46a-50a.

c. The court of appeals affirmed in a divided opinion. Pet. App. 1a-28a. The majority held, *inter alia*, that the Nevada Supreme Court's determination that the trial evidence was sufficient to allow a "reasonable jury" to convict was contrary to this Court's "rational"-jury standard in *Jackson*. *Id.* at 13a-14a. The majority further

held that the state court's application of *Jackson* was "unreasonable" because, "in light of the Mueller Report, no rational trier of fact could have found [respondent] guilty beyond a reasonable doubt on the evidence presented at trial." *Id.* at 14a-15a; see *id.* at 14a-21a. The court accordingly held that respondent was denied due process under *Jackson* and was entitled to habeas relief without reaching respondent's ineffective-assistance claim. *Id.* at 3a, 21a.

The court explained that Romero's trial testimony "was later proved to be inaccurate and misleading" on federal habeas review because "[t]he Mueller Report [now] indicates that Romero's testimony was unreliable for two main reasons." Pet. App. at 3a, 15a. First, the court found that Romero's testimony concerning a 99.99967% probability that respondent's DNA was the same as the DNA in the semen sample reflected the "prosecutor's fallacy" by incorrectly "confus[ing] source probability with random match probability." *Id.* at 15a. Citing scholarly articles and court opinions on DNA evidence, the court concluded that the "probability of finding a random match can be much higher than the probability of matching one individual" to the crime and, for that reason, Romero's statements were "misleading" and probably caused respondent to be "convicted based on the jury's consideration of false, but highly persuasive, evidence." *Id.* at 16a-17a. Second, the court found that Romero "inaccurately minimized the likelihood that [respondent's] DNA would match one of his four brothers' DNA" because Mueller estimated that the odds were 1/66, roughly ten times greater than Romero's 1/6500 figure. *Id.* at 17a-18a.

The court then reasoned that a "federal court on habeas [review] may exclude evidence admitted in the

state court" if that evidence has "rendered [the] trial so fundamentally unfair as to violate federal due process," and that the "[a]dmission of [Romero's] unreliable testimony most certainly rendered the trial fundamentally unfair." Pet. App. 18a-19a (citation omitted). "After excluding Romero's testimony," the court agreed with the district court that "the remaining evidence [viewed] in the light most favorable to the prosecution" was insufficient under *Jackson* to permit "any rational trier of fact to believe that [respondent] was the assailant beyond a reasonable doubt." *Id.* at 19a-21a; see *id.* at 14a (evidence insufficient "once the unreliable DNA testimony is excluded"). The court ordered respondent to be retried within 180 days or released. *Id.* at 21a.

Judge O'Scannlain dissented. Pet. App. 21a-28a. He concluded that the Nevada Supreme Court complied with *Jackson*, reasoning that a *Jackson* claim is based on "the record evidence *adduced at the trial*" and cannot be resolved "by imagining a different state trial in which evidence actually presented would have been excluded—especially not on the basis of reports added to the record during federal habeas review." *Id.* at 22a, 26a (quoting *Jackson*, 443 U.S. at 324). Even accepting Mueller's post-trial analysis, Judge O'Scannlian explained, the DNA and circumstantial evidence was sufficient to support respondent's conviction. *Id.* at 26a-28a.

SUMMARY OF THE ARGUMENT

The evidence at trial, which included powerful DNA evidence linking respondent to Jane Doe's rape, was constitutionally sufficient for a rational jury to convict respondent beyond a reasonable doubt. The Ninth Circuit's contrary holding based on post-trial evidence fun-

damentally misconstrues *Jackson* v. *Virginia*, 443 U.S. 307 (1979).

Jackson concluded that due process requires that factfinders rationally apply the proof-beyond-a-reasonable-doubt standard to the facts in evidence. It therefore held that a conviction violates due process if "no rational trier of fact could have found proof of guilt beyond a reasonable doubt" based "upon the record evidence adduced at the trial." 443 U.S. at 324. *Jackson*'s evidentiary threshold does not ask whether the factfinder was correct, but whether its verdict was rational based on the evidence before it. Reviewing courts accordingly must (1) restrict their *Jackson* review *only* to the "record evidence adduced at the trial" and (2) examine "all of the evidence" in the light most favorable to the prosecution. *Id.* at 319, 324. If that evidence is insufficient, the conviction must be reversed and double jeopardy precludes retrial.

Romero's expert testimony, with the other trial evidence, far exceeded *Jackson*'s threshold. The Ninth Circuit did not conclude otherwise. It instead found, based on Mueller's report and other information submitted after trial, that Romero's testimony was partially inaccurate or unreliable and, excluding all of her testimony, that the remaining evidence was insufficient. This analytical approach is foreclosed by *Lockhart* v. *Nelson*, 488 U.S. 33 (1988), which held that *all* the trial evidence must be considered when evaluating a sufficiency-of-the-evidence claim, even evidence conclusively shown after trial to be incorrect. The jury did not have access to such subsequently submitted information. Nor could the jury be thought to have possessed such information on its own. The jury thus considered a different evidentiary record than the one on which the court of

appeals conducted sufficiency analysis. By starting with evidence adduced at trial, *adding* Mueller's post-trial report, *subtracting* evidence that the court found unreliable, and weighing the *remaining* evidence for sufficiency, the Ninth Circuit charted a fundamentally unsound course, untethered from *Jackson*'s rationale and holding.

The Ninth Circuit also erred in holding that Romero's testimony must be excluded because its admission rendered respondent's trial fundamentally unfair. The State provided respondent a DNA expert to assist in his defense, and respondent had a full opportunity to present evidence and cross-examine Romero effectively to expose any unreliable aspects of her testimony. Respondent's failure to exercise his full spectrum of trial rights does not render his trial fundamentally unfair. At best, respondent may have an ineffective assistance of counsel claim, which, unlike his *Jackson* claim, would not preclude respondent's retrial.

ARGUMENT

CLAIMS OF EVIDENTIARY INSUFFICIENCY UNDER *JACKSON* V. *VIRGINIA* MUST BE EVALUATED ONLY ON THE EVIDENCE ADDUCED AT TRIAL AND NOT ON POST-TRIAL SUBMISSIONS

A. *Jackson*'s Rationality Test Turns On The Evidence That Was Before The Factfinder

In *Jackson* v. *Virginia*, 443 U.S. 307 (1979), this Court concluded that the due-process requirement that criminal convictions rest on proof beyond a reasonable doubt entails that "the factfinder will rationally apply that standard to the facts in evidence." *Id.* at 316-317. A "reasonable doubt," the Court explained, must be "one based upon 'reason,'" and, if a judge or jury convicts

based on evidence that would permit "no rational trier of fact [to] find guilt beyond a reasonable doubt," the resulting conviction "cannot constitutionally stand." *Id.* at 317-318 & n.9. *Jackson* accordingly held that a criminal conviction violates due process if "no rational trier of fact could have found proof of guilt beyond a reasonable doubt" based "upon the record evidence adduced at the trial." *Id.* at 324 & n.16; see *id.* at 319 n.12.

Jackson accordingly establishes a "constitutional minimum" of evidentiary sufficiency, 433 U.S. at 319 & nn.12-13, that defines the threshold at which "the trier of fact has power to make a finding of guilt." *Schlup* v. *Delo*, 513 U.S. 298, 330 (1995). That inquiry "does not focus on whether the trier of fact made the *correct* guilt or innocence determination, but rather whether it made a *rational* decision to convict or acquit." *Herrera* v. *Collins*, 506 U.S. 390, 402 (1993).[4] If "no rational factfinder could have voted to convict the defendant" on the evidence before it, the conviction must be reversed and the Double Jeopardy Clause precludes retrial. *Tibbs* v. *Florida*, 457 U.S. 31, 41, 45 (1982) (citing *Jackson* and *Burks* v. *United States*, 437 U.S. 1 (1978)); see *id.* at 51 (White, J., dissenting) ("[R]etrial is foreclosed by the Double Jeopardy Clause if the evidence fails to satisfy the *Jackson* standard.").[5]

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[4] *Jackson*'s focus on the jury's power to convict is "wholly unrelated to the question of how rationally the verdict was actually reached." 443 U.S. at 319 n.13. It therefore "does not require scrutiny of the reasoning process actually used by the factfinder—if known." *Ibid.*

[5] Accord, *e.g.*, *Bean* v. *Calderon*, 163 F.3d 1073, 1086 (9th Cir. 1998), cert. denied, 528 U.S. 922 (1999); *Fagan* v. *Washington*, 942 F.2d 1155, 1157 (7th Cir. 1991); *United States* v. *Simpson*, 910 F.2d 154, 159 (4th Cir. 1990).

At least two principles flow from *Jackson*'s focus on the factfinder's ability to "rational[ly]" convict on the "record evidence adduced at trial," 443 U.S. at 317, 324. First, *Jackson* claims must be evaluated *only* on the evidence that was actually presented to the factfinder. The "critical inquiry" under *Jackson* is "whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Id.* at 318. A court conducting that inquiry must limit itself to the evidence that the factfinder actually could have considered—*i.e.*, the evidence adduced at trial—because a decision may be fully rational when made on one set of information yet entirely irrational on another. This Court has accordingly made clear that the "eviden[tiary] review authorized by *Jackson* is limited to 'record evidence'" and "does not extend to non-record evidence, including newly discovered evidence" submitted after trial. *Herrera*, 506 U.S. at 402 (quoting *Jackson*, 443 U.S. at 318); see *House* v. *Bell*, 547 U.S. 518, 538 (2006) (distinguishing *Jackson* claims from gateway actual-innocence claims "involv[ing] evidence the trial jury did not have before it").

Second, a reviewing court must "review *all of the evidence*" admitted at trial and evaluate that evidence for sufficiency "in the light most favorable to the prosecution." *Jackson*, 443 U.S. at 319. That deferential standard preserves "the factfinder's role as weigher of the evidence" and impinges on its authority "only to the extent necessary to guarantee the fundamental protection of due process of law." *Ibid.* By focusing on whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," *ibid.*, *Jackson* ensures that the factfinder possessed the "the power * * * to reach its conclusion"

based on the record that was before it, *Schlup*, 513 U.S. at 330, without second-guessing the factfinder's conclusions.

Jackson's minimal requirement of rationality does not turn on whether the factfinder "made the correct guilt * * * determination," *Herrera*, 506 U.S. at 402, and it does not authorize a reviewing court to "make its own subjective determination of guilt or innocence." *Jackson*, 443 U.S. at 320 n.13. Instead, a court "faced with a record of historical facts that supports conflicting inferences" must "presume * * * that the trier of fact resolved any such conflicts in favor of the prosecution" and "defer to that resolution." *Id.* at 326. Reversals for evidentiary insufficiency are therefore "confined to cases where the prosecution's failure is clear." *Tibbs*, 457 U.S. at 41 (quoting *Burks*, 437 U.S. at 17).

B. The Evidence Presented At Trial Was Sufficient To Find Respondent Guilty Beyond A Reasonable Doubt

1. The evidence adduced at respondent's trial far exceeds *Jackson*'s constitutional threshold for sufficiency. We assume *arguendo* that the trial evidence linking respondent to Jane Doe's rape would be insufficient in the absence of any DNA evidence connecting respondent to the crime. Cf. Pet. App. 3a & n.1, 10a, 19a (citing purported concession by petitioners); J.A. 1176. But cf. Pet. Br. 35 & n.6 (disputing concession).[6] On that

[6] It is far from clear that that assumption is correct. The court's evidentiary summary appears to resolve evidentiary inconsistencies against the State, *e.g.*, Pet. App. 20a (relying on testimony by respondent's brother, which the jury could disregard as biased), and ultimately concludes that "conflicts in the evidence" were "too stark for any rational trier of fact" to convict beyond a reasonable doubt. *Id.* at 21a. Such reasoning ignores *Jackson*'s teaching that the evidence must be viewed "in the light most favorable to the prosecution" by resolving

assumption, Romero's uncontradicted, expert testimony provided three evidentiary bases which, when combined with the other evidence at trial, would permit a rational jury to find respondent guilty beyond a reasonable doubt.

First, Romero testified that only one in about three million individuals would exhibit a DNA profile matching that of the semen retrieved from Jane's underwear, and Romero's corresponding report (J.A. 752-753) was admitted in evidence. J.A. 437-440, 463. The trial court qualified Romero as an "expert in DNA analysis" in the jury's presence without opposition, and Romero's resume (J.A. 755-760) was in evidence. J.A. 414-415. Respondent introduced no expert testimony at trial that might have contradicted Romero's analysis, and even Mueller's post-trial report (J.A. 1581-1584) does not dispute that there is only a one-in-three-million probability of a random DNA match for the semen sample. The match of respondent's DNA with this exceedingly rare genetic profile would, with the other evidence in the case, permit a rational juror to find respondent guilty beyond a reasonable doubt.

Second, Romero's testimony indicated that there was a 99.999[9]67% likelihood that the DNA in the semen sample belonged to respondent or, stated differently, only a 0.000033% chance that the DNA was not from respondent. J.A. 458-462. That testimony went unchallenged at trial, and the conclusion of the court of appeals that this aspect of Romero's testimony was "highly per-

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"any such conflicts [in the record]" in its favor. *Jackson*, 443 U.S. at 319, 326; cf. *Tibbs*, 457 U.S. at 35-36, 45 n.21 (testimony from one eyewitness "clearly satisfied" *Jackson*'s standard even though the state court identified multiple problems with the prosecution's case, including "several factors [that] undermined [the eyewitness's] believability").

suasive," Pet. App. 17a, effectively acknowledges that the testimony is sufficient to support a rational conviction.

Finally, Romero testified that there was only a 1-in-6500 likelihood that one of respondent's brothers would have the same DNA profile. J.A. 468-469. That uncontradicted evidence would permit a rational jury to conclude beyond a reasonable doubt that respondent, rather than a brother, committed the rape. Especially given the trial evidence indicating that respondent's brothers (Trent and Travis) had alibis at the time of the rape, see Pet. Br. 29, a rational jury could have eliminated the brothers as assailants.[7]

2. Although the court of appeals found that Mueller's report showed that the latter two aspects of Romero's testimony were inaccurate or unreliable, Pet. App. 15a-18a, the jury could not have based its verdict on the reasoning in Mueller's report because it was written 12 years after respondent's trial. Expert evidence that was not presented at trial cannot undermine the reliability of the trial evidence for purposes of applying the *Jackson* standard. The only question under *Jackson* is whether the jury could have rationally convicted "upon the record evidence adduced at the trial," 443 U.S. at 324, and "newly discovered evidence" is irrelevant, *Herrera*, 506 U.S. at 402. Thus, unless other trial evidence could demonstrate overwhelmingly that Romero's testimony was flawed, a rational jury properly could rely upon it, even if in hindsight and with the ben-

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[7] While the trial evidence reflects that respondent had two other brothers, J.A. 275, it does not indicate their whereabouts on the night of the rape. Cf. J.A. 1586 (post-trial evidence that other brothers, then aged 16 and 13, lived with their mother in Utah).

efit of a newly prepared expert report, its reliability can now be questioned.

That conclusion follows from *Lockhart* v. *Nelson*, 488 U.S. 33 (1988), which held that all evidence admitted at trial (including evidence subsequently shown to be incorrect) must be considered in a court's sufficiency calculus. In *Nelson*, the State sought to prove the applicability of a recidivist sentencing enhancement beyond a reasonable doubt by submitting into evidence four prior felony convictions. *Id.* at 34-36. The jury found that Nelson had four such convictions and imposed an enhanced sentence. *Id.* at 36. The State subsequently determined that one of the convictions had been pardoned. *Id.* at 36-37. A federal district court then invalidated the sentencing enhancement on habeas review and held that double jeopardy precluded the State from resentencing Nelson. *Id.* at 37. The court of appeals affirmed, concluding that it was error to have introduced the pardoned conviction into evidence and, without it, the State failed to submit constitutionally sufficient evidence. *Ibid.*

This Court reversed, holding that the proper review of a double jeopardy claim based on "insufficiency of the evidence" must "consider *all* of the evidence admitted by the trial court." *Nelson*, 488 U.S. at 41 (citing *Burks*, 437 U.S. at 16-17) (emphasis added).[8] The Court explained that, although there would be "insufficient evi-

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[8] *Nelson* assumed, without deciding, that the Double Jeopardy Clause applies to non-capital recidivist sentencing. 488 U.S. at 37 n.6. In *Monge* v. *California*, 524 U.S. 721, 724 (1998), the Court held that it does not. *Nelson*'s sufficiency analysis nevertheless remains valid in other settings in which a reviewing court determines, based on newly proffered evidence, that the evidence originally admitted at trial is incorrect or otherwise unreliable.

dence to support a judgment of conviction" without evidence of the (pardoned) offense, there "clearly" was "enough to support the sentence" "*with* that evidence" because the "jury had before them certified copies of four prior felony convictions" which, on the record as it then existed, were "sufficient to support a verdict of enhancement." *Id.* at 40. The Court recognized that Nelson had not submitted evidence to the jury "to prove that the conviction had become a nullity" and observed that, if he had, the State presumably would have had "an opportunity to offer [other] evidence * * * to support the habitual offender charge." *Id.* at 42.[9]

Nelson is fatal to respondent's *Jackson* claim. By requiring that "all" trial evidence be considered, *Nelson* underscores that the purpose of a sufficiency-of-the-evidence claim is to test the rationality of a verdict from the perspective of the factfinder at the time the verdict was rendered. If the trial evidence is later shown to be incorrect by information outside the trial record, that showing will not alter the rationality of the verdict based on that evidence, before its reliability had been undermined. All evidence before the factfinder must be weighed, not to determine whether its verdict was "correct" (*Herrera*, 506 U.S. at 402), but to assess whether that determination was rational. *Jackson*, it might be said, does not permit Monday-morning quarterbacking.

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[9] *Nelson* expressed doubt that the disputed evidence was correctly described as being "inadmissible" because "[e]vidence of the disputed conviction was introduced" and the subsequent discovery of Nelson's pardon appeared most closely analogous to "newly discovered evidence." 488 U.S. at 40 n.7. But the Court held that, even if proof of the conviction had been inadmissible, it must be considered in the sufficiency calculus because it was, in fact, "admitted by the trial court." *Id.* at 41.

3. In cases in which a jury convicts after hearing expert testimony, a court reviewing a sufficiency-of-the-evidence claim may consider that testimony and conclude that the conviction must be reversed if no rational juror could have found guilt beyond a reasonable doubt on the evidence as a whole. But the court must be careful not to evaluate the evidence using specialized knowledge obtained from sources outside the trial record if the prototypical juror would not have had such information in rendering the verdict.[10]

Expert testimony, by its very nature, "often will rest 'upon an experience confessedly foreign in kind to [the jury's] own.'" *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137, 149 (1999) (brackets in original; citation omitted). Experts must testify in federal court to "scientific, technical, or other specialized knowledge," Fed. R. Evid. 702, and a central criterion for admissibility is whether the expertise would assist laypersons. Thus, a court must conduct "the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular

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[10] In *Smith* v. *Mitchell*, 437 F.3d 884 (9th Cir. 2006), vacated, 550 U.S. 915, and reinstated, 508 F.3d 1256, 1258 (9th Cir. 2007), for instance, no specialized knowledge of matters beyond the trial evidence was necessary to conclude that expert testimony was insufficient to support the conviction. Shaken-Baby-Syndrome experts testified that Smith's granddaughter died from shaking but conceded the absence of the usual indicators of violent shaking and agreed that no autopsy evidence showed that a brain injury caused the child's death. *Id.* at 890. The experts nevertheless concluded that "death was caused by shearing or tearing of the brain stem * * * because there was no evidence in the brain itself of the cause of death." *Ibid.* With other evidence indicating that the crime was unlikely to have occurred, the speculative expert testimony premised on the *absence* of evidence was insufficient to establish guilt beyond a reasonable doubt. *Ibid.*

issue without enlightenment from those having specialized understanding of the subject." *Id.* advisory comm. note (citation omitted); see 4 *Weinstein's Federal Evidence* § 702.03[1], at 702-34 & n.1 (2d ed. 2009) (expert testimony is admissible if it "assists" the factfinder by addressing "matters beyond the understanding of the average person"); cf. *Salem* v. *United States Lines Co.*, 370 U.S. 31, 35 (1962). That principle is embraced by Nevada state courts, which admit expert testimony "to provide the trier of fact a resource for ascertaining truth in relevant areas outside the ken of ordinary laity." *Townsend* v. *State*, 734 P.2d 705, 708 (Nev. 1987); see *Hallmark* v. *Eldridge*, 189 P.3d 646, 650 (Nev. 2008) (Nev. Rev. Stat. § 50.275 tracks Rule 702); *Banks ex rel. Banks* v. *Sunrise Hosp.*, 102 P.3d 52, 60 (Nev. 2004) (experts may testify "on matters outside the average person's common understanding").

The advanced probability and genetic principles that persuaded the court of appeals that Romero's testimony was inaccurate, Pet. App. 15a-18a, involve matters that a typical juror would not have considered in rendering a verdict. Neither "judges [n]or juries are experts in statistics," *Metro-North Commuter R.R.* v. *Buckley*, 521 U.S. 424, 435 (1997), and the "analysis of * * * DNA found at a crime scene" surely involves "factual matters outside the jurors' knowledge." *United States* v. *Scheffer*, 523 U.S. 303, 313 (1998) (plurality opinion). Indeed, the court of appeals and district court recognized that the relevant DNA science and "statistical calculation[s]" are "highly complex and difficult to understand even for the well[-]educated and patient student." Pet. App. 17a n.5, 39a.

The prosecutor's fallacy, for instance, is a colloquial name for an advanced probability concept known as the

"fallacy of the transposed conditional." *The New Wigmore* § 12.4.1.b(1), at 463.[11] Such complex principles require specialized knowledge that most educated laypersons—and, indeed, most lawyers—lack. Cf. *id.* at 464-465 ("Although the logical fallacy in transposing the conditional seems obvious enough—after it has been pointed out—the case reports are replete with it."). The court of appeals' own reliance on Mueller's report, judicial opinions, scholarly articles, and a "complicated formula known as Bayes's Theorem," Pet. App. 15a-17a, illustrates that its evaluation of the trial evidence was premised on knowledge well beyond what a typical layperson would possess—and therefore, well beyond what anyone could expect a rational jury in this case to have considered.

Similarly, without specialized knowledge of genetics, DNA, and probability theory, a typical juror would not have a sound reason to reject the accuracy of Romero's uncontradicted assessment of the likelihood that respondent's brothers would share respondent's DNA profile. Cf. J.A. 468-472. The court of appeals' repeated observation that the evidence was unreliable "in light of the Mueller Report," Pet. App. 8a, 15a, itself reflects

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[11] The prosecutor's fallacy lies in equating two distinct probabilities. The first is the probability that the individual tested has the same DNA profile as the forensic sample *if* the individual tested were selected at random. That probability is the random-match probability, which can be estimated from population studies and, here, is one in three million. The second probability is the probability that the individual tested was selected at random *if* the individual tested has the same DNA profile as the forensic sample. That probability is the likelihood that the individual matched purely by chance—*i.e.*, the probability that the individual is not the actual DNA source. Though sounding linguistically similar, the actual values for those probabilities can be very different. See *The New Wigmore* § 12.4.1.b(1), at 463-464.

that a typical juror would not have identified inaccuracies in Romero's testimony. Again, then, the information deemed critical by the court of appeals cannot be thought to have entered into the analysis of the jury.

4. In short, the Ninth Circuit's analytical approach to the *Jackson* inquiry is fundamentally unsound. The court purported to perform a *Jackson* analysis by starting with the trial evidence, *adding* Mueller's post-trial report, and *subtracting* the evidence that the court itself found unreliable based on that report. By "weigh[ing] the sufficiency of the *remaining* evidence," Pet. App. 19a (emphasis added), the court completely untethered its decision from *Jackson*'s underlying rationale. By adding to and subtracting from the information that the jury actually considered, the court's analysis no longer answered whether the jury rationally could have rendered its verdict. To resolve that question, courts must base their inquiry only on the evidence actually "adduced at the trial" and "review *all of the evidence*" so admitted. *Jackson*, 443 U.S. at 319, 324; see pp. 18-19, *supra*.

C. Due Process Concerns Do Not Warrant The Ninth Circuit's Approach to Evidentiary Insufficiency

The Ninth Circuit appears to have justified its departure from a proper *Jackson* analysis with its conclusion that due process required the exclusion of Romero's expert testimony. The court reasoned that the "[a]dmission of this unreliable testimony * * * violated [respondent's] due process rights" by "render[ing] the trial fundamentally unfair," and the district court therefore "did not err in excluding it" from its *Jackson* analysis. Pet. App. 18a-19a. That analysis is flawed for at least two reasons. First, even if Romero's testimony was improp-

erly admitted, *Nelson* makes clear that such evidence must be considered in the sufficiency calculus. See pp. 22-23, *supra*.[12] But more fundamentally, the admission of Romero's testimony did not render respondent's *trial* fundamentally unfair. Criminal defendants have numerous constitutional rights that guarantee a fair trial process, and the Due Process Clauses do not generally impose thresholds of evidentiary reliability.

1. Outside the specific guarantees of the Bill of Rights, this Court has "defined the category of infractions that violate 'fundamental unfairness' very narrowly," *Dowling* v. *United States* 493 U.S. 342, 352 (1990), and it has explained that questions concerning the reliability of evidence, such as those raised by the court of appeals in this case, are "governed by the evidentiary laws of the forum," "not by the Due Process Clause." *Colorado* v. *Connelly*, 479 U.S. 157, 167 (1986); see *Spencer* v. *Texas*, 385 U.S. 554, 563-564 (1967) ("[I]t has never been thought that [cases concerning the due process guarantee of fundamental fairness] establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure."); *Kansas* v. *Ventris*, No. 07-1356 (Apr. 29, 2009), slip op. 7 n.* (rejecting exclusionary rule for uncorroborated statements of jailhouse snitches on the theory that they constitute "inherently unreliable" testimony, reasoning that "it is the province of the jury to weigh the credibility of competing witnesses"). In particular, the Court has rejected the contention that it is "fundamentally unfair" to admit evidence alleged to be "inherently unreliable" where, as

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[12] See also, *e.g.*, *United States* v. *Cruz*, 363 F.3d 187, 197 (2d Cir. 2004); *United States* v. *Miller*, 146 F.3d 274, 280 (5th Cir. 1998); *Simpson*, 910 F.2d at 159.

here, the defendant "had the opportunity to refute it." *Dowling*, 493 U.S. at 353.

That conclusion reflects that, while "[t]he Constitution guarantees a fair trial through the Due Process Clauses," it "defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment." *Strickland* v. *Washington*, 466 U.S. 668, 684-685 (1994). That Amendment confers upon defendants rights to the effective assistance of counsel, *id.* at 687, to compulsory process, *Taylor* v. *Illinois*, 484 U.S. 400, 408-409 (1988), and to confrontation and an opportunity for effective cross-examination, *Delaware* v. *Fensterer*, 474 U.S. 15, 19-20 (1985) (per curiam). Thus, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence" from expert witnesses. *Daubert* v. *Merrill Dow Pharms., Inc.*, 509 U.S. 579, 596 (1993). The Constitution provides defendants with "a full and fair opportunity to probe and expose * * * infirmities" in the testimony of prosecution experts through the adversary process, *Fensterer*, 474 U.S. at 20, 22, thereby providing a procedural guarantee, "not that evidence be reliable," but that "reliability be assessed * * * in the crucible of cross-examination." *Crawford* v. *Washington*, 541 U.S. 36, 61 (2004).

Due process plays a role in supplementing these trial rights, but it does so by providing, in certain instances, the means for a defendant to seek to rebut the prosecution's experts at trial. See *Ake* v. *Oklahoma*, 470 U.S. 68, 74 (1985) (due process requires the State to provide access to a psychiatrist to assist a defendant who shows that his sanity is likely to be an important trial issue and that he cannot otherwise afford one). The Due Process

Clauses do not provide a general judicial check on the reliability of evidence. Rather, the Court's cases make clear that due process aids in constructing a procedural framework from which juries, not judges, are to "resolve differences in opinion" between experts "on the basis of the evidence offered by each party." *Id.* at 81.[13]

Here, the State provided respondent with a DNA expert for trial; respondent was entitled to subpoena witnesses; and his counsel had a full opportunity to cross-examine Romero effectively. Respondent's ability to call his own DNA expert gave him ample means "to suggest to the jury that [Romero] had relied on a theory which the defense expert considered baseless," and, combined with respondent's opportunity for cross-examination, it provided respondent with a fair process to contest any trial testimony "marred by forgetfulness, confusion, or evasion." *Fensterer*, 474 U.S. at 20, 22.

Respondent's own failure to exercise the full spectrum of his procedural rights—by failing to object to Romero's testimony, probe more fully Romero's now-disputed statements during cross-examination, or present a defense expert at trial—cannot form the basis of a subsequent due process claim. The admission of Romero's testimony did not render the trial fundamentally unfair, and the jury was entitled to rely upon it. At

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[13] Due process prohibits unnecessarily suggestive pre-trial police practices that corrupt a witness's ability to identify a perpetrator reliably. See *Manson* v. *Brathwaite*, 432 U.S. 98 (1977). In the absence of such a governmental practice that might distort a witness's memory, however, the Constitution does not require courts to examine in-court testimony for "indicia of reliability" because the right to cross-examination and other trial protections ensure a fair trial process. See *United States* v. *Owens*, 484 U.S. 554, 560-561 (1988) (declining to extend *Brathwaite*).

best, respondent may have a *Strickland* claim —an issue the court of appeals found unnecessary to resolve. Pet. App. 21a.[14]

The Due Process Clauses impose meaningful obligations on prosecutors that facilitate a fair, adversarial process and constrain improper uses of expert testimony. For example, due process is violated if prosecutors intentionally present perjured testimony by experts, *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935), fail to correct testimony that they know to be false, *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959), or fail to disclose to defendants either material exculpatory or impeachment evidence. *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963); *Giglio* v. *United States*, 405 U.S. 150, 153-154 (1972). Those restrictions are not at issue where, as here, expert testimony may include good-faith misstatements that are not identified before the jury's verdict. In any event, prosecutorial errors of this kind do not implicate concerns of evidentiary insufficiency and would permit retrial.

2. The consequences of the court of appeals' error are significant. Reversals for evidentiary insufficiency trigger double jeopardy protections that preclude retrial. See p. 17, *supra*. Allowing defendants to relitigate their convictions based on newly submitted evidence, and prohibiting the State from retrying these individuals if a court finds that new evidence casts sufficient

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[14] This case does not require the Court to resolve "whether the introduction of an expert opinion with no basis could *ever* be so lacking in reliability, and so prejudicial, as to deny a defendant a fair trial." *Fensterer*, 474 U.S. at 22-23 (emphasis added) (reserving question). Romero's overall testimony, while imperfect in parts, had a valid basis in DNA science, and respondent had a full opportunity to challenge that testimony at trial.

doubt on the evidence at trial, would impose serious social costs. Such an expansion of *Jackson* also would invite collateral litigation to revisit jury verdicts and thus would undermine the jury's central role in resolving the core issues at criminal trials.[15]

Allowing defendants to use newly discovered material to launch post-trial attacks on the reliability of trial evidence improperly benefits defendants who fail to submit such evidence when the prosecution could have either corrected any evidentiary inaccuracies at trial or submitted additional evidence to sustain its burden of proof. For example, had respondent challenged Romero's testimony concerning the likelihood of respondent's brothers having a matching DNA profile, the State might have corrected any error, challenged the opinions of respondent's expert, and submitted additional evidence showing that respondent's brothers could not have committed the offense.[16] Indeed, respon-

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[15] In this case, the court of appeals affirmed the district court's order that respondent be released unless retried. Pet. App. 21a, 54a. That remedy does not logically follow from a *Jackson* violation; an insufficiency holding precludes retrial. The court of appeals' mistaken understanding of *Jackson* cannot be recharacterized as the grant of a new trial based on due process principles, for at least two reasons. First, the court explicitly relied on *Jackson* sufficiency principles in granting relief. *Id.* at 13a-15a, 19a-21a. Second, the admission of expert evidence claimed to be unreliable, as shown by a newly presented competing expert report, does not itself render a trial fundamentally unfair so as to require a new trial. See pp. 28-31, *supra*.

[16] Mueller's report is in fact premised on some questionable assumptions. For example, Mueller fails to account for the possibility that some or all of respondent's brothers may be half-brothers or unrelated by blood and fails to eliminate respondent's two brothers who apparently were living a significant distance away in another State. J.A. 1586.

dent's trial counsel avoided disclosing to the State his theories of alternative suspects precisely because he knew the State could "exclude all or any other possible suspects by the simple expedient of testing their DNA." J.A. 1188, 1435. Had respondent focused on his brothers as suspects during trial, "the trial judge would presumably have allowed the prosecutor an opportunity to offer evidence" in that regard. *Nelson*, 488 U.S. at 42. This Court should not countenance an approach to evidentiary sufficiency that allows defendants in this way to evade the normal trial process.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

E. K. MCDANIEL, Warden, *et al.*,
Petitioners,

vs.

TROY BROWN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. What is the standard of review for a federal habeas court for analyzing a sufficiency-of-the-evidence claim under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)?

2. Does analysis of a sufficiency-of-the-evidence claim pursuant to *Jackson* v. *Virginia*, 443 U. S. 307, 318-319 (1979), under 28 U. S. C. § 2254(d)(1), permit a federal habeas court to expand the record or consider nonrecord evidence to determine the reliability of testimony and evidence given at trial?

TABLE OF CONTENTS

Questions presented i

Table of authorities v

Interest of *amicus curiae* 1

Summary of facts and case 2

A. The crime and trial 2

B. State court review 4

C. Federal habeas review 5

Summary of argument 6

Argument 7

I

The §2254(d)(1) question should be decided on the state court record, before taking any additional evidence 8

A. The purpose of §2254(d) 8

B. Decision on the state court record 12

C. Relation to §2254(e)(2) 14

D. Discretion and limits 18

II

The standard used by the state court is not contrary to *Jackson* v. *Virginia* 20

A. Exhaustion, identity, and contrariness ... 20

B. Reasonableness and rationality 22

III

Strickland, not *Jackson*, is the proper vehicle for dealing with insufficiently challenged expert testimony 25

A. Due process and reliable evidence 25

B. Meaningful adversarial testing 28

Conclusion 32

TABLE OF AUTHORITIES

Cases

Allen v. McCurry, 449 U. S. 90, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980) 10

Baldwin v. Reese, 541 U. S. 27, 124 S. Ct. 1347, 158 L. Ed. 2d 64 (2004) 20, 21

Bell v. Cone, 543 U. S. 447, 125 S. Ct. 847, 160 L. Ed. 2d 881 (2005) 24

Bradshaw v. Richey, 546 U. S. 74, 126 S. Ct. 602, 163 L. Ed. 2d 407 (2005) 14

Brady v. Maryland, 373 U. S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) 29

Brown v. Allen, 344 U. S. 443, 73 S. Ct. 397, 97 L. Ed. 469 (1953) 8

Brown v. Farwell, 525 F. 3d 787 (CA9 2008) 6

Brown v. State, 113 Nev. 275, 934 P. 2d 235 (1997) 4

Burks v. United States, 437 U. S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978) 30

Chappell v. State, 114 Nev. 1403, 972 P. 2d 838 (1998) 21

Coleman v. Thompson, 501 U. S. 722, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991) 12, 17

Coleman v. Thompson, 789 F. Supp. 1209 (1992) 3

Cooper v. Brown, 510 F. 3d 870 (CA9 2007) 3

Crawford v. Washington, 541 U. S. 36,
124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) 27

Darr v. Burford, 339 U. S. 200, 70 S. Ct. 587,
94 L. Ed. 761 (1950) 9, 12

Duncan v. Henry, 513 U. S. 364, 115 S. Ct. 887,
130 L. Ed. 2d 865 (1995) 20, 21

Early v. Packer, 537 U. S. 3, 123 S. Ct. 362,
154 L. Ed. 2d 263 (2002) 25

Edwards v. State, 90 Nev. 255, 524 P. 2d 328
(1974) 21

Estelle v. McGuire, 502 U. S. 62, 112 S. Ct. 475,
116 L. Ed. 2d 385 (1991) 26

Fay v. Noia, 372 U. S. 391, 83 S. Ct. 822,
9 L. Ed. 2d 837 (1963) 16

Felker v. Turpin, 518 U. S. 651, 116 S. Ct. 2333,
135 L. Ed. 2d 827 (1996) 9

Giles v. California, 554 U. S. __, 128 S. Ct. 2678, 171
L. Ed. 2d 488 (2008) 17

Holland v. Jackson, 542 U. S. 649, 124 S. Ct. 2736,
159 L. Ed. 2d 683 (2004) 14, 24

Holmes v. South Carolina, 547 U. S. 319,
126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006) 29

Horn v. Banks, 536 U. S. 266, 122 S. Ct. 2147,
153 L. Ed. 2d 301 (2002) 8

Idaho v. Wright, 497 U. S. 805, 110 S. Ct. 3139,
111 L. Ed. 2d 638 (1990) 27

Jackson v. Virginia, 443 U. S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) 7, 20, 24, 25, 26, 29

Kansas v. Ventris, 556 U. S. __ (No. 07-1356, April 29, 2009) 26

Kazalyn v. State, 108 Nev. 67, 825 P. 2d 578 (1992) 20

Keeney v. Tamayo-Reyes, 504 U. S. 1, 112 S. Ct. 1715, 118 L. Ed. 2d 318 (1992) 14

Lay v. State, 110 Nev. 1189, 886 P. 2d 448 (1994) 22

Lee v. Illinois, 476 U. S. 530, 106 S. Ct. 2056, 90 L. Ed. 2d 514 (1986) 27

Lee v. Kemna, 534 U. S. 362, 122 S. Ct. 877, 151 L. Ed. 2d 820 (2002) 16

Lonchar v. Thomas, 517 U. S. 314, 116 S. Ct. 1293, 134 L. Ed. 2d 440 (1996) 9

Marshall v. Lonberger, 459 U. S. 422, 103 S. Ct. 843, 74 L. Ed. 2d 646 (1983) 27

Massaro v. United States, 538 U. S. 500, 123 S. Ct. 1690, 155 L. Ed. 2d 714 (2003) 29

Middleton v. McNeil, 541 U. S. 433, 124 S. Ct. 1830, 158 L. Ed. 2d 701 (2004) 24

Miller-El v. Dretke, 545 U. S. 231, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005) 12

Mitchell v. Forsyth, 472 U. S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985) 12

Ohio v. Roberts, 448 U. S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980) 27

Salinger v. Loisel, 265 U. S. 224, 44 S. Ct. 519, 68 L. Ed. 989 (1924) 9

Schriro v. Landrigan, 550 U. S. 465, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007) 18

Strickland v. Washington, 466 U. S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) 25, 28, 30

Teague v. Lane, 489 U. S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989) 8

Townsend v. Knowles (No. 07-15712, USCA9 April 21, 2009) 16

Townsend v. Sain, 372 U. S. 293, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963) 14

United States v. Scheffer, 523 U. S. 303, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998) 26

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Williams (Terry) v. Taylor, 529 U. S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) 8, 11, 12, 13, 15

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Wright v. West, 505 U. S. 277, 112 S. Ct. 2482, 120 L. Ed. 2d 225 (1992) 8

Ylst v. Nunnemaker, 501 U. S. 797, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991) 12

United States Statutes

18 U. S. C. § 3771 19

28 U. S. C. § 2254(b) 22

28 U. S. C. § 2254(d) 7, 8

Rules of Court

Rules Governing Section 2254 Cases in the United States District Courts, Rule 7 ..... 7, 18

Rules Governing Section 2254 Cases in the United States District Courts, Rule 8 18

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141 Cong. Rec. (1995) 10, 11

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IN THE

Supreme Court of the United States

E. K. MCDANIEL, Warden, *et al.*,

Petitioners,

vs.

TROY BROWN,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In this case, the District Court and Court of Appeals overturned a state conviction for insufficiency of the

1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

evidence even though the sum of the evidence presented at trial and in a full evidentiary hearing on state habeas was not only sufficient but overwhelming. They did this through the unusual, possibly unprecedented, step of allowing the habeas petitioner to introduce new evidence never presented to the state courts despite ample opportunity, striking the trial testimony contrary to the new evidence, and then declaring the remainder insufficient. This is precisely the kind of misuse of federal habeas to relitigate state trials that this Court denounced in *Barefoot* v. *Estelle*, 463 U. S. 880, 887 (1983). It is contrary to the controlling Act of Congress, contrary to this Court's precedents, and contrary to the rights of victims that CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

A. The Crime and Trial.

On January 29, 1994, in Carlin, Nevada, an adult man committed an unspeakable atrocity against a nine-year-old girl, called "Jane Doe" in the published opinions in this case. J. A. 1049. He raped her so brutally that she "lost fifteen percent of her blood and required vaginal reconstruction." J. A. 1052. The primary question at trial was whether Troy Brown was that man.

In an interview at the hospital, the traumatized girl said that the attacker reminded her of Troy Brown, then said his brother Trent. She later picked Troy's picture out of a photo line-up although this identification was less than certain. J. A. 521-530.

Renee Romero testified for the State regarding DNA testing. A sample from the victim's underwear was tested using Restriction Fragment Length Polymorphism (RFLP) analysis with five probes. See J. A. 423,

426-427. Using the "ceiling principle" created by the National Research Council, Romero testified to a conservative estimate that the chance that a person chosen at random would match the profile was one in three million. J. A. 437.

On recross-examination, defense counsel raised the question of a DNA match between brothers. J. A. 468. Romero testified that a brother who was not an identical twin had a 1 in 6,500 chance of matching on all five probes. The defense had no objection to this testimony and elicited much of it. J. A. 468-472. The defendant had two brothers who were adults at the time of the crime. All three lived in Carlin. J. A. 1277, 1586. They bear a resemblance to each other and are close in age. See J. A. 275, 1538. Two other brothers were teenagers at the time of the crime and were living with their mother in Loa, Utah, J. A. 1586, which is a six-hour drive from Carlin. J. A. 1245. Brown was convicted of two counts of sexual assault on a child, including substantial bodily harm on one of the counts, and one count of child abuse. J. A. 783-786.

After the trial, the defense requested and received an additional DNA test on a different sample, a vaginal swab. The test was performed by an independent lab chosen by the defense and paid for by the State. J. A. 798-799. The report by Forensic Science Associates is signed by Edward T. Blake, a well-known authority on forensic DNA,[2] and Jennifer Mihalovich. Using a different technique than the State used, PCR, Blake and Mihalovich found the sperm in the vaginal swab to

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2. Dr. Blake has testified in many high profile DNA cases over the years. See, *e.g.*, *Coleman* v. *Thompson*, 789 F. Supp. 1209, 1213 (1992), aff'd 966 F. 2d 1441, stay den. 504 U. S. 188; *Cooper* v. *Brown*, 510 F. 3d 870, 879-881 (CA9 2007), pet. for rehg. pending.

be a match to Brown and that only 1 person in 10,000 would match. J. A. 910-918.

B. State Court Review.

On direct appeal, the Nevada Supreme Court held in a published opinion that admission of the DNA evidence without objection was not "plain error," and the evidence was sufficient for conviction, but it reversed the child abuse count as duplicative and remanded for resentencing. App. to Pet. for Cert 69a, 82a; *Brown* v. *State*, 113 Nev. 275, 277, 284, 934 P. 2d 235, 236-237, 241 (1997) (*per curiam*).

In Brown's appeal brief, his attack on the admission of the DNA evidence was based on state law. See J. A. 842-850. His attack on the sufficiency of the evidence was a single paragraph making no mention of *Jackson* v. *Virginia*, due process, the United States Constitution, or any federal law whatever. J. A. 850. The Nevada Supreme Court rejected the sufficiency argument using a Nevada standard which predates *Jackson*, "whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt." App. to Pet. for Cert. 82a; see *infra*, at 21.

Following resentencing, see J. A. 1031, defendant appealed again. The Nevada Supreme Court dismissed the appeal. This appeal involved no issues relevant to the present habeas petition. See J. A. 1077-1080. Brown then filed a state habeas petition. His points and authorities made nine specific claims of ineffective assistance. See J. A. 1093-1110. Brown did not allege his attorney had been insufficiently vigorous in suggesting his brother Trent might have been the perpetrator, but just the opposite. He claimed trial counsel was ineffective for raising the possibility at all. See J. A. 1105.

The state trial court held an evidentiary hearing. J. A. 1023-1487. The trial court made findings of fact. J. A. 1489-1495. Among other findings, the court rejected attacks on the qualifications of both the state's and the defense's experts and rejected the claim that the DNA samples might have been contaminated. J. A. 1492-1493. After rejecting the various ineffective assistance claims, the court denied the petition. J. A. 1499. The Nevada Supreme Court affirmed. J. A. 1500-1506.

C. Federal Habeas Review.

On federal habeas corpus, petitioner Brown claimed five grounds of relief. Ground One was insufficiency of the evidence in violation of the Due Process Clause. J. A. 147a. Ground Two was ineffective assistance of counsel related to the DNA evidence. J. A. 164a. The District Court denied the State's motion to dismiss. It found Ground One had been fairly presented to the state court, despite the lack of a federal citation in the appeal brief, on an identical-standards theory. App. to Pet. for Cert. 60a-62a.

Over the State's objection, the District Court permitted petitioner Brown to expand the record with an affidavit from another DNA expert, Laurence Mueller. J. A. 1595-1598. Mueller criticized the way Renee Romero reluctantly agreed with the prosecutor's restatement of her calculation on the probability of a random match, J. A. 1583; cf. J. A. 458-462, but he did not question her original testimony that the chance of an unrelated person matching at random was one in three million. Mueller also disagreed with Romero's testimony regarding sibling matches. He said the chance that one brother would match is "1 in 263. The chance that among two brothers one or more would match is 1 in 132 . . . ." J. A. 1583.

The District Court granted relief on the insufficiency of evidence ground and two ineffective assistance grounds. App. to Pet. for Cert. 54a. The court ordered, "Respondents shall retry Brown within 180 days or shall release him from custody," *ibid.*, apparently unaware that relief under *Jackson* precludes retrial. See *infra*, at 29-30. On appeal, a divided panel affirmed the expansion, exhaustion, and insufficiency holdings and did not reach the ineffective assistance claims. *Brown* v. *Farwell*, 525 F. 3d 787 (CA9 2008), App. to Pet. for Cert. 11a, 21a. The Court of Appeals was also apparently unaware that its holding precluded retrial. See App. to Pet. for Cert. 21a. Judge O'Scannlain dissented.

SUMMARY OF ARGUMENT

When a state court decision on the merits is challenged in a petition under 28 U. S. C. § 2254, the question of whether relief is precluded by § 2254(d) should be decided on the state court record, before taking any additional evidence. Proceeding in this manner will advance the primary objective of the habeas reforms of AEDPA, to reduce delay.

The § 2254(e)(2) bar on evidentiary hearings when the petitioner has defaulted the factual basis of his claim is independent of § 2254(d). The fact that § 2254(e)(2) does not bar a hearing in a particular case does not necessarily entitle the petitioner to one, particularly when no facts he could prove would lift the bar of § 2254(d) and entitle him to relief.

When the state court decision judged on the state court record precludes relief under § 2254(d), it is an abuse of discretion to take additional evidence, whether by expansion of the record or an evidentiary hearing.

The state court decision in this case was not contrary to *Jackson* v. *Virginia*. *Jackson* itself uses the terms "rational" and "reasonable" interchangeably.

Jackson v. *Virginia* is not a proper vehicle for adjudicating claims that trial evidence was unreliable. The right to an effective attorney who properly challenges that evidence at trial is the vehicle consistent with the text of the Constitution and this Court's precedents. That approach also offers important practical advantages.

ARGUMENT

In the present case, the Court of Appeals held "that the Nevada Supreme Court's decision was 'an unreasonable application' of *Jackson*[3] because, *in light of the Mueller Report*, no rational trier of fact could have found [petitioner] Troy [Brown] guilty beyond a reasonable doubt *on the evidence presented at trial*." App. to Pet. for Cert. 14a-15a (emphasis added). Petitioner never presented the Mueller Report to the state courts but instead presented it for the first time in federal habeas corpus. It was brought in through a motion to expand the record under Rule 7 of the Rules Governing Section 2254 Cases in the United States District Courts ("Habeas Rules"), over the State's objection. See App. to Pet. for Cert. 219a-239a.

As the quoted passage above indicates, this new evidence, never presented to the state courts, was essential to the holdings of both the District Court and the Court of Appeals. The threshold questions are whether such evidence can be considered under

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3. *Jackson* v. *Virginia*, 443 U. S. 307 (1979). The inner quote is from 28 U. S. C. § 2254(d)(1).

§ 2254(d)(1) and whether it should have been received at all before ruling on the point. The answer to both questions, *amicus* submits, is no.[4]

I. The § 2254(d)(1) question should be decided on the state court record, before taking any additional evidence.

A. *The Purpose of § 2254(d).*

In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress added subdivision (d) to 28 U. S. C. § 2254 as a new limitation on the power of federal courts to overturn state criminal judgments via the writ of habeas corpus. This new limitation was not, as some contended, a mere codification or even expansion of the preexisting retroactivity rule of *Teague* v. *Lane*, 489 U. S. 288 (1989). *Teague* and § 2254(d) are distinct inquiries. *Horn* v. *Banks*, 536 U. S. 266, 272 (2002) (*per curiam*).

The new limitation abrogated the pre-AEDPA, post-1953 rule of independent review, taking the step the Court considered but did not take in *Wright* v. *West*, 505 U. S. 277 (1992). See *Terry Williams* v. *Taylor*, 529 U. S. 362, 400-402 (2000) (O'Connor, J., concurring in part); *id.*, at 410-412 (opinion of the Court). Before *Brown* v. *Allen*, 344 U. S. 443 (1953), a federal petition by a state prisoner who had exhausted state remedies was considered to be analogous to a successive federal petition by a federal prisoner. Three years earlier, the

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4. The State is certainly correct that *Jackson* on its face calls for decision on the state trial court record, and reversal would be required, AEDPA or no AEDPA. See Brief for Petitioners 40-43. However, decision on that basis would leave the important issue described above undecided until another case brings it to this Court.

Court explained the status of a prior state decision in *Darr* v. *Burford*, 339 U. S. 200, 215 (1950) (emphasis added):

> "Even after this Court has declined to review a state judgment denying relief, other federal courts have power to act on a new application by the prisoner.[40] On that application, the court may require a showing of the record and action on prior applications, and may decline to examine further into the merits *because they have already been decided* against the petitioner.[41]
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> 40. *Ex parte Royall*, 117 U. S. 241 [1886].
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> 41. *Salinger* v. *Loisel*, 265 U. S. 224 [1924]."

The *Salinger* case cited for the last proposition is a federal successive petition case. See 265 U. S., at 226-228. In AEDPA, Congress abrogated the *Brown* "independent judgment" rule and restored the basic concept of pre-*Brown* law as explained in *Darr*. The so-called "deference" rule of § 2254(d) is a rule of the same class as the successive petition rules of §§ 2241(b) and 2255(h)—"a modified res judicata rule." Cf. *Felker* v. *Turpin*, 518 U. S. 651, 664 (1996). The new statute does not restore the pre-1953 rule in its original, open-ended form, though. Consistently with other developments in the law of habeas corpus, it replaces the discretionary rule with "more complex procedural principles that regularize and thereby narrow the discretion that individual judges can freely exercise." *Lonchar* v. *Thomas*, 517 U. S. 314, 322 (1996). The language at the top of subdivision (d) establishes a general rule forbidding relitigation of issues decided on the merits by the state court, and the two numbered paragraphs make exceptions to that general rule. See Scheidegger, Habeas Corpus Relitigation, and the

Legislative Power, 98 Colum. L. Rev. 888, 946, 957-958 (1998).

The central purpose of the habeas reforms of AEDPA is abundantly clear from the debates. It is to expedite the resolution of habeas corpus petitions, particularly in capital cases. The supporters of reform invariably bolstered their arguments with horror stories of unconscionable delays. See 141 Cong. Rec. 14,734, col. 1 (1995) (statement of Sen. Feinstein); *id.*, at 15,062, cols. 1-2 (statement of Sen. Hatch); *id.*, at 15,019 (statement of Sen. Specter); *id.*, at 15,036-15,037 (statement of Sen. Nickles).

> "After all, State courts are constrained to uphold the Constitution and faithfully apply Federal law as well. There is simply no reason that Federal courts should have the ability to virtually retry cases that have been properly adjudicated by our State courts. There is no reason to allow Federal courts to do that." *Id.*, at 15,062, col. 3 (statement of Sen. Hatch) (emphasis added).

The primary sponsor of § 2254(d) saw it as not only a limitation on relief but also as a limitation on relitigation. This is a rule about respecting the outcome of a previous adjudication, in the same category as res judicata and law of the case. See Scheidegger, *supra*, 98 Colum. L. Rev., at 946; see also *id.*, at 911-917. A substantial part of its value lies in protecting the party who has already prevailed on the merits from the burden and delay of having to litigate those merits over again. It is not enough for that party to win the second battle over the same turf; in most cases he should not have to fight the second battle at all. See *Allen* v. *McCurry*, 449 U. S. 90, 94 (1980) ("relieve parties of the cost and vexation of multiple lawsuits").

Respect for the intent of Congress and the purpose of the AEDPA therefore favors addressing the § 2254(d) question at the threshold. Specifically addressing § 2254(d), Senator Hatch noted, "Now, Federal habeas corpus proceedings have become, in effect, a second round of appeals in which convicted criminals are afforded the opportunity to relitigate claims already considered and rejected by the state courts." 141 Cong. Rec. 15,062, col. 2 (1995) (emphasis added); see also K. Scheidegger, Overdue Process: A Study of Federal Habeas Corpus in Capital Cases and a Proposal for Reform 27-28 (1995), available at http://www.cjlf.org/publctns/OverdueProcess.pdf.

In *Terry Williams*, 529 U. S., at 386, Justice Stevens acknowledged that, "Congress wished to curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law." (Opinion concurring in the judgment). The opinion of the Court noted, "That acknowledgment is correct and significant to this case. It cannot be disputed that Congress viewed § 2254(d)(1) as an important means by which its goals for habeas reform would be achieved." *Id.*, at 404.

For § 2254(d)(1) to achieve its purpose, it is not enough to preclude relief; it must preclude relitigation. The state's primary interest in habeas reform was not to block relief in cases where it is warranted. Rather, it was to reduce the "burden of federal relitigation of state decisions . . . ." S. O'Connor, Local Control of Crime, Address to the Attorney General's Crime Summit 5 (Mar. 4, 1991), reprinted in Habeas Corpus Issues: Hearings before the House Subcommittee on Civil and Constitutional Rights, Serial No. 39, 102d Cong., 1st Sess., 192, 197 (1991). In habeas, as in immunity, once the respondent is forced to litigate the question, much

of the value of the protection is lost. Cf. *Mitchell* v. *Forsyth*, 472 U. S. 511, 526 (1985).

B. Decision on the State Court Record.

As noted in *Darr*, *supra*, 339 U. S., at 215, a decision to "decline to inquire further into the merits because they have already been decided against the petitioner" normally requires examination of the "record and action" in the prior proceeding and nothing more. This is true as well under AEDPA.

The threshold requirement for § 2254(d) to apply is that the state court decision must be on the merits. That determination obviously must be made from the state court decision itself, and when there is a written opinion, as in the present case, it generally presents little difficulty. Summary dispositions may require reference to lower court decisions, see *Ylst* v. *Nunnemaker*, 501 U. S. 797, 803 (1991), or to the briefs. See *Coleman* v. *Thompson*, 501 U. S. 722, 740 (1991) (state court granted motion to dismiss, motion based solely on state procedure).

When the petitioner claims the "unreasonable determination of the facts" exception of § 2254(d)(2), the statute is explicit that this determination is based on "the evidence presented in the State court proceeding." *Miller-El* v. *Dretke*, 545 U. S. 231, 241-242, n. 2 (2005), confirmed that the evidence to be considered is limited in this way, while distinguishing "theories about that evidence." Expansion of the record might be required in the unusual circumstance where the petitioner proffered evidence and the state court unreasonably rejected it and kept it out of the record, but in the typical case the state court record contains everything relevant. The "contrary to" portion of paragraph (1) refers to the state court's selection of the governing rule, see *Terry Williams*, 529 U. S., at 405-406, or "if

the state court confronts a set of facts that are materially indistinguishable from a decision of this Court." See *id.*, at 406. Both of those inquiries necessarily depend on the facts before the state court, and only those facts.

That leaves the "unreasonable application" clause. This clause only comes into operation when the state court has decided the claim on the merits, has selected the correct rule to apply, and has reasonably determined the facts. Otherwise, either § 2254(d) does not apply at all or one of the other exceptions removes its barrier. "[W]hen a state-court decision unreasonably applies the law of this Court *to the facts* of a prisoner's case, a federal court applying § 2254(d)(1) may conclude that the state-court decision falls within that provision's 'unreasonable application' clause." *Terry Williams*, 529 U. S., at 409. What facts? It would make no sense to speak of "unreasonable application" to facts never presented to the court. This must refer to facts that have been reasonably found under § 2254(d)(2), are undisputed, or have been alleged by the petitioner and assumed to be true for the purpose of disposition without factfinding. It cannot refer to evidence never presented in any form to the state court.

We can put to one side, for now, the scenario where a state court decides a claim on the merits but refuses to consider the petitioner's evidence. A claim along those lines was alleged in a case recently before this Court, but the allegation was false. See Tr. of Oral Arg. in *Bell* v. *Kelly*, No. 07-1223, pp. 4-5. A procedurally unreasonable determination of facts might fit within § 2254(d)(2). The Court can decide that issue when and if a case actually presents it. The record is clear in the present case that the petitioner had a full and fair opportunity to present his evidence in the state postconviction proceeding.

When the state court record shows a decision on the merits after either a reasonable fact-finding process or an assumption of genuinely disputed material facts in the petitioner's favor, the § 2254(d)(1) question should be decided solely on the state court record. New evidence is not relevant to the decision, and the delay caused by hearing it is contrary to the core purpose of AEDPA.

C. Relation to § 2254(e)(2).

Holland v. *Jackson*, 542 U. S. 649, 652 (2004) (*per curiam*), recognized that "whether a state court's decision was unreasonable must be assessed in light of the record the court had before it." However, in the next paragraph the *Holland* opinion muddies this clear language with a reference to § 2254(e)(2). *Bradshaw* v. *Richey*, 546 U. S. 74, 79 (2005), is similar. The confusion arises from a failure to recognize that subdivisions (d) and (e) are distinct rules.

As discussed *supra*, at 9, § 2254(d) is a "modified res judicata rule." By its terms, it applies only to claims "adjudicated on the merits in State court proceedings . . . ." Paragraph (e)(2), in contrast, is a procedural default rule. In *Keeney* v. *Tamayo-Reyes*, 504 U. S. 1, 4-5 (1992), the Court overruled *Townsend* v. *Sain*, 372 U. S. 293 (1963), on the question of when a federal court must hold an evidentiary hearing for evidence not presented to the state court. The *Keeney* dissent maintained that the decision was inconsistent with the pre-AEDPA subdivision (d) of section 2254, regarding the presumption of correctness of state findings of facts. See 504 U. S., at 12, 20-23 (opinion of O'Connor, J.).

In AEDPA, Congress resolved the tension in favor of the *Keeney* majority opinion by repealing the former subdivision (d) and enacting the new subdivision (e). Paragraph (e)(1), like former subdivision (d), addresses

the presumption of correctness when the state court has found the facts. Paragraph (e)(2), like *Townsend* and *Keeney*, addresses the default situation where the defendant fails to present the facts to the state court. See *Michael Williams* v. *Taylor*, 529 U. S. 420, 433-435 (2000) (discussing § 2254(e)(2) as a partial codification of *Keeney*).

Paragraph (e)(2) can come into play in two different scenarios, as illustrated by *Keeney* and *MichaelWilliams*. In *Keeney*, the petitioner made his claim in state court but made an inadequate factual showing, and the state court denied his claim on the merits. See 504 U. S., at 3-4. In *Michael Williams*, the petitioner raised three new claims on federal habeas based on facts not known to him at the time of his state habeas proceeding. See 529 U. S., at 427.

In the *Keeney* situation, an evidentiary hearing would usually be barred both by § 2254(e)(2) and by a denial of relief under § 2254(d) based on the state court record alone,[5] but not always. If the state court found the facts reasonably based on the evidence the petitioner presented, but then chose the wrong standard of law to apply, § 2254(d) would not bar relief. See *Terry Williams*, 529 U. S., at 405-406. However, if the petitioner left out evidence through a lack of diligence and did not qualify for one of § 2254(e)(2)'s exceptions, an evidentiary hearing would be barred, and the federal court's decision would be limited to *de novo* application

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5. The present case would fit the *Keeney* pattern *if* it is assumed that (1) the federal question was fairly presented to the state court and decided on the merits, and (2) evidence outside the record is relevant to a *Jackson* claim. See Brief for Petitioner 45 (arguing both §§ 2254(d) and 2254(e)(2)); but see *id.*, at 47-52 (exhaustion); *id.*, at 40-43 (extra-record evidence and *Jackson*).

of the correct standard to the facts proved in state court.

The *Williams* scenario is different. Michael Williams never presented his *Brady* claim to the state court. See 529 U. S., at 427. Hence, there was no state court decision on the merits, and § 2254(d) did not apply. However, because the facts were readily available to petitioner at the time of the state habeas proceeding and neither of § 2254(e)(2)'s exceptions applied, no evidentiary hearing on this claim was permitted in federal habeas. See *id.*, at 437-440.

In most cases where § 2254(e)(2) bars an evidentiary hearing by itself, without overlap with § 2254(d), relief should also be barred by the nonstatutory procedural default rule. That fact does not render § 2254(e)(2) superfluous for several reasons. First, the procedural default rule does not necessarily protect the state from the burden and delay of retrying the facts before the federal court rules on the default question. As discussed *supra*, at 10, protection from this burden is an important aspect of habeas reform, independent of protection from an erroneous ultimate judgment. Second, the default rule has loopholes that allow many defaulted claims in. Section 2254(e)(2) does not depend on the state default rule being "adequate." Cf. *Lee* v. *Kemna*, 534 U. S. 362 (2002); see also Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Philip Morris USA* v. *Williams*, No. 07-1216, pp. 8-13 ("CJLF *Philip Morris* Brief") (discussing confused state of this area of the law). Indeed, California's default rules are brushed aside so routinely by the Ninth Circuit, see, *e.g.*, *Townsend* v. *Knowles* (No. 07-15712, April 21, 2009) (slip op., at 4635-4639); CJLF *Philip Morris* Brief 4-7, that for all practical purposes the state remains under the discredited regime of *Fay* v. *Noia*, 372 U. S.

391 (1963), overruled in *Coleman* v. *Thompson*, 501 U. S. 722 (1991).

In addition, the exceptions to § 2254(e)(2) for defaulted facts are more stringent than the caselaw exceptions for defaulted claims. See *Michael Williams*, 529 U. S., at 433-434. A petitioner who is allowed to bring a defaulted claim for any of several reasons may nonetheless have had a fair opportunity to establish the factual basis of the claim in state court. For example, if the trial court admitted an out-of-court statement over a hearsay objection after finding it was a dying declaration, a petitioner who is permitted to raise a Confrontation Clause claim on federal habeas (*e.g.*, because the state default rule is deemed "inadequate") should not also be excused from a failure to introduce evidence refuting the status of the statement as a dying declaration. See *Giles* v. *California*, 554 U. S. __, 128 S. Ct. 2678, 2684-2685, 171 L. Ed. 2d 488, 497-498 (2008) (noting dying declaration as established exception to confrontation right).

In summary, § 2254(e)(2) is an independent bar on evidentiary hearings in certain circumstances of default by the petitioner. It does not, by negative implication, authorize a hearing in those circumstances where it does not bar one. Whether a hearing is required, discretionary, or prohibited in those other circumstances must be determined by reference to other rules of law. One of those other rules, *amicus* submits, is that the State is entitled to a ruling under § 2254(d) on the state court record, *before* being burdened with any fact-finding procedures, for any claim that was decided on the merits by the state court.

D. Discretion and Limits.

Habeas Rule 7 permits the district judge to expand the record, and Habeas Rule 8 directs the judge "to determine whether an evidentiary hearing is warranted." Neither rule indicates when these steps are warranted.

Schriro v. *Landrigan*, 550 U. S. 465, 468-469 (2007), was a case where the District Court denied an evidentiary hearing and the Court of Appeals held that a hearing was mandatory. The case therefore directly addresses only the limit on the court's discretion to deny a hearing, not the limit on the court's discretion to grant one. *Landrigan* discusses how AEDPA changed the factors to be considered without directly altering the judge's authority. See *id.*, at 473-474. The Court then continues, "It follows that if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." *Id.*, at 474. This holding implements AEDPA's purpose of reducing delays in execution. See *id.*, at 475.

The passage emphasizes factual findings that dispose of the claim because that was the situation presented by the case history in *Landrigan*. As a matter of historical fact, Landrigan had forbidden all mitigating evidence, and that fact precluded any possibility of establishing prejudice under *Strickland*. See *id.*, at 477. However, the "otherwise precludes" language indicates that the principle is not limited to dispositive facts. A reasonable application of the correct precedent to the facts before the state court "otherwise precludes habeas relief" on that claim. Therefore, the District Court is not *required* to take new evidence on a claim if the state court decided that claim on the merits and neither exception to § 2254(d) applies.

Is a district court *permitted* to hold a hearing on such a claim? There is no reason to hold one. If the claim is precluded by § 2254(d) on the basis of the state record, no facts introduced in federal court can lift that bar. A hearing would be an unnecessary delay and a waste of resources. An unnecessary delay is an unreasonable delay and therefore a violation of the rights of the victims. See 18 U. S. C. §§ 3771(a)(7), (b)(2)(A), (b)(2)(D).

The question *Landrigan* did not reach is presented in the present case. The District Court authorized expansion of the record with an affidavit of an expert who simply contradicted the state's trial expert. That was error and an abuse of discretion. The correct procedure is to decide whether the § 2254(d) exceptions apply or not based solely on the record in state court. That record may be expanded if necessary to add material missing from it but necessary for understanding the state court proceedings, but not with additional evidence on the merits never presented to the state courts. If no § 2254(d) exception applies, the claim should be finally denied at that point. If an exception does apply, petitioner has cleared that hurdle and must now establish his claim on the merits, just as before AEDPA. If a hearing is needed for that purpose and not precluded by § 2254(e)(2), the court should hold one.

Conceivably, there might be a case where a state court acts unreasonably in summarily deciding material factual questions against the petitioner despite a proffer of solid evidence. When and if that case arises, the Court can consider whether § 2254(d)(2) provides relief. This is not that case. The § 2254(d) question should have been decided solely on the record of proceedings in the state court, and receipt of evidence outside that record was an abuse of discretion.

II. The standard used by the state court is not contrary to *Jackson* v. *Virginia*.

A. Exhaustion, Identity, and Contrariness.

The Nevada Supreme Court evaluated Brown's "sufficiency of the evidence" claim under its standard of *Kazalyn* v. *State*, 108 Nev. 67, 825 P. 2d 578 (1992). The Court of Appeals held that this "decision was 'contrary to' *Jackson* as the Nevada Supreme Court did not apply the *Jackson* standard." App. to Pet. for Cert. 13a-14a.

There is a very good reason why the Nevada Supreme Court did not cite or quote *Jackson* v. *Virginia*, 443 U. S. 307 (1979), or apply its standard. Appellant in his brief did not cite *Jackson* or its standard. His one-paragraph argument on sufficiency of the evidence did not cite any federal cases or mention the federal Constitution. See App. to Pet. for Cert. 120a.

The Court of Appeals held, in one paragraph, that Brown had exhausted his federal *Jackson* claim simply by making a generic sufficiency claim. On the face of the opinion, it appears that the Court of Appeals repeated once again the same error for which it has been reversed twice before in *Duncan* v. *Henry*, 513 U. S. 364 (1995) (*per curiam*), and *Baldwin* v. *Reese*, 541 U. S. 27 (2004).

The most charitable interpretation that could be given to the Court of Appeals' terse disposition of the exhaustion question is that it implicitly adopted the reasoning of the District Court in its denial of the State's motion to dismiss. The District Court was at least aware of *Baldwin*, see App. to Pet. for Cert. 61a, n. 2, but its reasoning was still flawed, and it contradicted its later decision of the § 2254(d) issue.

The District Court notes, as if it were significant, that petitioner cited *Jackson* in the state trial court.

See *ibid.* The central holding of *Baldwin* is that a citation to federal authority in the lower court is insufficient to fairly present a federal claim to the higher court. See 541 U. S., at 31-32. The primary basis of the District Court's exhaustion holding appears to be a theory that an appellant need not expressly assert a federal claim or cite federal authority to the state court if the state and federal standards are the same. That theory was advanced in Justice Stevens' dissents in *Duncan*, 513 U. S., at 369-370, and *Baldwin*, 541 U. S., at 34, but this Court has never endorsed it. In *Duncan*, *supra*, at 366, the Court passed on the issue because the standards were not the same. In *Baldwin*, *supra*, at 34, the Court passed again because the habeas petitioner had not preserved the argument.

In its exhaustion analysis, the District Court accepted petitioner's argument that the state and federal standards are identical because "the Nevada Supreme Court has consistently applied the *Jackson* v. *Virginia* test," citing three Nevada cases from the early 1980s. App. to Pet. for Cert. 60a. However, when the District Court reached the § 2254(d) analysis 17 months later, this consistency mysteriously vanished. Now the standard applied by the Nevada Supreme Court in the present case, quoting its 1992 *Kazalyn* precedent, is "contrary to clearly established federal law," *i.e.*, *Jackson*.

One of the District Court's two holdings must be wrong. The Nevada Supreme Court has applied the standard articulated in *Kazalyn* to sufficiency claims many times, before and after *Jackson* and before and after the present case. See, *e.g.*, *Edwards* v. *State*, 90 Nev. 255, 258-259, 524 P. 2d 328, 331 (1974) (pre-*Jackson*, cited by *Kazalyn*); *Chappell* v. *State*, 114 Nev. 1403, 1407, 972 P. 2d 838, 840 (1998) (after *Jackson* and *Brown*). If *Kazalyn* really is substantially different

from *Jackson*, then the identical-standards premise for the exhaustion holding is false, even assuming that there really is an identical-standards exception to *Duncan* at all. On the other hand, if the *Kazalyn* and *Jackson* statements of the test are substantially the same, then the Nevada Supreme Court's decision is not contrary to *Jackson*.

The State did not include the exhaustion question in the Questions Presented, although it is mentioned in the body of the certiorari petition, see Pet. for Cert. i, 15-17. The State makes a somewhat different exhaustion argument in its brief on the merits. See Brief for Petitioners 47-52. The exhaustion point has not been expressly waived and cannot be defaulted. See 28 U. S. C. § 2254(b)(3). If the Court should find it necessary to decide the identical-standards question left hanging in *Duncan* and *Baldwin*, *amicus* CJLF suggests that the Court call for supplemental briefing on the point. We do not believe that it will be necessary, though, because while an unexhausted claim cannot be granted on the merits, *ibid.*, it can be denied on the merits, see § 2254(b)(2), and this one should be.

B. Reasonableness and Rationality.

There is no doubt that the Nevada Supreme Court considers the *Kazalyn* and *Jackson* standards to be equivalent. For example, in *Lay* v. *State*, 110 Nev. 1189, 1192, 886 P. 2d 448, 450 (1994), the court stated:

> "The standard of review on appeal in a criminal case for sufficiency of evidence is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt by the evidence that was properly before it. *Kazalyn* v. *State*, 108 Nev. 67, 71, 825 P. 2d 578, 581 (1992). This standard has also been articulated as 'whether, after viewing the evidence in the light most favor-

> able to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' *Guy* v. *State*, 108 Nev. 770, 776, 839 P. 2d 578, 582 (1992)."

On federal habeas in the present case, the Court of Appeals held that the *Kazalyn* standard is contrary to *Jackson* because it " '*only* requires a reasonable jury, not a rational one.' " J. A. 14a (emphasis added) (quoting District Court). This statement is unreasonable on its face, and it becomes irrational in light of the *Jackson* opinion.

In common usage, the term "irrational" connotes a *greater* departure from the norm than "unreasonable," not a lesser one. If one says to a friend, "My neighbor is unreasonable," the friend may well reply, "Yeah, so is mine." On the other hand, if one says, "My neighbor is irrational," the response is more likely to be an expression of concern, such as, "Should we call the mental health department?" To the extent there is any difference in the terms, the federal courts in this case got it backwards.

According to the New Oxford American Dictionary 1413 (2001), the word "rational," when used to refer to a person, means either "able to think clearly, sensibly, and logically" or "endowed with the capacity to reason." When used in the same way, "reasonable" means "having sound judgment; fair and sensible." *Id.*, at 1419. To the extent they differ, assessing reasonableness may include an assessment of a person's fairness, while assuring rationality may require only that the person has the capacity to reason in accordance with basic logic.

As applied to the *Jackson* rule, though, we need not speculate. *Jackson* itself uses the terms interchangeably, indicating it uses them in the sense in which they

are synonymous. "After *Winship*, the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be . . . to determine whether the record evidence could *reasonably* support a finding of guilt beyond a reasonable doubt." 443 U. S., at 318 (emphasis added). To assert that a decision is contrary to *Jackson* because it uses the word "reasonably" is to assert that *Jackson* is contrary to itself. That is irrational.

The Court of Appeals also held that the *Kazalyn* standard is contrary to *Jackson* because it involves an assessment of "whether the jury could have been 'convinced of the defendant's guilt,' " while *Jackson* supposedly requires the court to "analyze each of the essential elements of the substantive state crime." App. to Pet. for Cert. 14a. This is wrong both on its face and as applied. On its face, the same passage of *Jackson* quoted above refers to assessment of support for a finding of guilt, which under the basic constitutional requirement is equivalent to finding each element to have been proved. See 443 U. S., at 318-319 (stating standard as "support a finding of guilt" and "could have found the essential elements" in the same paragraph).

As applied to this particular case, there is no need to go through each element when the crime is undisputed and the only genuine question is who committed it. The Ninth Circuit's conclusion that the state court decision is contrary to clearly established federal law simply because it did not tick off a list of undisputed elements is the same kind of error this Court found summarily reversible in *Woodford* v. *Visciotti*, 537 U. S. 19, 23-24 (2002) (*per curiam*), *Middleton* v. *McNeil*, 541 U. S. 433, 437-438 (2004) (*per curiam*), *Holland* v. *Jackson*, 542 U. S. 649, 654-655 (2004) (*per curiam*), and *Bell* v. *Cone*, 543 U. S. 447, 455 (2005) (*per curiam*). Over and over, this Court has admonished the

federal courts of appeals not to read state court opinions with such hostility, eager to find error in every nuance. Yet the practice continues.

The state high court applied a standard consistent with this Court's precedents, even though none were cited to it. Cf. *Early* v. *Packer*, 537 U. S. 3, 8 (2002) (*per curiam*). The state court applied that standard reasonably to the facts presented to it, as the State has described. See Brief for Petitioners 23-31. Nothing further is required to decide this case. Congress has forbidden the overturning of final state judgments via federal habeas corpus under these circumstances.

III. *Strickland*, not *Jackson*, is the proper vehicle for dealing with insufficiently challenged expert testimony.

The Court of Appeals in this case rested its decision on the sole ground of insufficiency of the evidence under *Jackson* v. *Virginia*, 443 U. S. 307 (1979). Although in this case the defendant was properly convicted on DNA evidence that holds up upon reexamination, see Brief for Petitioners 31-35, that will not be true in every case. For the benefit of reviewing courts that may be confronted with a case where there actually *has* been "junk science" introduced at trial and not refuted there, it may be helpful to clarify the proper approach. Such claims should not be analyzed under *Jackson*. They should be considered under the right to effective assistance of counsel, under the standard of *Strickland* v. *Washington*, 466 U. S. 668 (1984).

A. Due Process and Reliable Evidence.

The District Court in the present case recognized, correctly, that "the evidence actually presented at trial, not evidence that should have or might have been

presented . . . is reviewed by the court" under *Jackson*. App. to Pet. for Cert. 38a. *Jackson* further requires that the evidence *at trial* be viewed through the eyes of factfinders who are "rational," 443 U. S., at 319, or "reasonabl[e]," *id.*, at 325, not factfinders who are experts. If a layman hearing the uncontradicted testimony of an expert witness could have found that testimony persuasive by the requisite standard, there is no *Jackson* claim, even if another expert would have considered the witness to be a crackpot. This makes *Jackson* an inappropriate vehicle for this purpose.

The District Court cited four cases for the proposition that it could go outside the trial record, in clear contradiction of *Jackson*, and exclude trial evidence from its weighing because it is supposedly shown to be unreliable by evidence never presented to the state courts. See App. to Pet. for Cert. 38a. These cases do not bear the weight placed on them, either individually or collectively.

United States v. *Scheffer*, 523 U. S. 303, 309 (1998), simply states a general government interest in reliable evidence. It does not remotely support a federal constitutional veto over the admission of evidence in state trials on generalized grounds of reliability. *Scheffer* was about the defendant's right to admit reliable evidence, not exclude unreliable evidence. See *id.*, at 308. Exclusion of evidence on general grounds of unreliability is normally the province of evidence codes and rules, and the authorities promulgating those rules have broad latitude. See *ibid.* Federal habeas does not lie to second-guess determinations under rules of evidence, see *Estelle* v. *McGuire*, 502 U. S. 62, 67-68 (1991), and to date this Court has not held that the Due Process Clauses of the Constitution include an overarching protection against all unreliable evidence. See *Kansas*

v. *Ventris*, 556 U. S. __, n. * (No. 07-1356, April 29, 2009) (slip op., at 7).

The District Court also cited three other cases for federal constitutional exclusion of unreliable evidence, but each one relates to the implementation of a specific constitutional guarantee, not a general prohibition of unreliable evidence. The District Court cited *Idaho* v. *Wright*, 497 U. S. 805 (1990), a Confrontation Clause case, for the proposition that unreliable hearsay is constitutionally excludable. The District Court was apparently unaware that *Wright*'s reliability discussion, see *id.*, at 816-817, was based on *Ohio* v. *Roberts*, 448 U. S. 56 (1980), which had been overruled two years before the District Court's decision. See *Crawford* v. *Washington*, 541 U. S. 36, 68 (2004). The same is true of *Lee* v. *Illinois*, 476 U. S. 530, 543 (1986), also cited by the District Court. Whatever precedential value these two cases retain, they are implementations of the Confrontation Clause, not examples of a generalized protection against unreliable evidence.

Continuing to grasp at straws, the District Court cited *Marshall* v. *Lonberger*, 459 U. S. 422 (1983). In that case, the Court upheld the admission of the prior conviction in question and admonished the federal habeas court that "the Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules . . . ." *Id.*, at 438, and n. 6. The case stands for exactly the opposite of the proposition for which it is cited. The District Court cited page 440 of *Lonberger*, apparently unaware that this is a dissent.

The District Court's attempt to pound the square peg of *Jackson* into the round hole of junk science through a general constitutional shield against unreliable evidence fails at its premise. There is no such shield. The drafters of state evidence codes and rules

have broad latitude with regard to the admission as well as the exclusion of evidence, and the trial judge's rulings under those rules are not subject to scrutiny on federal habeas. See *supra*, at 26.

B. Meaningful Adversarial Testing.

The lack of any general federal constitutional requirement for reliability of evidence does not mean that the defendant lacks constitutional protection.

> "The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause:
>
> > " 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.'
>
> "Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Strickland*, 466 U. S., at 684-685.

In a case where the prosecutor really *did* present "junk science" as proof of guilt and defense counsel failed to show it was junk, the constitutional violation would lie in defense counsel's failure, not the prosecutor's presentation. The right of the defendant to make his own case is expressly protected by the Sixth Amendment in terms of confronting the witness against him, "obtaining witnesses in his favor," and the assistance of counsel to effectively use both of those rights. Those expressly provided rights are supplemented with rights to disclosure of exculpatory information, see *Brady* v. *Maryland*, 373 U. S. 83 (1963), and to present vital, reliable evidence despite contrary technicalities in state evidence rules. See *Holmes* v. *South Carolina*, 547 U. S. 319, 324-325 (2006). The affirmative right of the defendant to counter the prosecution's evidence, not a negative right to keep it out, is the protection provided in both the text of the Constitution and this Court's precedents.

Strickland also has important practical advantages over *Jackson* as the vehicle for dealing with claims of unreliable evidence. *Jackson* unambiguously calls for decision on the trial record. See 443 U. S., at 324. It looks at what happened at trial, not what should have happened. To preserve a *Jackson* claim, the defendant would normally have to make it on direct appeal, where additional evidence is typically not allowed. *Strickland* claims generally depend on facts outside the record, and raising them for the first time on collateral review is the norm. See *Massaro* v. *United States*, 538 U. S. 500, 504-507 (2003).

A grant of relief under *Strickland* typically means the defendant gets a new trial, while a successful *Jackson* claim means the defendant walks free, protected from retrial by the Double Jeopardy Clause. See

Burks v. *United States*, 437 U. S. 1, 18 (1978).[6] When a habeas court is convinced the petitioner did not receive a fair trial but is not convinced he is innocent, the drastic consequence of irrevocably freeing a murderer or rapist must surely give the judge pause.

The element of prejudice in the *Strickland* test and the fact that the habeas petitioner has the burden of proof facilitate getting to the real truth rather than speculating about what might be. Although *Strickland*'s "reasonable probability" test, 466 U. S., at 694, is the most cited definition of prejudice, this test is just a crystalization of the underlying principle that we should assure that society is justified in relying on the outcome of the trial. See *id.*, at 691-692.

In the present case, the random match probability, not challenged by Brown's expert, is much more than sufficient to justify reliance on the conclusion that this crime was not committed by anyone other than Troy Brown or a close blood relative. On the "brother did it" hypothesis, discourse on probabilities that a brother *might* match is absurd. Just test the brothers. See J. A. 1540-1541 (petitioner's District Court reply memo, quoting Scheck, DNA and Daubert, 15 Cardozo L. Rev. 1959, 1974 (1994)). If one matches, the probability that Troy Brown is the perpetrator based on the DNA alone drops to 50%, and he *might* have a substantial argu-

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6. Both the District Court and the Court of Appeals in the present case appear to have been unaware of this rule. See App. to Pet. for Cert. 21a, 54a.

ment that trial counsel's failure to have that test done was prejudicial.[7] If not, as is highly likely, prejudice is conclusively negated. If petitioner wanted to claim that counsel was ineffective for not sufficiently pursuing the brother-perpetrator hypothesis, he should have had this test done during the state habeas proceedings.

The Court of Appeals did not rule on the ineffective assistance claim, see App. to Pet. for Cert. 21a, and it is not in the Questions Presented. See Pet. for Cert. i. This claim would, unfortunately, need to remain open on remand if this Court reverses on the *Jackson* claim. It is worth noting, though, that a habeas petitioner with the burden of proof is fundamentally different from a criminal defendant at trial, and his failure to seek and introduce a test that would end the speculation and establish the facts may properly be considered as evidence that he knows he is guilty. Cf. J. A. 1540-1541.

In summary, then, the problem of reliability of evidence should be viewed through the lens of the multiple rights of defendants related to putting on their own case, of which the right to effective counsel is foremost. Allowing federal habeas courts to strike out all the evidence they consider unreliable and then applying *Jackson* v. *Virginia* to what is left is the wrong road to travel.

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7. A matching brother would not be substantially exonerating, however, if he has a solid alibi. See App. to Pet. for Cert. 27a (O'Scannlain, J., dissenting). It matters not if the then-13-year-old brother who lived a six-hour drive away has a matching profile. We say "might" because there is a substantial amount of other evidence in addition to the DNA, described in the Brief for Petitioners 4-7, 23-31.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed.

May, 2009

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 08-559

In the Supreme Court of the United States

E. K. MCDANIEL, WARDEN AND THE ATTORNEY GENERAL OF THE STATE OF NEVADA,
Petitioners,
v.
TROY BROWN, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE STATES OF MICHIGAN, ALABAMA, ARIZONA, COLORADO, DELAWARE, HAWAII, IDAHO, KANSAS, MARYLAND, MISSOURI, NEW HAMPSHIRE, NEW MEXICO, NORTH DAKOTA, OHIO, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, WASHINGTON, WEST VIRGINIA, AND WYOMING IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amici will address the following question:

What is the standard of review for a federal habeas court analyzing a sufficiency of the evidence claim under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)?

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iv
INTEREST OF AMICI CURIAE 1
INTRODUCTION AND SUMMARY OF ARGUMENT 2
ARGUMENT 4
In reviewing a sufficiency-of-the-evidence claim, a federal habeas court should first determine whether §2254(d) bars habeas relief because the State court decision was not objectively unreasonable before reaching the question whether in its independent view the evidence was sufficient 4
A. It is both possible and consistent with the text of §2254(d) to determine whether habeas relief is barred because a State court decision was not objectively unreasonable before reaching the issue whether the underlying constitutional right was violated 5
1. An examination of recent courts of appeals' cases demonstrates that a widespread practice of using a de novo determination of the sufficiency of the evidence to gauge the reasonableness of the State court decision, which has resulted in a thinly-veiled plenary review, contrary to the limitation of review created by §2254(d) 9

2. A State court is in the best position to conduct the sufficiency of the evidence analysis under Jackson in a case arising out of State court conviction, and a habeas court's de novo determination that the evidence was insufficient does not speak to the reasonableness of the State court decision. 12

3. Because §2254(d) gives State courts more leeway in reasonably deciding sufficiency of evidence claims since the test involves the application of a broad standard, there is little utility in having a habeas court add its own application of the standard to determine whether the State court's decision was reasonable. 15

B. In this case, the court's decision to conduct a *de novo* review of Respondent's claim led it to erroneously grant habeas relief. A straightforward application of §2254(d) demonstrates that habeas relief should have been barred because the decision of the State court was not objectively unreasonable since it fell within the matrix of reasonable applications of the broad *Jackson* standard 19

CONCLUSION 23

TABLE OF AUTHORITIES

Page

Cases

Bates v. McCaughtry,
934 F.2d 99 (7th Cir. 1991) 13

Crawford v. Washington,
541 U.S. 36 (2004) 17

Engle v. Issac,
456 U.S. 107 (1982) 13

Fiore v. White,
528 U.S. 23 (1999) 12

Garner v. Louisiana,
368 U.S. 157 (1961) 12

Hurtado v. Tucker,
245 F.3d 7 (1st Cir. 2001) 7

Jackson v. Virginia,
443 U.S. 307 (1979) ..... passim

Knowles v. Mirzayance,
556 U.S. ____ (2009) 16, 17

Lockyer v. Andrade,
538 U.S. 63 (2003) 5, 7, 8

McFowler v. Jaimet,
349 F.3d 436 (7th Cir. 2003) 11

Miranda v. Arizona,
384 U.S. 436 (1965) 6

Rompilla v. Beard,
545 U.S. 374 (2005) 16

Stone v. Powell,
428 U.S. 465 (1976) 14

Cases (continued)

Wiggins v. Smith,
539 U.S. 510 (2003) 16

Williams v. Ozmint,
494 F.3d 478 (4th Cir. 2007) 7

Williams v. Taylor,
529 U.S. 420 (2000) 9, 10, 11, 19

Woodford v. Visciotti,
537 U.S. 19 (2002) 15

Wright v. West,
505 U.S. 277 (1992) 17

Yarborough v. Alvarado,
541 U.S. 652 (2004) ..... passim

Statutes

28 U.S.C. §2254(d) ..... passim

28 U.S.C. §2254(d)(1) 15

Other Authorities

Antiterrorism and Effective Death Penalty 12, 15, 18

Joseph L. Hoffman and William J. Stuntz,
Habeas After the Revolution,
1993 Sup. Ct. Rev. 65, (1994) 15

Monaghan, Constitutional Fact Review,
85 Colum. L. Rev. 229, 272 (1985) 15

Rules

Supreme Court Rule 37.4 1

INTEREST OF AMICI CURIAE

Amici sovereign States routinely defend State court criminal convictions against federal habeas corpus challenges. 28 U.S.C. §2254(d) affords State courts the deference to which they are entitled in a system of federalism consistent with the limited role of federal collateral review. In this case, the United States Court of Appeals for the Ninth Circuit abandoned its obligation to defer to objectively reasonable State court decisions by conducting a thinly-veiled plenary review of a sufficiency-of-the-evidence claim that was rejected on the merits by the Nevada Supreme Court. If the process of analysis employed by the decision here is ratified by this Court it would undermine the States' interests in enforcing presumptively valid criminal convictions.

Amici States' interests are served by resolving the question presented as to the methodology that federal habeas courts must employ to ensure that the restrictions to review imposed by §2254(d) with respect to sufficiency-of-the-evidence claims are enforced. Amici submit this brief in support of the petitioner in this case, through their respective Attorneys General, under this Court's Rule 37.4.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court's decisions have demonstrated that it is both possible and consistent with the text of the statute for a habeas court to determine whether 28 U.S.C. §2254(d) bars habeas relief without determining whether the underlying constitutional right was violated. In order to prevent unwarranted plenary review of sufficiency-of-the-evidence claims, habeas courts should be required to determine whether §2254(d) bars relief because the State court decision was not objectively unreasonable, without using its own *de novo* determination of the merits of the claim to gauge the reasonableness of the State court decision. This methodology should be imposed for three reasons:

1. Allowing habeas courts to conduct a *de novo* review of the sufficiency of the evidence and use the result to gauge the reasonableness of the State court decision—which has been the typical methodology—has, effectively resulted in the abandonment of any meaningful limitation to review. An examination of recent courts of appeals' opinions following this methodology has revealed that *perceived erroneous* State court decisions are being equated with *unreasonable* ones. The standard in §2254(d) provides that even though a decision may be wrong is not a sufficient reason to grant habeas relief—but there is apparently only one published decision in which a court of appeals noted that the limitations imposed by §2254(d) actually made a difference in the outcome of a sufficiency-of-the-evidence claim.

2. State courts are in a better position than federal habeas courts to decide sufficiency-of-the-evidence claims arising out of State convictions. State-law questions—such as the elements that comprise a State crime and

the type of evidence that can be used to satisfy those elements—form the predicate to such claims. State courts are also more familiar with the quantum of evidence necessary to convince a presumably rational State jury to return a guilty verdict; State courts witness on a daily basis both the convictions and acquittals. And there is no reason to believe that State courts are less competent than federal courts to apply the sufficiency-of-the-evidence test.

3. State courts evaluating sufficiency-of-the-evidence claims apply a broad constitutional standard. Because §2254(d) gives State courts greater leeway in applying such standards, it compels a habeas court to defer to a wider range of State court decisions that reject sufficiency-of-the-evidence claims on the merits. A federal habeas court's *de novo* determination of the evidence's sufficiency merely gives the habeas court a single data point on how another reviewing court might decide the issue. But because the data point is the reviewing court's own product, there is a danger that it will be given unwarranted weight in determining the reasonableness of the State court decision.

The present case is emblematic of the problem. Not only did the district court fail to first determine whether §2254(d) barred relief, its false step led it to consider non-record evidence to aid its plenary review. The Ninth Circuit perpetuated the error by engaging in yet another finding that the evidence was insufficient and concluding for that reason that the contrary decision made by the State court was unreasonable. In fact, habeas relief should have been denied because the decision of the Nevada Supreme Court was not objectively unreasonable. The State court employed the correct constitutional standard and applied it to the facts of the case in a reasonable manner by reciting the

evidence—viewed most favorably to the prosecution—that supported the determination that Respondent was responsible for the crime.

ARGUMENT

In reviewing a sufficiency-of-the-evidence claim, a federal habeas court should first determine whether §2254(d) bars habeas relief because the State court decision was not objectively unreasonable before reaching the question whether in its independent view the evidence was sufficient.

State courts occupy a superior position to federal habeas courts to determine the sufficiency of the evidence presented at a State criminal trial. State courts are expert in the State laws that form the legal predicate to such claims. And State courts have far more experience in the quantum of evidence that convince presumably rational State juries to convict or acquit a criminal defendant of State crimes. Also, the sufficiency-of-the-evidence test involves the application of a broad standard that gives a State court more leeway in rendering a reasonable decision. This Court's decisions demonstrate that it both possible and consistent with the text of 28 U.S.C. §2254(d) to determine whether habeas relief is barred because a State court decision was not objectively unreasonable before reaching the issue whether the underlying constitutional right was violated.

A. It is both possible and consistent with the text of §2254(d) to determine whether habeas relief is barred because a State court decision was not objectively unreasonable before reaching the issue whether the underlying constitutional right was violated.

This Court has previously criticized habeas courts for determining whether a petitioner's constitutional rights were violated before determining whether habeas relief is barred by §2254(d) on other constitutional questions. In *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003), this Court disagreed with the approach taken by the Ninth Circuit of requiring federal habeas courts to review the State court decision *de novo* before applying §2254(d): "we do not reach the question whether the State court erred and instead focus solely on whether §2254(d) forecloses habeas relief on Andrade's Eighth Amendment claim." This Court went on to find that the State court decision was not objectively unreasonable irrespective of whether it was correct.

Andrade involved a claim that an application of California's "three-strikes" law violated the Eighth Amendment. This Court never determined whether the habeas petitioner's Eighth Amendment rights were in fact violated. Rather, after finding that clearly established Supreme Court law prohibited only sentences that were grossly disproportionate to the crime—the bounds of which were unclear—it found that the State court's conclusion was not objectively unreasonable.

Similarly, in *Yarborough v. Alvarado*, 541 U.S. 652, 665-666 (2004), this Court avoided deciding whether a habeas petitioner's constitutional rights were violated

because a straight forward application of §2254(d) prevented it from reaching the question:

> We cannot grant relief under AEDPA by conducting our own independent inquiry into whether the State court was correct as a *de novo* matter. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the State court decision applied [the law] incorrectly." *Woodford v. Visciotti*, 537 U.S. 19, 24-25 (2002) (per curiam). Relief is available under §2254(d)(1) only if the State court's decision is objectively unreasonable. See *Williams* [*v. Taylor*, 529 U.S. 362 (2000)] *supra*, at 410; *Andrade*, 538 U.S. at 75. Under that standard, relief cannot be granted.

Yarborough looked at the legal landscape regarding the right at issue—whether a suspect is being held in custody such that the warnings under *Miranda v. Arizona*, 384 U.S. 436 (1965), are required—and then it examined whether the decision of the State court reasonably comported with it. This Court noted that the State court applied the correct constitutional test and described the factors that led the State court to conclude that the suspect was not in custody. *Yarborough* did not first weigh the factors on its own, make a *de novo* determination whether the suspect was in custody, and then compare its result to the State court decision. It limited its review to determining whether the decision of the State court was a reasonable one:

> These differing indications lead us to hold that the State court's application of our custody standard was reasonable. The

> Court of Appeals was nowhere close to the mark when it concluded otherwise. Although the question of what is an "unreasonable application" of law might be difficult in some cases, it is not difficult here. The custody test is general, and the State court's application of our law fits within the matrix of our prior decisions.

541 U.S. at 665.

The methodology used in *Andrade* and *Yarborough*, provides a template for the standard that this Court should articulate for federal habeas courts to use in sufficiency of the evidence cases. As a matter of review, this Court examined the legal standards identified by the State courts and the reasonableness of the application of the standards without an independent review of the constitutional issue itself. And in fact, a small minority of the decisions of the courts of appeals has applied a similar mode of analysis to sufficiency of the evidence claims.

In *Hurtado v. Tucker*, 245 F.3d 7, 18-19 (1st Cir. 2001), the First Circuit limited its analysis to an examination of whether the State court decision evidenced an understanding of the *Jackson* standard and recited the evidence that supported its conclusion that the evidence was sufficient in a manner that was not objectively unreasonable. 245 F.3d at 18-19. The methodology avoided plenary review of the claim by focusing on the standard employed by the State court and reasonable manner in which it applied the standard to the facts of the case.

Likewise, in *Williams v. Ozmint*, 494 F.3d 478, 490 (4th Cir. 2007), the Fourth Circuit limited its review consistent with this approach. The only element of the crime disputed in *Oznunt* was venue. The petitioner argued that insufficient evidence was presented to prove that the crime occurred in South Carolina. In finding that the State court decision was reasonable, the Fourth Circuit noted that the State court decision pointed to the evidence that supported the jury's determination that the murders occurred in South Carolina. The Fourth Circuit did not make its own determination of the sufficiency of the evidence and compare it to the State court's conclusion. Rather, the habeas court limited its examination to a determination that the State court conducted a reasonable sufficiency-of-the-evidence analysis.

This Court stated in *Andrade* that "AEDPA does not require a federal habeas court to adopt any one methodology in deciding the only question that matters under § 2254(d)(1)—whether a State court decision is contrary to, or involved an unreasonable application of, clearly established Federal law." 538 U.S. at 71. But at least in the context of sufficiency-of-the-evidence claims, it is necessary for the methodology routinely employed by habeas courts—preceding the §2254(d) inquiry with a *de novo* review of the claim—to be revised. The change in methodology is warranted because: (1) recent federal courts of appeals' cases demonstrate that they have failed to limit review of sufficiency-of-the-evidence claims as required by §2254(d); (2) a State court is in a better position than a federal habeas court to conduct plenary consideration of sufficiency-of-the-evidence claims; and (3) §2254(d) gives a State court more latitude in deciding the claim, as the sufficiency-of-the-evidence test creates a broad standard.

1. **An examination of recent courts of appeals' cases demonstrates that a wide-spread practice of using a de novo determination of the sufficiency of the evidence to gauge the reasonableness of the State court decision, which has resulted in a thinly-veiled plenary review, contrary to the limitation of review created by §2254(d).**

Despite talismanic references to §2254(d), the section has made a difference in the outcome of perhaps only one published court of appeals' habeas decision reviewing a sufficiency-of-the-evidence claim. The vast majority of published cases in the courts of appeals since *Williams v. Taylor*, 529 U.S. 420 (2000), demonstrate that either the evidence is judged sufficient and the State court decision is therefore deemed *a fortiori* reasonable, or the evidence is judged insufficient and the State court decision is therefore found to be *ipso facto* unreasonable. There appears to be only a single reported court of appeals' case where the court suggested that the evidence was insufficient yet the State court decision was nevertheless reasonable. This is powerful evidence that the practice of using a *de novo* determination of the sufficiency of the evidence is ineffective as the first step in the review is ineffective in separating perceived erroneous applications of *Jackson v. Virginia*, 443 U.S. 307 (1979), with objectively unreasonable ones.

There are more than fifty reported courts of appeals' decisions since *Williams* in which a sufficiency-of-the-evidence claim has been denied on the merits on habeas review. In the vast majority of these decisions, the courts of appeals conducted their own *de novo* sufficiency-of-the-evidence review, determined the evidence to be sufficient, and then concluded in an *a fortiori* fashion that the State court result was

reasonable. *See* Appendix A. There are seven cases where the courts of appeals did not explicitly perform a *de novo* analysis, but the court's determination of reasonableness followed from an in-depth examination of the evidence as applied to State law. *See* Appendix B. There are only six cases in which it appears relief was denied without extensive factual analysis and based only on the reasonable form of the State court decision. *See* Appendix C. Therefore, in the vast majority of reported cases where relief was denied, the result was reached in conjunction with explicit or implicit plenary consideration of the sufficiency of the evidence.

On the other side of the ledger, there are at least thirteen reported courts of appeals' decisions where habeas relief was granted on a sufficiency-of-the-evidence claim after *Williams*. In eight of these cases, the courts of appeals followed their assessment that the evidence was insufficient with a determination that the State court decision was unreasonable for that reason alone. *See* Appendix D. In these cases, the courts of appeals equated an erroneous application of *Jackson* with an unreasonable one. In the other five cases in which relief was granted, the court found that the State court decision was not only erroneous but was also unreasonable because the evidence was wholly lacking or patently insufficient with respect to an element. *See* Appendix E. Nevertheless, in this group of cases the courts of appeals still conducted a plenary assessment of the sufficiency of the evidence as its first step in the review process and then compared it with the State court decision to determine its reasonableness.

There is a single reported court of appeals' case in which the court suggested that §2254(d) made a difference in the outcome. In *McFowler v. Jaimet*, 349 F.3d 436, 456-457 (7th Cir. 2003), the Seventh Circuit

found that in its view the evidence produced at trial might not support the verdict, but that the result reached by the State court was objectively reasonable:

> [w]ere we reviewing McFowler's conviction on direct appeal, we might have reversed on the ground that no factfinder could find beyond a reasonable doubt that it was McFowler whom Merodith saw next to Logan's body with a shotgun in his hand . . . . But we do not sit in direct review of McFowler's conviction—it was the Illinois Appellate Court that filled that role. And the AEDPA demands that we give appropriate deference to the decision making authority of the State courts. We may not use the writ of habeas corpus to effectively overrule the decisions of those courts simply because we disagree with them.

Unlike *McFowler*, however, an examination of the reported courts of appeals' decisions since *Williams* reveals a willingness on the part of habeas courts to review sufficiency-of-the-evidence claims *de novo* and render a decision that comports with their independent view of the sufficiency of the evidence. Of the more than seventy reported decisions, in only one did the court of appeals' determination of reasonableness differ from its determination of the merits of the underlying claim. Even in the more than fifty cases in which relief was denied, the courts of appeals' plenary consideration of the sufficiency of the evidence exceeds the limitations on review of State court decisions imposed by §2254(d). Accordingly, the approach typically followed by habeas courts has failed to distinguish between perceived erroneous applications of *Jackson* with objectively

unreasonable ones. The methodology of review for the federal courts should accurately reflect the legal standards in AEDPA to give meaning to the distinction between erroneous decisions and unreasonable ones. The method typically used to date has proven to be ineffective at limiting habeas review as required by §2254(d).

2. A State court is in the best position to conduct the sufficiency-of-the-evidence analysis under Jackson in a case arising out of State court conviction, and a habeas court's de novo determination that the evidence was insufficient does not speak to the reasonableness of the State court decision.

Jackson requires a court reviewing a sufficiency-of-the-evidence claim to view the evidence in a light most favorable to the prosecution to determine whether any rational juror could have found the essential elements of the offense beyond a reasonable doubt. In the context of federal habeas review of a State court conviction, sufficiency-of-the-evidence claims are exceptional in that they are based on a number of State-law predicates that a federal court cannot question.

The elements of the crime that are subject to the beyond-a-reasonable-doubt standard are for the State courts alone to define. *Fiore v. White*, 528 U.S. 23, 29-30 (1999); *Garner v. Louisiana*, 368 U.S. 157, 166 (1961) ("We of course are bound by a State's interpretation of its own statute and will not substitute our judgment for that of the State's when it becomes necessary to analyze the evidence for the purpose of determining whether that evidence supports the findings of a State court.") A State may even elect to carry the burden of proof with respect

to a defense while insulating that portion of its case from habeas review by not designating the lack of the affirmative defense as an element of the crime. *Engle v. Issac*, 456 U.S. 107, 120-121 (1982).

Likewise, the type of evidence that can be considered to support those elements is a matter of State law. *Bates v. McCaughtry*, 934 F.2d 99, 103 (7th Cir. 1991) ("What is essential to establish an element, like the question whether a given element is necessary, is a question of State law. To say that State law 'rightly understood' requires proof of Z', and that the evidence is insufficient because the prosecution failed to establish this, is to use *Jackson* as a back door to review of questions of substantive law.")

The only federal question is a quantitative one: given how the State court defines the elements of the crime and given the type of evidence the State court views as probative of those elements, was there enough evidence presented to satisfy the *Jackson* standard? A habeas court assessing a sufficiency-of-the-evidence claim arising out of a State court conviction is, therefore, at a disadvantage. It cannot make authoritative statements with respect to the first half of the inquiry concerning the elements of the crime or the type of evidence that can support them, because it must defer completely to the State court's interpretation of its own law.

On top of this legal disadvantage lies the fact that the State courts are asked to weigh the sufficiency of the evidence presented at State criminal trials on a daily basis. When a State trial court is asked to decide a motion for a directed verdict of acquittal or a motion JNOV, it performs its task with a great deal of experience regarding the quality and quantity of

evidence that in fact tends to satisfy a jury beyond a reasonable doubt. A seated jury is presumed to be rational, and a busy State trial court has daily first-hand experience on the verdicts that typically result from various evidentiary profiles. A federal habeas court sees only a small sub-set of criminal cases that were tried in State court and reviewed by a State appellate court.

In *Stone v. Powell*, 428 U.S. 465, 493-94 n.35 (1976), the Court noted that federal courts are no more expert than State courts in deciding search-and-seizure claims because both courts deal with such claims on a daily basis. The observation is truer with sufficiency-of-the-evidence claims: State courts routinely handle sufficiency-of-the-evidence claims predicated on State-defined crimes on direct appeal, whereas federal courts only see a smaller number of such claims arising out of State-defined crimes on habeas review.

Accordingly, when a federal habeas court conducts its own *de novo* review of a sufficiency-of-the-evidence claim, the result does not provide the most useful gauge as to the reasonableness of the State court decision. The habeas court does not occupy a position that is as good as the State court does to perform the *de novo* analysis: the State court is the expert in its own laws that form the predicate to the claim, and the State court more routinely engage in the quantitative half of the analysis. The determination by the habeas court that it views the evidence as insufficient may only constitute another data point on the matrix of reasonable results. The federal habeas court's *de novo* disagreement with the result does not resolve the issue whether the State court decision was objectively unreasonable.

The view that a State court might be less willing than a federal court to apply federal law in favor of a criminal defendant ignores the premise upon which AEDPA was based. The "readiness to attribute error [to a State court] is inconsistent with the presumption that State courts know and follow the law." *Woodford v. Viscotti*, 537 U.S. 19, 24 (2002) (per curium); Joseph L. Hoffman and William J. Stuntz, Habeas After the Revolution, 1993 Sup. Ct. Rev. 65, 111 (1994) ("The notion that State courts as a whole are strongly pro-government in criminal procedure disputes seemed plausible thirty years ago, but it is a hard sell [in 1994] ... . There is no good evidence (and it is hard to see how one would go about really testing the point), but it seems more plausible to believe that State court criminal procedure errors are distributed about equally on both sides of the constitutional line."); See also Monaghan, Constitutional Fact Review, 85 Colum. L. Rev. 229, 272 (1985) ("The premise that State courts are to be suspected of distorted factfinding and law application is disquieting. After all, the Constitution presupposes that the State courts will enforce declared federal law fairly ").

3. Because §2254(d) gives State courts more leeway in reasonably deciding sufficiency-of-evidence claims since the test involves the application of a broad standard, there is little utility in having a habeas court add its own application of the standard to determine whether the State court's decision was reasonable.

This Court interpreted the unreasonable application prong of §2254(d)(1) in *Williams* as requiring habeas courts to defer to State court applications of federal law that are not "objectively unreasonable." In

Rompilla v. Beard, 545 U.S. 374, 380 (2005)(quoting *Wiggins v. Smith*, 539 U.S. 510, 520 (2003)), this Court Stated that an "unreasonable application" occurs when a State court "identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of petitioner's case."

This Court has also consistently drawn a distinction between State court decisions applying a broad constitutional standard and ones that apply a narrow rule. As explained in *Yarborough*, where a general standard is at issue, State court decisions are given greater leeway:

> [i]f a legal rule is specific, the range may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations.

541 U.S. at 664.

In *Knowles v. Mirzayance*, 556 U.S. ____ (2009), the Court held that ineffective-assistance-of-counsel claims must be given extra latitude in light of the general nature of the rule: "because the *Strickland* standard is a general standard, a State court has even

more latitude to reasonably determine that a defendant has not satisfied that standard."

The standard for sufficiency-of-the-evidence claims constitutes another general rule which, under *Yarborough* and *Knowles*, requires federal courts to allow the States considerably more leeway in its application. As Justice Kennedy stated in his concurring opinion in *Wright v. West*, 505 U.S. 277, 308 (1992)(Kennedy, J., concurring in the judgment), *Jackson* articulates a standard which requires a fact-specific analysis:

> *Teague* does bear on applications of law to fact which result in the announcement of a new rule . . . . If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule. The rule of *Jackson v. Virginia* . . . is an example.

Where an issue involves the application of a narrow rule – perhaps for example what constitutes "testimonial hearsay" under *Crawford v. Washington*, 541 U.S. 36 (2004) – the range of reasonable outcomes is limited and there is arguably substantial value in comparing the independent review of the habeas court to the State court to determine reasonableness. But there is limited value in the practice of a habeas court seeking to determine the reasonableness of a state court decision regarding the sufficiency of the evidence by comparing the state court decision with its own *de novo* determination. As this Court stated in *Yarborough*, "[a]pplying a general standard to a specific case can demand a substantial element of judgment."

Thus, a habeas court's own view of the sufficiency of the evidence is just another judgment in the matrix of possible decisions. It is a single data point that has limited bearing on where the State court decision rests in that matrix. And, as previously noted,, it is a data point being placed by a court that does not have the same degree of authority over the States' law making the *de novo* determination. The more general the rule, the less relevant the habeas court's independent view of the claim becomes. And it is difficult to think of a claim that employs a constitutional standard more general than *Jackson*, which asks broadly whether any rational fact finder could find elements beyond a reasonable doubt.

Thus, the methodology this Court should require in sufficiency of the evidence cases is to mandate that the reviewing habeas court first look to the standard used by the State court, and then second examine the State court's application of the facts to that standard. This analysis of the facts is not an independent review. The review of the State's application examines the legal reasoning—the facts cited, whether these facts were supported by the record, whether the inferences from them were within the range of reasonable conclusions, and whether the application of the standards correlated to the facts. By doing so, this Court would require the reviewing court to examine the process of analysis by the State courts—such a methodology would honor and give meaning to the distinction between a decision that may be erroneous and an objectively unreasonable one. Without such guidance, the reality of review is, in effect, a *de novo* review with some citations to the legal standards of AEDPA where the limitations created by §2254(d) play no meaningful role in the decision.

B. In this case, the court's decision to conduct a *de novo* review of Respondent's claim led it to erroneously grant habeas relief. A straightforward application of §2254(d) demonstrates that habeas relief should have been barred because the decision of the State court was not objectively unreasonable since it fell within the matrix of reasonable applications of the broad *Jackson* standard.

This case vividly demonstrates the danger of allowing a habeas court to give plenary consideration to a sufficiency-of-the-evidence claim before determining whether §2254(d) bars relief.

The district court's consideration of Respondent's sufficiency-of-the-evidence claim exceeded the bounds of review contemplated by §2254(d). Not only did the district court conduct a plenary review of the claim before making an *ipso facto* determination that the State court decision was therefore unreasonable, it also considered new evidence to aid it. That is, the district court discarded the constraints on review placed on a habeas court and put itself in the role a State court—albeit without the expertise in State law and without the same degree of experience in reviewing State criminal trials—and asked itself whether the prosecutor had presented sufficient evidence. The Ninth Circuit perpetuated the error, and after making another finding that the evidence was insufficient, it also found *ipso facto* that the Nevada Supreme Court decision was unreasonable.

The plenary consideration of the evidence's sufficiency should not have occurred. This is because a straightforward application of the *Williams* standard demonstrates that the Nevada Supreme Court's decision

was not objectively unreasonable, and relief was therefore barred under §2254(d). Here, the State court identified the correct constitutional test and compared the record evidence to the challenged element in a manner that reasonably fit within the matrix of reasonable decisions allowed by the broad *Jackson* standard.

First, the State court plainly employed the correct test. It stated that the question was "whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt." For the reasons stated in Petitioner's brief, there is no principled distinction between a "reasonable acting jury" and a "rational fact-finder." The terms are equivalent and both speak to a fact-finder that makes a reasoned rather than an arbitrary decision. Likewise, the State court correctly acknowledged that the burden of proof was "beyond a reasonable doubt."

Next, the State court—viewing the evidence in the light most favorable to the prosecution—did not unreasonably determine that a rational fact-finder could have found proof of the challenged elements of the offense beyond a reasonable doubt. The only element of the crime at issue was that of identity. Respondent did not contend that any of the other elements had not been proven, and it is not unreasonable for a reviewing court to fail to address issues that are not raised.

The State court then cataloged the evidence that, in its view, allowed the jury to find the element of identity beyond a reasonable doubt. Evidence established that Respondent was located in sufficient proximity to the victim's house to have committed the crime. The victim's testimony that her attacker was dressed in a particular way and smelled like beer and vomit meshed

with the evidence that Respondent was dressed accordingly and in fact had been drinking and vomiting on the night of the assault. Evidence was presented that someone resembling Respondent was seen stumbling on the road near the victim's house very near the time of the assault. And finally, the DNA evidence indicated that Respondent's DNA matched the semen stain found in the victim's underwear, only 1 in 3,000,000 people would have matching DNA, and even the second DNA test indicated that only 1 in 10,000 people had matching DNA.

The State court decision evidences an application of the *Jackson* standard that was not objectively unreasonable. The Court recited the evidence in the light most favorable to the prosecutor that it viewed as supporting the disputed element. The Court then made the reasoned decision that the evidence was sufficiently persuasive to meet the constitutional threshold. That is, the Nevada Supreme Court's application of *Jackson* was not objectively unreasonable. And as such, §2254(d) bars Petitioner from habeas relief, whether or not the State court decision was correct. There is no reason that the Ninth Circuit, years after the fact, was better situated than the State courts to make that necessary judgment call.

The present case demonstrates the need to define a methodology for federal habeas courts to use in deciding sufficiency of the evidence cases. To determine whether relief is foreclosed by §2254(d), a habeas court should first ask whether the State court applied the correct constitutional standard. The habeas court should then examine the State court's application of the standard. This second step involves an examination of the State's legal reasoning rather than a comparison of *de novo* results. If the State court accurately described

the evidence, drew inferences from the evidence that were within the range of reasonable conclusions, and applied the *Jackson* standard in way that was reasonably correlated to the facts, its adjudication of the claim was not objectively unreasonable. Such a methodology would allow a real distinction to be drawn between State court decisions that may be viewed as erroneous merely because the habeas court would have reached a different result, and State court decisions that are objectively unreasonable. If the practice employed by the district court and Ninth Circuit in this case is allowed to stand, then the limitations required by §2254(d) will play no meaningful role in the deciding of sufficiency-of-the-evidence claims.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted

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APPENDIX A

2009

Curtis v. Montgomery, 552 F.3d 578, 583 (7th Cir. 2009)

2008

Coronado v. Ward, 517 F.3d 1212, 1217 (10th Cir. 2008)
Eady v. Morgan, 515 F.3d 587, 596 (6th Cir. 2008)
Saxton v. Sheets, 547 F.3d 597, 606 (6th Cir. 2008)
Tucker v. Palmer, 541 F.3d 652, 661 (6th Cir. Mich. 2008)
Wilson v. Sirmons, 536 F.3d 1064, 1106-1108 (10th Cir. 2008)

2007

Geboy v. Brigano, 489 F.3d 752, 764 (6th Cir. 2007)
Getsy v. Mitchell, 495 F.3d 295, 317 (6th Cir. 2007)
Hartman v. Bagley, 492 F.3d 347, 370 (6th Cir. 2007)
O'Hara v. Brigano, 499 F.3d 492, 500 (6th Cir. 2007)
Riley v. Berghuis, 481 F.3d 315, 324 (6th Cir. 2007)
Skillicorn v. Luebbers, 475 F.3d 965, 978 (8th Cir. 2007)
Young v. Sirmons, 486 F.3d 635, 670 (10th Cir. 2007)

2006

Kater v. Maloney, 459 F.3d 56, 68 (1st Cir. 2006)

2005

Boltz v. Mullin, 415 F.3d 1215, 1232-1233 (10th Cir 2005)

Jordan v. Hurley, 397 F.3d 360, 362 (6th Cir. 2005)

Parker v. Scott, 394 F.3d 1302, 1315 (10th Cir. 2005)

Patton v. Mullin, 425 F.3d 788, 796 (10th Cir 2005)

Sora v. Norris, 400 F.3d 538, 546 (8th Cir. 2005)

Tinsley v. Million, 399 F.3d 796, 815 (6th Cir. 2005)

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Bruce v. Terhune, 376 F.3d 950, 957 (9th Cir. 2004)

Conklin v. Schofield, 366 F.3d 1191, 1201 (11th Cir 2004)

Davis v. Woodford, 384 F.3d 628, 641 (9th Cir. 2004)

Trejo v. Hulick, 380 F.3d 1031 (7th Cir. 2004)

Valdez v. Bravo, 373 F.3d 1093, 1098 (10th Cir. 2004)

Webber v. Scott, 390 F.3d 1169, 1179 (10th Cir. 2004)

2003

Cargle v. Mullin, 317 F 3d 1196, 1225 (10th Cir. 2003)

Davis v. Woodford, 333 F.3d 982, 994 (9th Cir. 2003)

Matthews v. Abramajtys, 319 F.3d 780, 789 (6th Cir. 2003)

Moore v. Casperson, 345 F.3d 474, 488-489 (7th Cir. 2003)

Torres v. Mullin, 317 F.3d 1145, 1156 (10th Cir. 2003)

Whitehead v. Dormire, 340 F.3d 532, 537 (8th Cir. 2003)

2002

Gilbert v. Mullin, 302 F.3d 1166, 1181 (10th Cir. 2002)

Hayes v. Woodford, 301 F.3d 1054, 1085-1086 (9th Cir. 2002)

Martin v. Mitchell, 280 F.3d 594, 618 (6th Cir. 2002)

Romano v. Gibson, 278 F.3d 1145, 1155 (10th Cir. 2002)

Sanford v. Yukins, 288 F.3d 855, 863 (6th Cir. 2002)

Scott v. Elo, 302 F.3d 598, 603 (6th Cir. 2002)

Turner v. Calderon, 281 F.3d 851, 884 (9th Cir. 2002)

Wiggins v. Corcoran, 288 F.3d 629, 637 (4th Cir. 2002)

2001

May v. Iowa, 251 F.3d 713, 717 (8th Cir. 2001)

Romano v. Gibson, 239 F.3d 1156, 1165 (10th Cir. 2001)

2000

Loeblein v. Dormire, 229 F.3d 724, 726 (8th Cir. 2000)

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Oken v. Corcoran, 220 F.3d 259, 269 (4th Cir. 2000)

1999

Moore v. Gibson, 195 F.3d 1152, 1177 (10th Cir. 1999)

APPENDIX B

Gonzalez v. Knowles, 515 F.3d 1006, 1011-1012 (9th Cir. 2008)

Gonzales v. Tafoya, 515 F.3d 1097, 1127 (10th Cir. 2008)

Spears v. Mullin, 343 F.3d 1215, 1240 (10th Cir. 2003)

Johnson v. Bett, 349 F.3d 1030, 1035 (7th Cir. 2003)

Sexton v. Kemna, 278 F.3d 808, 814 (8th Cir. 2002)

Santellan v. Cockrell, 271 F.3d 190, 196 (5th Cir. 2001)

Valdez v. Ward, 219 F.3d 1222, 1238 (10th Cir. 2000)

Appendix C

Williams v. Ozmint, 494 F.3d 478, 489 (4th Cir. 2007)

Biros v. Bagley, 422 F.3d 379, 392 (6th Cir. 2005)

Evans v. Luebbers, 371 F.3d 438, 442 (8th Cir. 2004)

Fields v. Gibson, 277 F.3d 1203, 1222 (10th Cir. 2002)

Martinez v. Johnson, 255 F.3d 229, 245 (5th Cir. 2001)

Hurtado v. Tucker, 245 F.3d 7, 18 (1st Cir. 2001)

Appendix D

Briceno v. Scribner, 2009 U.S. App. LEXIS 3524 (9th Cir. Cal. Feb. 23, 2009)

Newman v. Metrish, 543 F.3d 793, 797-798 (6th Cir. 2008) ("[W]here the evidence taken in the light most favorable to the prosecution creates only a reasonable speculation that a defendant was present at the crime, there is insufficient evidence to satisfy the *Jackson* standard. Accordingly, we conclude that the Michigan Court of appeals unreasonably applied clearly established federal law and the decision of the district court granting a writ of habeas corpus is affirmed.")

Perez v. Cain, 529 F.3d 588, 599 (5th Cir. 2008)("The State produced insufficient evidence solely through cross-examination and argument to controvert Perez's claim. We therefore conclude that Perez established by a preponderance of the evidence that he was insane and that the State appellate court's conclusion that a rational jury could have found otherwise was an objectively unreasonable application of federal law.")

Brown v. Palmer, 441 F.3d 347, 352 (6th Cir. 2006)

Goldyn v. Hayes, 444 F.3d 1062 (9th Cir. 2006)

Torres v. Lytle, 461 F.3d 1303, 1313 (10th Cir. 2006)

Piaskowski v. Bett, 256 F.3d 687, 693-694 (7th Cir. 2001)("Having determined that no rational jury could convict Piaskowski, little further analysis is required to confirm Judge Gordon's conclusion that the Wisconsin Court of appeals' decision was an unreasonable application of the law as determined by the Supreme Court in *Jackson*.")

Thomas v. Gibson, 218 F.3d 1213, 1229 (10th Cir. 2000)("Because the OCCA's sufficiency finding as to the heinous, atrocious, or cruel aggravator is based exclusively on its Stated inference, and because the drawing of that inference is clearly unreasonable in light of the undisputed contrary trial testimony of the State medical examiner, this court concludes that no rational fact-finder could have found the existence of the aggravator beyond a reasonable doubt. Because the only aggravating circumstance advanced by the State of Oklahoma at trial is not supported by sufficient evidence, Thomas' death penalty cannot stand.")

Appendix E

Parker v. Renico, 506 F.3d 444, 452 (6th Cir. 2007)("Here, viewed individually each fact the State advances as "indicia of control" fails to link Parker to the gun, and viewed cumulatively the evidence gains no greater traction. The evidence may have led the jury, as Brown contemplates, to "reasonably speculate" that Parker possessed a weapon, but without "indicia of control," insufficient evidence supports beyond a reasonable doubt Parker's constructive possession. Although *Jackson v. Virginia* and AEDPA dictate deferential standards, this is the rare case where the jury's conclusion fails to conform to that of a rational jury, and where the Michigan Court of Appeals' contrary conclusion was unreasonable.")

Joseph v. Coyle, 469 F.3d 441, 456 (6th Cir. 2006)("In light of the . . . . total absence of such proof . . . we conclude that the Ohio Supreme Court's decision was an unreasonable application of the due process standard of *Jackson v. Virginia*.")

Smith v. Mitchell, 437 F.3d 884, 890 (9th Cir. 2006)(" With all due respect to the California Court of Appeal, and even with the additional layer of deference mandated by AEDPA, we conclude that the Court of Appeal unreasonably applied *Jackson* when it held the evidence to be sufficient to convict Smith of causing Etzel's death. There was simply no demonstrable support for shaking as the cause of death. As a result of the unreasonable application of *Jackson*, there has very likely been a miscarriage of justice in this case.")

Garcia v. Carey, 395 F.3d 1099, 1104-1105 (9th Cir. 2005) ("Without this evidentiary link, it is unreasonable to conclude that a rational jury could find that Garcia committed this robbery with the specific intent to facilitate other gang crimes. There was simply a total failure of proof of the requisite specific intent. The district court correctly granted habeas relief on the gang enhancement, and on the firearm enhancement that depended on it.")

Juan H. v. Allen, 408 F.3d 1262, 1277 (9th Cir. 2005)("The California Court of Appeal decision affirming the conviction of Juan H. was an unreasonable application of the Fourteenth Amendment requirement that the prosecution present evidence sufficient to prove every element of a crime beyond a reasonable doubt. . . . . The record contains manifestly insufficient evidence ")

AMICUS CURIAE BRIEF

No. 08-559

IN THE

Supreme Court of the United States

E.K. MCDANIEL, WARDEN AND THE ATTORNEY GENERAL OF THE STATE OF NEVADA,
Petitioners,

v.

TROY BROWN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. FALSE OR MISLEADING STATISTICAL PRESENTATION OF DNA EVIDENCE IS A SERIOUS PROBLEM REQUIRING RIGOROUS SAFEGUARDS. 5

A. The Prosecutor's Fallacy Is a Dangerous Misuse of DNA Evidence. 6

B. Courts Carefully Monitor The Presentation Of DNA Evidence to Protect Against The Prosecutor's Fallacy and Other Misleading Testimony. 10

II. THE NINTH CIRCUIT CORRECTLY HELD THAT THE INTRODUCTION OF FALSE DNA TESTIMONY AT RESPONDENT'S TRIAL VIOLATED THE DUE PROCESS CLAUSE AND MANDATES A NEW TRIAL 12

A. The State Committed And Then Compounded The Prosecutor's Fallacy In This Case. 13

TABLE OF CONTENTS

Page

B. The Ninth Circuit Correctly Held That Admission Of The False DNA Testimony Violated The Due Process Clause. 17

C. The Due Process Violation In This Case Was Sufficiently Prejudicial To Warrant A New Trial. 21

D. The Court Should Not Resolve Any Questions Arising From The Ninth Circuit's Due Process or Harmless Error Analyses In This Posture. 27

CONCLUSION 28

TABLE OF AUTHORITIES

Page(s)

CASES

Brecht v. Abrahamson,
507 U.S. 619 (1993).....4, 21, 26

Chapman v. California,
386 U.S. 18 (1967)..... 23

Dist. Attorney's Office for the Third Judicial Dist. v. Osborne,
129 S. Ct. 2308 (2009)..... 28

Francis v. Franklin,
471 U.S. 307 (1985)..... 18

Fry v. Pliler,
551 U.S. 112 (2007)..... 21

Harvey v. Horan,
285 F.3d 298 (4th Cir. 2002)..... 2

Jackson v. Virginia,
443 U.S. 307 (1979)..... 3, 22

Manson v. Brathwaite,
432 U.S. 98 (1977)..... 20

Mazer v. Stein,
347 U.S. 201 (1954)..... 27

Melendez-Diaz v. Massachusetts,
129 S. Ct. 2527 (2009)..... 8

People v. Coy,
620 N.W.2d 888 (Mich. App. 2000) 10

People v. Watley,
667 N.Y.S.2d 376 (N.Y. App. Div. 1997)..... 11

Sholler v. Commonwealth,
969 S.W.2d 706 (Ky. 1998) 10

TABLE OF AUTHORITIES
(continued)

Page(s)

State v. Bloom,
516 N.W.2d 159 (Minn. 1994)..... 11

State v. Hannon,
703 N.W.2d 498 (Minn. 2005)..... 11

State v. Roman Nose,
667 N.W.2d 386 (Minn. 2003)..... 11

United States v. Bishop,
959 F.2d 820 (9th Cir. 1992)..... 22

United States v. Chischilly,
30 F.3d 1144 (9th Cir. 1994).....11, 12

United States v. Collins,
395 F. Supp. 629 (M.D. Pa. 1975) 18

United States v. Gwaltney,
790 F.2d 1378 (9th Cir. 1986)..... 11

United States v. Massey,
594 F.2d 676 (8th Cir. 1979)..... 12

United States v. Yee,
134 F.R.D. 161 (N.D. Ohio 1991)..... 5

Wigglesworth v. Oregon,
49 F.3d 578 (9th Cir. 1995)..... 22

STATUTES

Nev. Rev. Stat. § 175.211.....17, 18

OTHER AUTHORITIES

Brief for Respondent, *Dist. Attorney's Office for the Third Judicial Dist. v. Osborne*, No. 08-6 (2009) 2

TABLE OF AUTHORITIES
(continued)

Page(s)

Edwards Connors et al., Department of Justice, *Convicted by Juries, Exonerated by Science* (1996) 2

I.W. Evett, *Evaluating DNA Profiles in a Case Where the Defence Is "It Was My Brother,"* 32 J. Forensic Sci. Soc. 5 (1992) 17

Brandon L. Garrett, *Claiming Innocence*, 92 Minn. L. Rev. 1629 (2008) 5

Eugene Gressman et al., *Supreme Court Practice* (9th ed. 2008) 27, 28

Richard Lempert, *Some Caveats Concerning DNA as Criminal Identification Evidence: With Thanks to the Reverend Bayes*, 13 Cardozo L. Rev. 303 (1991).....6, 7, 9, 17

Samuel Lindsey, Ralph Hertwig & Gerd Gigerenzer, *Communicating Statistical DNA Evidence*, 43 Jurimetrics J. 147 (2003)..... 5, 6, 7

William C. Thompson & Edward L. Schumann, *Interpretation of Statistical Evidence in Criminal Trials: The Prosecutor's Fallacy and the Defense Attorney's Fallacy*, 11 Law & Hum. Behav. 167 (1987).....7, 9, 13, 26

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

This brief is submitted on behalf of the National Association of Criminal Defense Lawyers ("NACDL") as *amicus curiae* in support of Respondent.[1]

INTEREST OF *AMICUS CURIAE*

NACDL is a nonprofit organization with a direct national membership of more than 12,500 attorneys, in addition to more than 35,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional association that represents public defenders and private criminal defense lawyers at the national level. The American bar Association ("ABA") recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL routinely files *amicus curiae* briefs in criminal cases in this Court and other courts.

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Modern DNA evidence, uniquely probative of both guilt and innocence, can be a powerful tool in the administration of criminal justice. DNA evidence has played a critical role in exonerating individuals who have been wrongfully convicted, and sometimes sentenced to death, on the basis of what seemed to be substantial evidence of guilt. *See, e.g.*, Edwards Connors et al., Department of Justice, *Convicted by Juries, Exonerated by Science* 15-18 (1996); *see also* Brief for Respondent at 3-5, *Dist. Attorney's Office for the Third Judicial Dist. v. Osborne*, No. 08-6 (decided June 18, 2009). Likewise, advances in DNA testing have "rendered it literally possible to confirm guilt," as well as innocence, "beyond any question whatsoever, at least in some categories of cases." *Harvey v. Horan*, 285 F.3d 298, 305 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc).

Precisely because it is so compelling, however, DNA evidence can be misused in a way that has especially dire consequences. This case illustrates what can go wrong when a court fails to guard against the introduction of inaccurate testimony regarding DNA evidence. At respondent Troy Brown's trial, the state's DNA expert – Renee Romero, of the county sheriff's office – testified that DNA evidence established a "99.999[9]67 percent" likelihood that Brown was the assailant who committed the crime in question.[2] Pet. App. 7a. That was incorrect. As the

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[2] Because the Ninth Circuit relied on a trial transcript that seems to have erroneously omitted a "9," its opinion attributes

Ninth Circuit explained below, Romero's analysis falls into a category of error common enough to merit its own short-hand designation: the "prosecutor's fallacy," so called because it may overestimate "source probability," or the likelihood that DNA evidence originated with a given suspect, by conflating it with "random-match probability," or the chance that DNA evidence would match a randomly selected sample. *Id.* at 15a.

The admission of this kind of false statistical evidence is a serious and often, as here, highly prejudicial error. By testifying incorrectly that DNA evidence made it 99.999967 percent likely that respondent was guilty – and then helpfully clarifying that this left only a ".000033" chance of innocence, *see id.* at 40a – the state's expert effectively directed a verdict of guilt. Given the gravity of that error, rendered especially profound by the weakness of the rest of the case against respondent, the Ninth Circuit correctly deemed admission of the "inaccurate and misleading" evidence a due process violation warranting a new trial. Pet. App. 19a ("[A]dmission of Romero's unreliable and misleading testimony violated Troy's due process rights . . . .").

Petitioner sought certiorari solely to review the Ninth Circuit's application of *Jackson v. Virginia*, 443 U.S. 307 (1979). *See* Petition for Certiorari i.

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a "99.99967 percent" to Romero instead of the 99.999967 percent to which she apparently testified. *See* U.S. Br. 9 n.3 (noting transcript error). This brief cites the actual 99.999967 percent figure throughout. Not that it matters: Either way, Romero's testimony was false; and either way, it effectively instructed the jury that respondent's guilt was scientifically proven beyond a reasonable doubt. *See infra* at 18-19.

But on one point *amicus* NACDL agrees with petitioner and the United States: This is no typical *Jackson* case. The Ninth Circuit did not evaluate all of the evidence presented to the jury, as is standard practice under *Jackson*. U.S. Br. 18. Nor, as the United States emphasizes, did the Ninth Circuit order an acquittal, the only appropriate relief under *Jackson*, *id.* at 1, 15, 17, 31. Instead, it remanded respondent for a new trial, *id.* at 32 n.15 – a course of action that would be impermissible had respondent's first conviction violated *Jackson*.

Particularly in light of that disposition, the best reading of the opinion below – the one that does most to minimize, if not entirely resolve, its internal contradictions – is that the Ninth Circuit did not in fact decide this case on *Jackson* grounds. Rather, it held that the admission of Romero's false testimony deprived respondent of his due process rights, Pet. App. 19a, and then, applying a *Jackson* gloss to its harmless-error review, deemed that error prejudicial because no reasonable juror could have convicted absent the false testimony, *id.* at 21a. That harmless-error standard demands more of a habeas petitioner than is actually required under *Brecht v. Abrahamson*, 507 U.S. 619 (1993). By clearing even that heightened standard, respondent certainly has established the necessary prejudice. But even if there were questions arising from the Ninth Circuit's due process or harmless-error analyses, they are not questions raised by the state's petition for certiorari. Accordingly, if the Court is not prepared to affirm the decision below on the grounds argued by respondent, *see generally* Brief for Respondent, then it may

wish to consider dismissing the petition as improvidently granted.

ARGUMENT

I. FALSE OR MISLEADING STATISTICAL PRESENTATION OF DNA EVIDENCE IS A SERIOUS PROBLEM REQUIRING RIGOROUS SAFEGUARDS.

Modern DNA testing produces scientific evidence that is "uniquely probative . . . if preserved and tested properly." Brandon L. Garrett, *Claiming Innocence*, 92 Minn. L. Rev. 1629, 1647 (2008). But that evidence also must be explained properly to the jury. Otherwise, "the jury does not know what to make of the fact that [DNA] patterns match: the jury does not know whether the patterns are as common as pictures with two eyes, or as unique as the Mona Lisa." *United States v. Yee*, 134 F.R.D. 161, 181 (N.D. Ohio 1991).

A DNA "match" occurs when all of the human genome materials or "alleles" in a genetic sample taken at a crime scene are identical to those of a given individual. Pet. App. 17a n.5; U.S. Br. 3. But by itself, the fact of a DNA match establishes only that an individual *could* be the source of a genetic evidentiary sample. *See* Samuel Lindsey, Ralph Hertwig & Gerd Gigerenzer, *Communicating Statistical DNA Evidence*, 43 Jurimetrics J. 147, 148 (2003). Whether that person is in fact the source depends, first of all, "on the integrity of the analysis," *id.*, as laboratory or other errors in the testing process may render a putative match meaningless. It also turns on "the rarity of the DNA profile in question," *id.*, a function

of the size and composition of the population of potential suspects. *See* Richard Lempert, *Some Caveats Concerning DNA as Criminal Identification Evidence: With Thanks to the Reverend Bayes*, 13 Cardozo L. Rev. 303, 306 (1991).

Determining the evidentiary weight to be accorded a DNA match requires evaluation of all of those factors, along with any benign reason that an innocent person's genetic material might be at a given crime scene. *See* Lindsey et al., *supra*, at 148. Because that ultimate probability assessment is "tangled in a web of statistical complexities," *id.* at 147-48, it is especially important that the jury be educated and not misled as to the meaning of a DNA match. *Id.* (citing "growing need to present such statistical scientific evidence in a form that judges and jurors can understand").

A. The Prosecutor's Fallacy Is a Dangerous Misuse of DNA Evidence.

One common and particularly damaging way in which a jury may be misled about the meaning of a DNA match is through the "prosecutor's fallacy" at issue in this case. The prosecutor's fallacy confuses two distinct probabilities: "random-match probability" and "source probability." *See* Lindsey et al., *supra*, at 150-51. Random-match probability is the probability that a person selected at random from the overall population would have DNA that matched a genetic sample recovered at a crime scene. Source probability, by contrast, is the probability that a given person is actually the source of the DNA found at the crime scene, given expert tes-

timony of a DNA match. *See* Lempert, *supra*, at 306; *see also* U.S. Br. 26 n.11. The prosecutor's fallacy falsely asserts that source probability is equal to one minus the random-match probability – in this case, that given a random-match probability of one in three million, the likelihood that respondent was the source of the crime-scene DNA was 99.999967. Or, put differently, the fallacy wrongly submits that random-match probability is tantamount to the probability that the defendant is *not* the source of the incriminating DNA. *See* Lindsey et al., *supra*, at 150; *see also* U.S. Br. 25-26 & n.11.[3]

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[3] The actual relationship between the source probability and the random-match probability involves a significantly more complicated equation. It depends on a formula known as Bayes' Theorem, and several other factors including the composition of the pool of potential suspects and the laboratory's testing error rate. Bayes' Theorem states that:

$$p(source|match) = \frac{p(source)p(match|source)}{p(source)p(match|source) + p(not\ source)p(match|not\ source)}$$

See William C. Thompson & Edward L. Schumann, *Interpretation of Statistical Evidence in Criminal Trials: The Prosecutor's Fallacy and the Defense Attorney's Fallacy*, 11 Law & Hum. Behav. 167, 170 n.2 (1987). The term p(source | match) is the source probability, or the probability that the defendant was the actual source of the DNA at the crime scene given the fact that the prosecution's expert reported a match. The terms p(source) and p(not source) are the "prior probabilities," or the probabilities that the defendant was or was not, respectively, the actual source of the DNA at the crime scene based on all the other evidence before considering the DNA evidence. The terms p(match | source) and p(match | not source) are the probabilities that the prosecution's expert would report a match if the defendant were or were not, respectively, the actual source of the DNA at the crime scene. *See id.*

The problem that gives the prosecutor's fallacy its name is this: In actuality, source probability may be lower (and thus the defendant more likely innocent) than the probability of guilt produced by the prosecutor's fallacy. *See* Pet. App. 16a ("probability of finding a random match can be much higher than the probability of matching one individual"). As recognized by courts and commentators across the country warning about the prosecutor's fallacy, random-match probability represents only the chance that the DNA of an individual chosen at random from the suspect population (typically a racial group) would match the specimen collected from a crime scene. It does not and cannot establish the odds that a particular suspect is in fact the source of that crime-scene specimen.

That is because source probability is affected not only by random-match probability, but also by other factors – factors that may reduce source probability but are wrongly disregarded by the prosecutor's fallacy. For instance, the probability of laboratory error or contamination of a DNA sample (whether intentional or inadvertent) must be factored into source probability, but is discounted entirely by the prosecutor's fallacy.[4] Similarly, source probability,

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[4] Accounting for laboratory error – which the prosecutor's fallacy fails to do – is particularly important because "forensic evidence is not uniquely immune from the risk of manipulation." *See Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2536 (2009); *see also Dist. Attorney's Office for the Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308, 2327-28 (2009) (Alito, J., concurring) ("Indeed, modern DNA testing technology is so powerful that it actually increases the risks associated with mishandling evidence.").

unlike the prosecutor's fallacy, takes account not only of the DNA match, but also of the weight of the *non*-DNA evidence against the defendant. *See* Lempert, *supra*, at 317.[5] Finally, and highly relevant here, the probability that a suspect's relative was the source of crime-scene DNA is critical to determining source probability but rendered irrelevant by the prosecutor's fallacy. *Id.* at 325.

As a result, an expert DNA witness, cloaked with scientific credibility, may end up presenting a jury with statistics that are simply false, in that they overestimate the likelihood that a defendant is the source of crime-scene DNA. Indeed, that is precisely what happened in this case, a point nobody disputes. And if that incorrect source-probability number is high enough, as 99.999967 percent surely is, then that false testimony is likely to carry so much weight that it discourages the jury from considering non-DNA evidence which may lead to a reasonable doubt about the perpetrator's identity or the defendant's guilt. *See* Thompson & Schumann, *supra*, at 170-71, 182 (warning that the prosecutor's fallacy "could lead to serious error, particularly where the other

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[5] Indeed, for this reason, expert testimony as to source probability is always problematic. Because source probability turns in part on the weight of the non-DNA evidence, determining the probability accurately requires a DNA expert to consider non-scientific evidence – invading the province of the jury and adding undue weight to the incriminatory nature of a DNA match. *See* Lempert, *supra*, at 317-18 ("If the expert's judgment regarding the existence and probative value of a DNA match is influenced by her knowledge of other incriminatory information, the jury's estimate of the incriminatory weight of the DNA evidence will be inappropriately high.").

evidence in the case is weak and therefore the prior probability of guilt is low").

B. Courts Carefully Monitor The Presentation Of DNA Evidence to Protect Against The Prosecutor's Fallacy and Other Misleading Testimony.

None of the potential pitfalls discussed above would come as a surprise to courts across the country facing the challenges associated with DNA evidence. Aware of the significant risk that juries might be misled by the presentation of DNA evidence, those courts are implementing necessary safeguards to ensure that such evidence is accurately and meaningfully explained to juries.

Perhaps most important, most state courts will not allow stand-alone testimony that a defendant's DNA "matches" a crime-scene sample; instead, the state must present statistical testimony explaining the significance of a match. *E.g.*, *People v. Coy*, 620 N.W.2d 888, 896 (Mich. App. 2000) (holding that failure to offer statistical evidence clarifying significance of possible DNA match was plain error, and observing that "[i]t appears that the majority of other states' courts share the view that evidence of a DNA match without accompanying statistical interpretation is meaningless and inadmissible."). Other courts have permitted evidence of DNA matches without explanatory statistics only because the expert witnesses otherwise made clear that a "match" does not mean that a defendant is the source of crime-scene DNA. *See Sholler v. Commonwealth*, 969 S.W.2d 706, 709–10 (Ky. 1998) (expert testified

that "match" did not mean that defendant was source of the DNA sample); *People v. Watley*, 667 N.Y.S.2d 376, 376 (N.Y. App. Div. 1997) (expert conceded that the DNA "could have come from others in the general population").

Most relevant here, courts strive to prevent the logical error that was committed in this case: permitting the jury to "use the probability evidence as a measure of the probability of the defendant's guilt or innocence, thereby undermining the presumption of innocence." *State v. Roman Nose*, 667 N.W.2d 386, 397 (Minn. 2003). To guard against this possibility, some courts allow the admission of random-match probability evidence only when the expert refrains from suggesting that random-match probability may be equated with the probability of a defendant's guilt, *see United States v. Gwaltney*, 790 F.2d 1378, 1383 (9th Cir. 1986) (government did not attempt "to reduce the ultimate question of innocence or guilt to one of mathematical probabilities"); *State v. Hannon*, 703 N.W.2d 498, 509 (Minn. 2005) (expert "did not give a bald percentage that the jury could mistake for a measure of the probability of [the defendant's] guilt"), or from putting undue emphasis on the random-match statistic, *Roman Nose*, 667 N.W.2d at 397.

At a minimum, courts generally prohibit testimony purporting to identify a particular defendant as the definitive source of crime-scene DNA. *State v. Bloom*, 516 N.W.2d 159, 168 (Minn. 1994) (expert could not testify that a particular DNA profile was "unique" or that the defendant was the source of the DNA); *see also United States v. Chischilly*, 30 F.3d

1144, 1158 (9th Cir. 1994) (affirming admission of statistical DNA evidence only because the prosecution "was careful to frame the DNA profiling statistics presented at trial as the probability of a random match, not the probability of the defendant's innocence that is the crux of the prosecutor's fallacy"). Indeed, similar testimony has led to reversal even under plain-error review. *United States v. Massey*, 594 F.2d 676, 681 (8th Cir. 1979) (reversing as plain error because prosecutor "infused in the minds of the jury the confusion in identifying the hair with identifying the perpetrator of the crime").

II. THE NINTH CIRCUIT CORRECTLY HELD THAT THE INTRODUCTION OF FALSE DNA TESTIMONY AT RESPONDENT'S TRIAL VIOLATED THE DUE PROCESS CLAUSE AND MANDATES A NEW TRIAL.

The risk that DNA evidence will be presented to the jury in a false and misleading light fully materialized in this case. The state's DNA expert, an employee of the Washoe County Sheriff's Office, made two errors in her DNA testimony: She committed the prosecutor's fallacy, incorrectly conflating random-match probability with source probability; and she compounded that mistake by underestimating the chance that the crime-scene DNA was attributable to one of respondent's brothers (at least some of whom were among the suspect pool). Together, those errors led to false testimony of a "99.999[9]67 percent" likelihood that respondent was the source of the incriminating DNA, and rendered respondent's trial so "fundamentally unfair as to violate federal

due process." Pet. App. 18a . And that violation occurred under exactly the circumstances experts have warned are most likely to produce a miscarriage of justice: where there are real deficiencies in the state's non-DNA case against the defendant. *See* Thompson & Schumann, *supra*, at 170-71. Given "the weakness of the remaining evidence against" respondent, Pet. App. 17a, the Ninth Circuit properly ruled that a new trial is required.

A. The State Committed And Then Compounded The Prosecutor's Fallacy In This Case.

1. The false DNA testimony in this case began with the classic prosecutor's fallacy. The state's expert, Ms. Romero, testified first that the random-match probability in this case – the chance that the DNA of a randomly selected individual would match the crime-scene DNA – was one in three million. And then, the fallacy: Romero went on to inform the jury that this random-match probability was equivalent to a scientific finding that "there was a 99.999[9]67 percent chance that Troy was the assailant." Pet. App. 7a; *see also supra* at 3. And in case that formulation did not resonate sufficiently, the prosecutor had Romero rephrase the same mistake and testify that the likelihood of respondent's innocence was .000033, for emphasis using a blackboard to subtract 99.999967 from 100. J.A. 459-60. Finally, the prosecutor relied on these false statistics in his closing argument, arguing that the jury could be "99.999967 percent sure" that respondent committed the crime. J.A. 730.

This is a textbook case of the prosecutor's fallacy. Indeed, neither the state nor the United States contests that Romero's crucial assessment of source probability was rendered incorrect by the prosecutor's fallacy. *See* Brief for Petitioners at 54-55 ("Romero committed this fallacy in her testimony"); U.S. Br. 26 (explaining legitimate concerns about prosecutor's fallacy). What sets this case apart is that Romero compounded that initial error with a second false statement – one that was, in the district court's view, even more significant than the first, Pet. App. 40a – when she "inaccurately minimized the likelihood that [respondent] Troy's DNA would match one of his four brothers' DNA, thus underestimating the likelihood that one of Troy's brothers could have been the perpetrator," *id.* at 17a.

2. At trial, Romero testified that there was a 1 in 6500 chance that there would be a match between respondent's DNA and that of one of his four brothers. That testimony was false on at least two different levels. First, Romero based her statistic on an underlying finding that there is a "25 percent chance that two brothers share both alleles at a single locus in common." *Id.* at 41a. But even accepting that premise, Romero's mathematical calculation was erroneous; it would follow that there is a 1 in 1024 chance, rather than 1 in 6500, that respondent's DNA would match the DNA of one of his four brothers. *Id.* at 17a–18a.

Second, and more fundamentally, Romero's underlying premise was incorrect. According to the uncontradicted expert report introduced on federal ha-

beas and known as the "Mueller Report,"[6] Romero erred when she testified without elaboration or caveat that there is a 25 percent chance that two brothers will share both alleles at one locus. That conclusion is correct only in the "special case" in which "both parents are heterozygotes and share at most one allele in common. For other possible parental pairs the probability of two sib[ling]s matching could be 50% or 100%." J.A. 1582. In other words, to support her testimony, Romero "chose[] a special case which suggests that sib[ling]s have the lowest chance of matching that is biologically possible." *Id.*; *see also* Pet. App. 18a (Romero's testimony "presented the narrowest interpretation of the DNA evidence").

In fact, instead of the 1 in 6500 chance of a sibling match to which Romero testified, the more accurate probability of a sibling match is 1 in 66. *Id.* Even on its face, that difference is highly significant; as the Ninth Circuit explained, the actual probability of 1 in 66 is "almost one hundred times the probability asserted by Romero." *Id.* But on the facts of this case, the difference is critically important. This is not a case in which the possibility of a sibling perpetrator is a remote hypothetical. All four of respondent's brothers lived relatively near to respon-

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[6] In federal habeas proceedings, Respondent submitted the report of Dr. Lawrence Dochez Mueller, a professor at the Ecology and Evolutionary Biology Department at the University of California, Irving. *See* J.A. 1581–84. The district court admitted the report because "the thesis of the report was argued during" Brown's state post-conviction proceedings, and because the state offered "no scientific evidence or information to counter Mueller's conclusions." Pet. App. 41a nn.2–3

dent and the scene of the crime. Two of them lived in the same small town where the crime occurred. And most compelling of all, one of respondent's brothers actually had been identified by the victim, not once but twice, as the assailant the police were seeking. Pet. App. 18a. A juror may well have harbored serious doubt as to whether one of Troy Brown's brothers had committed the crime – at least until Romero testified falsely that there was only a 1 in 6500 chance, rather than the much higher 1 in 66 chance, that a brother could have been the source of the DNA at the scene.

3. Cases like this one, in which the defendant's relatives are among the suspect pool, present a kind of perfect storm for inaccurate DNA testimony. As is clear from this case, estimating the probability of a sibling match is itself a complex undertaking, with the potential for serious error. But even if that process is completed perfectly, there is still the problem of the prosecutor's fallacy. As discussed above, *see supra* at 9, one of the factors that is improperly disregarded when random-match probability is conflated with source probability is the possibility of a blood-relative match. A defendant like Troy Brown is much more likely to share alleles with his brothers than with a person chosen at random. If the suspect population in his case includes at least some of his brothers (as it surely does), then the actual probability that respondent is the source of the crime-scene DNA decreases. But that decrease is not reflected if a DNA expert like Romero improperly uses random-match probability as a substitute for a full analysis of source probability. In short, the effects of prosecutor's fallacy are aggravated when, as in this case, a

defendant's relatives are among the suspect pool. *See* Lempert, *supra*, at 312 (when relatives are in suspect pool, probability that DNA would show a "match" even when defendant was not the source "will often be much higher" than random-match probability); I.W. Evett, *Evaluating DNA Profiles in a Case Where the Defence Is "It Was My Brother,"* 32 J. Forensic Sci. Soc. 5, 7-8 (1992).

B. The Ninth Circuit Correctly Held That Admission Of The False DNA Testimony Violated The Due Process Clause.

1. As the Ninth Circuit implicitly recognized, not every evidentiary error rises to the level of a Due Process Clause violation. But the admission of Romero's "misleading" DNA testimony, Pet. App. 3a, 16a, 18a, 19a, was not a garden-variety error. Instead, as the court below concluded, that error was sufficiently grave and consequential that it rendered respondent's trial "so fundamentally unfair as to violate federal due process." *Id.* at 18a.

The state's DNA expert testified that there was a 99.999967 percent chance that respondent was the source of the crime-scene DNA and, conversely, that there was only a .000033 chance that respondent was not the assailant. *See supra* at 3. That testimony, as discussed above, was concededly inaccurate. It also was tantamount to a directed verdict, effectively precluding the jury from voting to acquit.

Juries in Nevada are instructed that conviction does not require absolute certainty of a defendant's guilt. "Mere possible" or "speculat[ive]" doubt is not

enough to warrant acquittal; only "such . . . doubt as would govern or control a person in the more weighty affairs of life" constitutes the "reasonable doubt" that is a bar to conviction. Nev. Rev. Stat. § 175.211. In short, Nevada jurors are instructed that they may and should vote to convict on something less than 100 percent certainty of guilt. Against that backdrop, scientific testimony putting the percentage likelihood of guilt at 99.999967 has the same effect as a directed verdict. No reasonable juror, that is, could have understood that some percentage of certainty under 100 was sufficient to support a conviction and also believed that 99.999967 was not enough. *Cf. Francis v. Franklin*, 471 U.S. 307, 315-16 (1985) (in evaluating whether impermissible mandatory presumption has been applied against a criminal defendant, courts must consider "what a reasonable juror could have understood the charge as meaning").

Moreover, as the United States emphasizes in its brief, *see* U.S. Br. 25-27, the jury was in no position to identify the flaws in Romero's testimony for itself, or even to question its credibility. The false testimony at issue here was expert testimony, steeped in highly technical science and statistics. Because of its "aura of special reliability and trustworthiness," that kind of evidence is particularly powerful to juries. *United States v. Collins*, 395 F. Supp. 629, 637 (M.D. Pa. 1975). And even if a juror were inclined to take a hard look, he or she almost certainly would lack the "specialized knowledge" necessary to draw independent conclusions. U.S. Br. 26 ("most educated lay-persons – and indeed, most lawyers – lack" technical knowledge necessary to understand prose-

cutor's fallacy). As the United States explains, "without specialized knowledge of genetics, DNA, and probability theory, a typical juror would not have a sound reason to reject the accuracy of Romero's uncontradicted assessment" of the relevant probabilities. *Id.*

In short, the jurors had neither reason nor capacity to discount Romero's false scientific testimony. That testimony, in turn, was almost uniquely prejudicial, assessing the probability of respondent's guilt at 99.999967 percent when jury instructions made clear that something less than 100 percent was required. Under those circumstances, the Ninth Circuit did not err in finding that respondent's trial had been rendered "fundamentally unfair" by the false DNA testimony.

2. The United States argues that "questions concerning the reliability of evidence, such as those raised by the court of appeals in this case," do not implicate the Due Process Clause, and are instead governed exclusively by state evidentiary rules. U.S. Br. 28. But that is not always the case, and it is not the case here.

First of all, there are no "questions concerning the reliability" of Romero's expert testimony. The problem here is not lingering "questions" about whether Romero got her testimony right, or about the "inherent reliability," *see id.*, of her scientific method. The problem is that Romero assuredly got it wrong, and testified falsely that there was a 99.999967 percent chance that respondent was the source of the crime-scene DNA.

Second, as the United States explains, when the Court has concluded that "inherently unreliable" testimony does not violate the Due Process Clause, it has done so on the grounds that "it is the province of the jury to weigh the credibility" of witness testimony. *Id.* at 28 (quoting *Kansas v. Ventris*, No. 07-1356 (Apr. 29, 2009), slip op. 7 n.*). But as the United States itself makes clear, that maxim cannot apply in this case, where the jury lacked the "specialized knowledge" necessary to judge for itself whether Romero's testimony was true or false. *See supra* at 18-19; U.S. Br. 26.

In fact, this Court has indeed held that the Due Process Clause may be violated by the introduction of evidence much like that at issue here: unreliable eyewitness identifications. Like DNA-identification testimony, eyewitness-identification testimony, whether true or false, may be particularly compelling to jurors. And under this Court's precedents, there is no question but that unreliable eyewitness-identification testimony may violate the Due Process Clause. *See, e.g., Manson v. Brathwaite*, 432 U.S. 98 (1977). The same principles apply here.

The United States argues that the eyewitness-identification cases are inapposite because they turn on "governmental practice[s]" that unnecessarily corrupt an identification, rather than on reliability itself. U.S. Br. 30 n.13. But as *Manson* makes clear, "reliability is the linchpin" of the Due Process Clause analysis. 432 U.S. at 114; *see also id.* at 127 (Marshall, J., dissenting) ("[s]uggestively obtained eyewitness testimony is excluded . . . precisely because of its unreliability"). And while cases like *Manson*

do require, to show a Due Process Clause violation, that there be some "governmental practice" linked to the unreliability of the eyewitness identification, that condition is certainly fulfilled here. It was the prosecutor in this case who tenaciously elicited the testimony that there was only a .000033 percent chance that respondent was innocent, and then in his closing argument told the jury that it "could be 99.999967 percent sure that [respondent] committed the crime." Pet. App. 37a. And in any event, Romero herself, the source of the "unreliable" identification in this case, was a state actor, employed by the County's own Sheriff's Office. Nothing about the "government practice" prong of *Manson* distinguishes that case from this one.

C. The Due Process Violation In This Case Was Sufficiently Prejudicial To Warrant A New Trial.

After finding that admission of Romero's false testimony rose to the level of a Due Process Clause violation, the Ninth Circuit went on to conclude that the violation was sufficiently prejudicial to require a new trial. Pet. App. 21a (ordering that respondent be retried with 180 days or released). Though the Ninth Circuit's reasoning on this point may have been erroneous, its ultimate conclusion is correct.

1. Because this case arose on habeas review, the court below should have conducted its harmless-error inquiry pursuant to *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993), asking whether the due process error "had substantial and injurious effect or influence in determining the jury's verdict." *See also Fry v. Pliler*, 551 U.S. 112, 121-22 (2007). Instead, the

Ninth Circuit seems to have applied the insufficiency standard of *Jackson v. Virginia*, 443 U.S. 307 (1979), asking whether, absent the improperly admitted testimony, "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Pet. App. 13a (italics in original).

The import of the Ninth Circuit's multiple references to *Jackson* is admittedly unclear, and no account of the opinion below can resolve all of its internal contradictions. But the best reading of that opinion is that the Ninth Circuit borrowed the *Jackson* standard to engage in what otherwise would have been unremarkable harmless-error review. Such an unorthodox use of *Jackson* is not without precedent in the Ninth Circuit.[7] Moreover, there is

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[7] In *Wigglesworth v. Oregon*, 49 F.3d 578 (9th Cir. 1995), for instance, another Ninth Circuit panel employed *Jackson* in the same way. The court there first held a lab report unconstitutionally unreliable under the Due Process Clause. It went on, citing *Jackson*, to consider whether, absent the lab report, the evidence was sufficient to support a conviction.

Wigglesworth, in turn, cites *United States v. Bishop*, 959 F.2d 820, 828 (9th Cir. 1992), for the proposition that a *Jackson* analysis must follow any finding that the Due Process Clause has been violated by the admission of unreliable evidence. But that is not what *Bishop* says. Instead, the *Bishop* court, which reversed defendant's conviction under *Batson* and then went on to consider and reject his *Jackson* claim, holds only that when a defendant succeeds on a claim that entitles him to a new trial, it is still incumbent on the court to consider an outstanding *Jackson* claim which, if successful, would bar retrial and earn defendant an outright acquittal. *Id.* It may be that *Wigglesworth*'s over-reading of *Bishop* is the source of the Ninth Circuit's peculiar approach to harmless-error review in these cases.

no other explanation for the relief granted by the Ninth Circuit; as the United States emphasizes, the remedy for an actual *Jackson* violation is not the new trial ordered by the Ninth Circuit, but an acquittal, U.S. Br. 1, 15, 17, 31. Similarly, eliminating the improperly admitted testimony from its evaluation of the strength of the state's evidence is standard practice if and only if the Ninth Circuit is conducting harmless-error review rather than a traditional *Jackson* analysis. Finally, at the conclusion of its opinion, the Ninth Circuit itself states that it had granted respondent's petition "on due process grounds," not on *Jackson* grounds. Pet. App. 21a.

On that understanding, the Ninth Circuit erred when it used *Jackson* instead of *Brecht* to conduct its harmless-error review. But that error favored the *state*, not respondent. *Brecht* harmless-error review is stricter than that applied to constitutional errors on direct review under *Chapman v. California*, 386 U.S. 18, 24 (1967). The Ninth Circuit's *Jackson* standard, however, is stricter still: Unlike *Brecht*, which allows relief so long as an error has a "substantial and injurious effect or influence" on a jury's verdict, the Ninth Circuit, employing the language of *Jackson*, limits relief to those cases in which the properly admitted evidence is *constitutionally insufficient* to support a conviction. If, as the Ninth Circuit properly held, respondent satisfied even that inappropriately high standard, then it follows, *a fortiori*, that the *Brecht* standard was satisfied, as well.

2. Whatever the standard, the Ninth Circuit's holding that the constitutional error in this case warranted a new trial is wholly correct. The Ninth

Circuit reviewed the same "numerous inconsistencies" in the state's case that convinced the district court that any rational juror would have doubted respondent's guilt. Pet. App. 19a-21a. And it concluded, with solid basis, that "given the weakness of the remaining evidence against Troy," respondent "was most probably convicted based on the jury's consideration of false, but highly persuasive, [DNA] evidence," in the form of the prosecutor's fallacy and Romero's 99.999967 percent testimony. *Id.* at 17a.

First, there is ample record evidence suggesting that respondent was not in fact the assailant in question. There are questions about whether respondent could have been at the scene of the crime at the relevant time: One witness testified that respondent was elsewhere when the crime was committed. *Id.* at 19a-20a. Then there is the problem of the clothing: The descriptions of the assailant's clothes provided by both the victim, Jane Doe, and two other witnesses do not match the clothing that respondent was wearing at the relevant time. *Id.* at 5a-6a.[8] Though Doe stated that she had bitten her

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[8] Jane Doe told the police on the night of the assault that her attacker "did not wear a hat," wore a "jacket with 'a zipper for sure'" and wore "a watch which scraped her face." Pet. App. 5a. Troy Brown was wearing a cowboy hat on the night of the attack. *Id.* at 5a-6a. Troy's black satin coat had "no zipper" and he "did not own a watch." J.A. 823; *see also id* at 908. The other witnesses who claimed to have seen a man near Jane Doe's trailer around the time of the attack – the Dokes – both described the man as wearing "a black coat with a fluorescent green skull and bandit emblem on the back." *Id.* at 887; *see also* Pet. App. 5a-6a. Troy's black satin jacket had an orange and yellow CG's logo on the back. *Id.*

attacker's hand, the police found no evidence of any bite marks on respondent's hands when they examined him the next morning, nor blood on his clothing. *Id.* And although Doe testified that her assailant turned off the nightlight in her trailer, the only print found on the nightlight did not match respondent's, and none of respondent's prints were found anywhere else on the premises. *Id.* at 6a.

Moreover, Troy Brown's behavior immediately after the assault was "inconsistent with having something to hide." *Id.* at 20a-21a. Aware that he was under suspicion, respondent arranged for a full-body examination so that he would have a record of his physical condition shortly after the attack. *Id.* at 21a. And, during questioning prior to trial and at all phases of trial proceedings, Troy continually maintained his innocence. *Id.* at 20a-21a.

By itself, this record evidence would be enough to raise substantial questions about respondent's guilt. But here it is coupled with another very plausible suspect in the case, one with a much greater than average likelihood of matching Troy's DNA: respondent's brother, Trent Brown. Trent Brown lived across the street from Doe and was in the thick of the action on the night of the crime, at the same bar as his brother and the victim's mother; like Troy, it appears that Trent also was known to the victim and her family. *Id.* at 4a. And most significantly, the victim herself twice identified Trent and not Troy as her attacker. *Id.* at 20a.[9]

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[9] When asked to describe who her attacker looked like, Doe first said "Troy," and when asked again, responded, "Trent. Yes, Trent." Pet. App. 6a. Doe also said originally that her at-

This is simply not a case in which a reviewing court could be comfortable that the false DNA testimony did not have a "substantial" effect on the jury's verdict under *Brecht*, 507 U.S. 619. The non-DNA evidence against respondent does not come close to corresponding to the 99.999967 percent likelihood of guilt to which Romero testified. And while in some other case, underestimating the likelihood of a sibling DNA match by close to 100 times – from 1 in 6500 to 1 in 66 – might not be critical, it surely was here, given that respondent's brother, twice identified by the victim as her assailant, was at least a plausible suspect. In short, this is exactly the kind of case in which the prosecutor's fallacy "substantially and injuriously" affects the jury's verdict, *see Brecht*, 507 U.S. at 631: A case in which jury never focuses on the non-DNA evidence pointing toward acquittal because, thanks to the prosecutor's fallacy, it is presented with the scientifically-proven "fact" that the defendant is "99.999967 percent" guilty. *See* Thompson & Schumann, *supra*, at 170 (prosecutor's fallacy could lead to "serious error" where non-DNA evidence is weak and "prior probability of guilt is low").

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tacker's hair looked like Troy's, but then changed her mind and stated that it looked like Trent's. *Id.* When Doe saw a television report depicting Troy's arrest a few days after her assault, she identified the man on the television (Troy) as her attacker, *id.* at 6a-7a – but subsequently told police officers that the man on the television had sent her the flowers which came with a card signed by Trent, not Troy. *Id.* at 7a. And when shown a photo array that included Troy and nobody else known to her, Doe was unable to identify Troy as her assailant. *Id.*

D. The Court Should Not Resolve Any Questions Arising From The Ninth Circuit's Due Process or Harmless Error Analyses In This Posture.

As discussed above, the Ninth Circuit's analysis in this case – despite the misuse of *Jackson* as a standard for harmless-error review, which prejudiced respondent and not the state – was substantively correct. For that reason, *amicus* concurs in respondent's suggestion that the Court affirm the decision below on alternative due process grounds. *See* Brief for Respondent at 20.

If the Court concludes, however, that there are questions about the existence or gravity of a due process violation in this case, or about its review on federal habeas, then it should remand the case to the Ninth Circuit to address those questions in the first instance – respondent's alternative suggestion, *see id.* – or dismiss the case as improvidently granted. The Court should not itself reach out to resolve those questions, as they are not the questions upon which certiorari was granted.

The petition here was clearly and expressly limited to issues concerning sufficiency of the evidence review under *Jackson*. *See* Petition for Certiorari i. Accordingly, the Court should not resolve any of the very different due process questions that might be presented by the decision below. *See* Eugene Gressman et al., *Supreme Court Practice* 463 (9th ed. 2008) (the "Court considers only questions presented in the petition"); *see also, e.g.*, *Mazer v. Stein*, 347 U.S. 201, 206 n.5 (1954) ("We do not reach for constitutional questions not raised by the parties. The fact

that the issue was mentioned in argument does not bring the question properly before us."). Nor is this case a suitable vehicle for reaching the *Jackson* questions actually presented by the petition: Even if the Court were to agree with petitioner on every point argued, the decision below, turning as it seems to on distinct due process grounds, would remain unaffected. *Cf.* Gressman at 361 ("decision of the question upon which certiorari was granted may prove unnecessary because the judgment below was clearly correct on another ground"). Under these unusual circumstances, the wisest course may be to dismiss the petition as improvidently granted. *See id.* (dismissal of the petition may become necessary if the Court "conclude[s] that it cannot reach the question accepted for review without reaching a threshold question not presented by the petition").

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed. In the alternative, the judgment should be vacated and remanded to the Ninth Circuit, or the petition should be dismissed as improvidently granted.

Respectfully submitted,

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Dated: July 24, 2009

AMICUS CURIAE BRIEF

No. 08-559

IN THE SUPREME COURT OF THE UNITED STATES

E.K. MCDANIEL, WARDEN, ET AL.
Petitioners,

v.

TROY BROWN
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF 20 SCHOLARS OF FORENSIC EVIDENCE AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF FACTS AND CASE 2

SUMMARY OF ARGUMENT OF *AMICI CURIAE* 8

ARGUMENT 10

I. THE GOVERNMENT WRONGFULLY USURPED THE ROLE OF THE JURY WHEN IT USED INACCURATE TESTIMONY TO ARGUE THAT THE DNA EVIDENCE PROVED RESPONDENT'S GUILT. 10

II. THE JURY WAS WRONGLY INFORMED THAT THE PROBABILITY OF A FRATERNAL MATCH WAS SIGNIFICANTLY LESS LIKELY THAN WAS ACTUALLY THE CASE. 23

A. *The formula that the government's expert claimed to have used for computing the fraternal match probability was inappropriate.* 24

B. *The calculations that the expert made using the inappropriate formula were themselves incorrect* 25

C. *The misleading fraternal match testimony invited the repetition of the source probability error with regard to the fraternal match probability.* 27

D. *The government's expert wrongly implied that the source probability was unaffected by respondent's having multiple brothers.* 28

E. *The correct calculation of the fraternal match probability paints a dramatically different statistical picture than the one presented to the jury.* 30

CONCLUSION.....32

IDENTIFICATION OF *AMICI CURIAE* A-1

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INTEREST OF *AMICI CURIAE*

Amici Curiae are scholars who have published articles and books about the interpretation of forensic science evidence and about the appropriate way for experts to characterize such evidence when testifying in court.[1] Their goal is to provide information about the underlying scientific and statistical issues—information that will assist the Court in understanding the deficiencies in the scientific evidence in this case.

In this case, the District Court and Court of Appeals found that a key government witness made two critical errors when presenting DNA evidence to the jury. One of the errors arose from a mistake of logic known as "the prosecutor's fallacy." The other error concerned the likelihood of a DNA match between brothers.

Amici Curiae take no position on the procedural issues presented by this case, such as the standard of review for sufficiency of evidence claims or the rules for supplementing the record. However, they believe strongly that convictions obtained on the basis of materially false and misleading scientific testimony, such as the expert testimony presented in this case, should not be allowed to stand.

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[1] Pursuant to Rule 37.6, *Amici Curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *Amici Curiae* has made a monetary contribution to the preparation or submission of this brief. Counsel for the parties have consented to the filing of this brief.

SUMMARY OF FACTS AND CASE

In September 1994, respondent Troy Brown was convicted of sexual assault on a child. The dispositive evidence against him was a DNA test, conducted by Renee Romero of the Forensic Science Division of the Washoe County Sheriff's Office. Ms. Romero has a bachelor's degree in chemistry and a master's degree in cell biology, and had worked at the laboratory for over five years at the time of her testimony. (JA 412-13). She was a member of the Federal Bureau of Investigation's technical working group on DNA analysis methods, which creates DNA testing standards, and a provisional member of the American Academy of Forensic Sciences. (JA 413).

Ms. Romero testified that she tested both the crime-scene evidence and a known sample from Troy Brown using a DNA testing technique known as Restriction Fragment Length Polymorphism (RFLP) analysis. (JA 427).[2] Examining five loci, or places on the genomic strand, Ms. Romero concluded that Troy possessed a set of genetic characteristics that were also found in a semen stain on the victim's underwear. (JA 435-36).

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[2] For descriptions of RFLP analysis, *see generally* Norah Rudin & Keith Inman, *An Introduction to Forensic DNA Analysis* (2d ed. 2001); David H. Kaye & George F. Sensabaugh, Jr., Federal Judicial Center, *Reference Guide on DNA Evidence, in Reference Manual on Scientific Evidence* 485 (2d ed. 2000), http://www.fjc.gov/public/pdf.nsf/lookup/sciman00.pdf/$file/sciman00.pdf [hereinafter FJC Manual].

Ms. Romero was then asked to explain the strength of that match to the jury. Using what she repeatedly described as a "conservative" method, she reported that the likelihood that this particular genetic profile would be found in the population is roughly "one in 3 million." (JA 437).

The prosecutor then engaged in a series of exchanges, including a visual demonstration, intended to present this "one in 3 million" statistic in various—and he reiterated, equivalent—ways. The prosecutor invited Romero to present "another way to show that statistic" asking specifically "what is the likelihood that the DNA found in the panties [was from the defendant]" and "what would that percentage be?" (JA 458). Ms. Romero responded: "It would be 99.99[9]967 percent." (JA 458).[3] The prosecutor then asked the expert to write that percentage on a board and to subtract it from 100 percent. The display, which became Exhibit G, shows the numbers as follows:

```
100.000000
-99.999967
    .000033
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The prosecutor then asked whether it would be "fair to say" that "the likelihood that it is not Troy Brown would be .000033?" and that "just another way of looking at it" would be to say that "the chances that

[3] The transcript records Ms. Romero as saying 99.99967, but the exhibits and subsequent testimony suggest she actually said 99.999967. (JA 458).

the likelihood that ...it's not the same... would be .000033?" (JA 460-461). The expert agreed that the two expressions were equivalent, adding "[t]hat's the way the math comes out." (JA 462). Underscoring the point, the judge said: "Let's make sure. It's the same thing—it's the same math just expressed differently. Is that correct?" The witness responded: "Yes. Exactly, your Honor." (JA 462).

During cross-examination, the defense lawyer asked Ms. Romero about the probability of a DNA match between brothers. This was a relevant inquiry because Mr. Brown is one of five brothers, and two of his brothers also lived in Carlin, Nevada. (JA 1543). Two others "were within the region, residing in Loa, Utah." *Brown v. Farwell,* 3:03-cv-00712-PMP-VPC, 2006 U.S. Dist. LEXIS 98154, at *12 (D.N.V. December 14, 2006). None of the brothers were tested to determine whether they share the genetic characteristics that incriminated respondent, even though some evidence pointed in their direction. Both brothers who lived in Carlin had also been out that night with Troy, and only one had an alibi, provided by his wife. (JA 103-104, 278). Moreover, the nine-year-old victim told police at least twice that her attacker was Trent Brown, the brother whose wife gave an alibi, and she did not identify Troy as her assailant in a photo line-up, although he lived ten trailers away and had been to her home repeatedly. (JA 522-523, 533-534).

Ms. Romero testified that the chance that one of respondent's brothers would share the matching genetic characteristics was 1 in 6500. (JA 469). She

testified that she had used a formula recommended by the National Research Council to compute that number.[4] The prosecutor then asked Ms. Romero to add to Exhibit G a figure that would apply to brothers. (JA 471-472). On the exhibit, Ms. Romero wrote:

$$\begin{array}{r} 100.00 \\ \underline{-\ 99.982} \\ .02 \end{array}$$

The prosecutor asked whether it would be "fair, then, to say that the likelihood of the parents having one child, and then the very next child having the same genetic code would be .02 percent?" and Ms. Romero said "yes."[5] (JA 472). The defense lawyer

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[4] Ms. Romero testified as follows:

> In the National Research Council report, the one I spoke about earlier, the committee wrote the report under the auspices of the National Academy of Sciences, they addressed that problem....And they have a formula in there that they use...And in this case that turns out to be one in 6500. Meaning those two adults would have to mate and produce offspring 6500 times to come up with that pattern again.

(JA 469). It is clear from context that Ms. Romero was referring to a formula that appears on page 87 of the National Research Council's 1992 report. Committee on DNA Technology in Forensic Science, National Research Council, *DNA Technology in Forensic Science* 87 (1992) [hereinafter NRC 1992]. As explained below, however, she applied this formula incorrectly and, as a result, greatly understated the probability of a fraternal match.

[5] If the chances of a match were 1 in 6500, then the probability of a match would be .015 percent, rather than .02 percent. This

then asked whether the numbers would change if there were two brothers. Ms. Romero said no. (JA 472).

During his closing argument, the prosecutor argued that the DNA evidence was sufficient *by itself* to prove defendant's guilt. Recognizing the difficulty for laypersons in interpreting scientific evidence, he said that "[e]very day thousands of people get on a jet airplane and fly all over the world," even though "probably the vast majority of those people don't understand what makes a jet engine work or the mechanics or the engineering of it." (JA 723). However, "they still get on that plane and they fly," the prosecutor continued, "because it is reliable" and "it is provable."

The prosecutor closed by telling the jury that the DNA evidence proved there was a 99.999967 percent chance that Mr. Brown committed the crime:

> Now, the DNA. When you use the DNA, by itself, it's sufficient to prove beyond a shadow of a doubt that he committed this crime...
>
> ...sometimes people use the phrase, I'm 99 percent sure about that. Well, in this case the evidence shows—how sure can you be? 99.999967 percent sure. (JA 730).

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appears to have either been a small computational error of no significance or an instance of rounding off.

Respondent was convicted and the Nevada Supreme Court upheld his conviction. During subsequent federal habeas proceedings, the District Court allowed respondent to supplement the record with a report prepared by Dr. Laurence D. Mueller, Professor of Ecology and Evolutionary Biology at the University of California, Irvine (hereafter "Mueller Report").

The Mueller Report identified material statistical errors in the trial testimony and argument. Specifically, the report highlighted that Ms. Romero: (a) conflated the probability that a person picked at random would have a particular profile with the probability that someone other than respondent was the actual source of the stain, an error known as "the prosecutor's fallacy"; (b) misrepresented the probability that siblings would share a genetic profile; and (c) greatly understated the likelihood that one of respondent's brothers might share his DNA profile, reporting it to be 1 in 6500.[6]

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[6] According to Professor Mueller, were Troy to have only one brother, the probability that this *single brother* would share the genetic characteristics that linked Mr. Brown to the crime was 1 in 263. Professor Mueller based this determination on the FBI's Caucasian database and a formula published in the National Research Council's 1996 report. Committee on DNA Forensic Science: An Update, National Research Council, *The Evaluation of Forensic DNA Evidence* (1996) [hereinafter NRC 1996]. Given that Troy had four brothers, Mueller also estimated the probability of finding a match among multiple brothers. Using standard probability theory, Mueller calculated the chance that among *two brothers* one or both would match those characteristics as 1 in 132, and the chance that among *four brothers* one or more would match as 1 in 66.

Based on the Mueller report, the District Court and Court of Appeals found that Ms. Romero's testimony had been "inaccurate and misleading." *Brown v. Farwell*, 525 F.3d 787, 789 (9th Cir. 2008). Noting that the petitioners had "conceded at least twice that, absent this faulty DNA testimony there was not sufficient evidence to sustain Troy's conviction," the Court of Appeals sustained the District Court's conclusion that Mr. Brown was denied due process and affirmed the District Court's grant of the petition of habeas corpus. *Id.* at 787.

SUMMARY OF ARGUMENT OF *AMICI CURIAE*

In presenting the DNA evidence to the jury, the government's expert witness, Ms. Romero, made two critical errors: she wrongly presented the *random match probability* as a *source probability*, and she radically underestimated the probability of a sibling match among the brothers.

First, Ms. Romero equated a *random match probability* with a *source probability*. The *random match probability* is the probability that a randomly chosen person unrelated to respondent would, like respondent, match the DNA profile found in the

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By analogy, imagine rolling a pair of dice. The probability that any one roll will produce "snake eyes" is only 1 in 36, but the probability of snake eyes becomes more likely the more times one rolls. The difference between the formula (mis)used by Ms. Romero and the formula used (correctly) by Professor Mueller will be elaborated below.

semen stain. Ms. Romero estimated the chances of such a random match to be 1 in 3 million and that estimate is not contested. Based on that estimate, however, she went on to testify about the *source probability—i.e.*, the probability that respondent was the source of the semen. She told the jury, in essence, that there is only one chance in 3 million that the semen came from *someone other than respondent* and therefore only one chance in 3 million that respondent was *not* the source of the semen. As this brief will explain, her testimony about *source probability* was fallacious, scientifically groundless and misleading. It rested on a logical error that is widely recognized in both the scientific and legal literature, where it has been called the "prosecutor's fallacy," the "source probability error," and the "transposition fallacy" (as we will explain below).

Ms. Romero's second error was to vastly underestimate the probability that one of respondent's four brothers would match the profile of the stain. She told the jury that the probability of a fraternal match was 1 in 6500, but this number is wrong. When computed correctly, by a method well known to geneticists and forensic scientists, the probability that any one of the brothers considered singly would match is 1 in 263; with four brothers, the probability that at least one would match is 1 in 66. The prosecutor repeated and reinforced Ms. Romero's errors in his closing statement to the jury. Moreover, he made matters worse by using Ms. Romero's incorrect testimony to effectively usurp the jury's role, erroneously telling them that the DNA

evidence *by itself* had proven respondent's guilt beyond a reasonable doubt.

The inaccurate testimony and misleading arguments compromised the fairness of respondent's trial. *Amici Curiae* call upon this Court to remedy this unfairness and to set standards that will preclude future such errors. Forensic science has tremendous potential to contribute to the cause of justice, but that potential will be undermined if courts allow scientific evidence to be distorted and misused as it was in this case. Setting and enforcing attainable standards will help ensure that forensic science evidence in general, and DNA evidence in particular, will achieve its potential and merit its good reputation in the criminal justice system.

ARGUMENT

I. THE GOVERNMENT WRONGFULLY USURPED THE ROLE OF THE JURY WHEN IT USED INACCURATE TESTIMONY TO ARGUE THAT THE DNA EVIDENCE PROVED RESPONDENT'S GUILT.

When DNA evidence is used in a criminal trial to identify the defendant as a possible source of a biological sample, such as a semen stain, the jury must assess the *source probability*—*i.e.*, the probability that defendant was the source of the stain. But DNA evidence cannot, by itself, establish the *source probability*. It can show only that the defendant possesses a set of genetic characteristics

that were also found in the stain, and then provide information about the rarity of those characteristics. Unless the characteristics are unique, however, the DNA test cannot establish that defendant *was* the source. It can, at best, establish that he is one of a group of people who *could have been* the source, and provide data useful for estimating the size of that group.

To help jurors assess the strength of DNA evidence, experts typically offer statistics on the frequency (or rarity) of the matching DNA characteristics in various reference populations. The expert might say, as in this case, that one person in 3 million would have the matching characteristics. These statistics are often called *random match probabilities* because they reflect the probability that a randomly chosen person would have the matching characteristics.

It is easy to become confused and assume that the *random match probabilities* provided by DNA experts are equivalent to *source probabilities*. When the random match probability is one in 100, for example, people sometimes reason that if there is only a one in 100 (1 percent) chance that the defendant would match if he was *not* the source then there must be a 99 percent chance that he *is* the source. Alternatively, people sometimes think that the random match probability reflects the probability that *someone other than the defendant* would match; they then reason that if there is only a one percent chance someone else is the source then there must be a 99 percent chance defendant is the

source. Both lines of reasoning are indisputably wrong. Yet conflating *random match* and *source probability* in this way is an error so common it has come to be known as the "prosecutor's fallacy,"[7]

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[7] The term "prosecutor's fallacy" was originated by William Thompson (one of the authors of this brief) and Edward Schumann in 1987. *See* William C. Thompson & Edward L. Schumann, *Interpretation of Statistical Evidence in Criminal Trials: The Prosecutor's Fallacy and the Defense Attorney's Fallacy*, 11 Law & Hum. Behav. 167 (1987). This term has been widely used in the scholarly literature, *see, e.g.*, Dawn McQuiston-Surrett & Michael J. Saks, *Communicating Opinion Evidence in the Forensic Identification Sciences: Accuracy and Impact*, 59 Hastings L.J. 1159, 1178-79 (2008); Robert Aronson & Jacqueline McMurtrie, *The Use and Misuse of High-Tech Evidence by Prosecutors: Ethical and Evidentiary Issues*, 76 Fordham L. Rev. 1453, 1478-79 (2007); Boaz Sangero & Mordechai Halpert, *Why A Conviction Should Not Be Based on a Single Piece of Evidence: A Proposal for Reform*, 48 Jurimetrics J. 43, 44 (2007); David J. Balding, *Weight-of-Evidence for Forensic DNA Profiles* (2005); Bernard Robertson and G.A. Vignaux, *Interpreting Evidence: Evaluating Forensic Science in the Courtroom* (1995); David J. Balding & Peter Donnelly, *The Prosecutor's Fallacy and DNA Evidence*, 1994 Crim. L. Rev. 711; William C. Thompson, *Are Jurors Competent to Evaluate Statistical Evidence?*, 52 Law & Contemp. Probs. 9 (1989). The prosecutor's fallacy has been discussed both directly and indirectly in court opinions in the United States, *see, e.g.*, *United States v. Morrow*, 374 F.Supp.2d 51, 66 (D.D.C. 2005); *United States v. Shea*, 957 F.Supp. 331, 345 (D.N.H. 1997); *United States v. Chischilly*, 30 F.3d 1144, 1156-57 (9th Cir. 1994); *State v. Spann*, 617 A.2d 247, 258 (N.J. 1993); *State v. Bible*, 858 P.2d 1152, 1185 n.18 (Ariz. 1993); *State v. Bloom*, 516 N.W.2d 159, 163 (Minn. 1994), as well as abroad in the United Kingdom, *see, e.g.*, *R. v. Gray*, [2005] EWCA 3564 (Eng. C.A.); *R. v. Dallagher*, [2002] EWCA Crim. 1903 (Eng. C.A.); *R. v. Doheny*, [1997] 1 Cr. App. R. 369, 372-73 (Eng. C.A. 1996), and Australia, *see, e.g.*, *R. v. Keir*, [2002] NSWCCA 30, 127 A.

although some scholars prefer the terms "transposition fallacy"[8] or "ultimate issue error."[9] By whatever name, this mistake has been roundly condemned, including by the Federal Judicial Manual,[10] the 1996 National Research Council

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Crim. R. 198; *R. v. GK*, [2001] NSWCCA 413, 125 A. Crim. R. 315; *R. v. JCG*, [2001] NSWCCA 504, 127 A. Crim. R. 493.

[8] Some experts prefer to call this error the "fallacy of the transposed conditional," because it arises from transposing two conditional probabilities. The random match probability represents the conditional probability of a match *if* the person being tested is not the source; the source probability is the conditional probability that a person is the source *if* the person matches. *See, e.g.*, Ian W. Evett & Bruce S. Weir, *Interpreting DNA Evidence: Statistical Genetics for Forensic Scientists* 30-32, 227 (1998); Richard Lempert, *Some Caveats Concerning DNA as Criminal Identification Evidence: With Thanks to the Reverend Bayes*, 13 Cardozo L. Rev. 303, 306 (1991); Ian W. Evett, *Avoiding the Transposed Conditional*, 35 Sci. & Just. 127 (1995); *Forensic DNA Evidence Interpretation* 50-52 (John S. Buckleton, Christopher M. Triggs & Simon J. Walsh, eds., 2004); David P. Leonard, et al., *The New Wigmore: A Treatise on Evidence* (1998).

[9] Jonathan Koehler, *Error and Exaggeration in the Presentation of DNA Evidence at Trial*, 34 Jurimetrics J. 21, 27, 32 (1993). Professor Koehler uses the term "source probability error" to describe the conflation of the random match probability with source probability, and uses the term "prosecutor's fallacy" or "ultimate issue error" to describe the conflation of random match probability with the probability of guilt or innocence. Applying that taxonomy here, Ms. Romero committed the source probability error, while the prosecutor committed the prosecutor's fallacy.

[10] FJC Manual, *supra* note 2, at 539.

report on DNA,[11] and by courts in the United States and abroad.[12]

The underlying error can be demonstrated with a simple illustration. Imagine that a blood stain from a crime scene undergoes DNA testing, which reveals that it contains the gene for colorblindness. Suppose further that the defendant's DNA also has this trait, and that population studies have found that only one person in 100 in the United States has the colorblindness gene. What can we conclude from the DNA evidence about the *source probability—i.e.*, the probability that defendant is the source of the blood?

People are often surprised to realize that we can draw no meaningful conclusions about the *source probability* from the DNA evidence alone. The DNA evidence shows that the defendant falls within a small fraction of the human population (1%) consisting of people who could have been the source. But one percent of the population includes a very large number of people; the DNA evidence does not reveal which of those many people *is* the source of the blood, nor does it tell us whether any particular member of that group, such as the defendant, is any more or less likely than any other member to be the source. Hence, it cannot prove, *by itself*, that there is

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[11] NRC 1996, *supra* note 6, at 133.

[12] *See supra* note 7; *see also* Nuffield Council on Bioethics, *The Forensic Use of BioInformation: Ethical Issues* 68-72 (2007) (condemning the prosecutor's fallacy), *available at* http://www.nuffieldbioethics.org/go/ourwork/bioinformationuse/publication_441.html.

a 99 percent chance that the defendant was the source.[13]

Drawing useful conclusions about *source probability* thus generally requires considering DNA evidence in conjunction with other evidence in a case. If other evidence points strongly to defendant's guilt, a jury could reasonably conclude that there is a high likelihood that defendant is the source of the blood, even though he is only one of many people who could have been the source. In contrast, if the other evidence points to someone else, a jury could reasonably conclude that the match to defendant was just a coincidence. As any player of poker knows, seemingly improbable events sometimes occur just by chance.[14]

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[13] Members of the matching group cannot all have a 99 percent chance of being the source. Because only one can be the actual source, the probabilities that each is the source must necessarily sum to one.

[14] Another analogy may help clarify this point. Suppose you join a poker game and in the first hand one player deals herself a royal flush. This is an extremely unlikely event if the player is dealing fairly. The probability of dealing oneself a royal flush, in a random deal of cards, is only 0.000154%, or approximately one chance in 650,000. Does it therefore follow that the player is unlikely to have been dealing fairly—*i.e.*, that she is probably cheating?

A person who adopted the fallacious logic underlying Ms. Romero's testimony in this case would conclude that because there is only 1 chance in 650,000 of receiving a royal flush in a fair deal, there must therefore be only one chance in 650,000 that the player was dealing fairly, and hence a 99.999846 percent chance that she was cheating. But this conclusion would be foolish, because the low probability of getting a royal flush is but one of many facts that must be considered to assess

In light of this analysis, it should now be clear that, in a case of this type, an expert witness cannot draw conclusions about *source probability* from DNA evidence alone. If an expert expresses an opinion about *source probability*, the expert is either making a fallacious statement based on a misunderstanding of probability, or the expert is basing the opinion on information other than the scientific findings, such as an assessment of the strength of the non-scientific evidence in the case. In the former situation, the opinion about source probability is unreliable and invalid; in the latter situation, the opinion goes beyond the scope of the expert's legitimate testimony by relying upon the expert's judgment of evidence outside her scientific expertise. We contend that it is fundamentally inconsistent with both good scientific practice and with the courts' interest in providing juries with accurate and helpful expert evidence for experts to offer their own opinions about source probability.[15]

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the probability of cheating. If the dealer is a person that you believe to be of sterling character, such as a clergymember or judge, it would be quite reasonable to conclude that she just got lucky rather than cheated, notwithstanding the long odds against dealing a royal flush. If, on the other hand, the dealer is a notorious card shark, you might reasonably conclude the probability of cheating was much higher. To draw conclusions about the probability of cheating you would need to consider all the circumstances—it would be fallacious to equate the probability she was dealing fairly with the probability of dealing a royal flush.

[15] The only possible exception would be instances in which the expert determines, based solely on the scientific evidence, that two items share one-of-a-kind or unique features. In such cases, experts at times conclude with certainty that the two

matching items have a common source, which is tantamount to opining that the random match probability is effectively zero. *See* Keith Inman & Norah Rudin, *Principles and Practices of Criminalistics: The Profession of Forensic Science* (2001); William C. Thompson & Simon A. Cole, *Psychological Aspects of Forensic Identification Evidence, in Expert Psychological Testimony for the Courts* 31, 44-46 (Mark Costanzo et al. eds., 2006). We distinguish such testimony, called "individualization testimony," from source probability testimony.

Serious questions have been raised about the scientific foundations for individualization testimony. For example, a recent report of the National Research Council declared that "[w]ith the exception of nuclear DNA analysis . . . no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source." National Research Council of the National Academies, *Strengthening Forensic Science in the United States: A Path Forward*, at S-5 (Prepublication Copy Feb. 2009) [hereinafter NRC 2009]; *see also* Simon A. Cole, *Where the Rubber Meets the Road: Thinking About Expert Evidence as Expert Testimony*, 52 Vill. L. Rev. 803, 835-36 (2007). With DNA analysis, experts generally declare that two samples have a common source only when the random match probabilities are so exceptionally low as to render it unlikely that the matching profile would be duplicated in the human population. *See* NRC 1996, *supra* note 6, at 194-202. Even those conclusions are controversial because they depend on an arbitrary decision about just how low the random match probability must be for the probability of finding another matching profile to be deemed effectively zero. *Id.* at 193-95; Thompson & Cole, *supra*, at 44-46. But that issue—whether individualization might be warranted when the random match probability is sufficiently minuscule—does not arise in this case and we offer no comment on it. Our contention here is that forensic scientists should express no opinion about source probability in cases such as this one, in which no one claimed or could have credibly claimed that the matching characteristics clearly were so rare as to be unique.

Ms. Romero's testimony in this case is a classic example of the source probability error. Upon determining that respondent had a DNA profile consistent with the profile found in the semen stain, Ms. Romero used an accepted method to determine the frequency with which that profile would occur in the general population—in other words, the *random match probability*. Ms. Romero estimated the frequency to be 1 in 3 million, or .000033 percent. That estimate is not being contested although, as discussed below, it reflects the probability of a random match among people *unrelated* to Mr. Brown; the probability of a match among his relatives, particularly close relatives like brothers, would be far higher.

The problem is that Ms. Romero then repeatedly misrepresented her calculation of the *random match probability* as a statement of the *source probability*. She wrongly testified that there was a 99.999967 percent chance that Troy Brown was the source of the semen. She correspondingly averred that there was only a .000033 percent chance that he was *not* the source. These conclusions about source probability are scientifically groundless. As discussed above, the DNA evidence by itself does not allow direct evaluation of *source probability*.[16]

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[16] Given that there are over 300 million people in the United States, it would be expected that roughly 100 people in the United States share this profile (and we focus here just on people unrelated to Mr. Brown, ignoring for the moment his relatives). The DNA evidence establishes that respondent falls within that group, but it does not distinguish him from anyone else who falls within that group. Hence, it does not establish

The prosecutor compounded this error by arguing in closing that the DNA evidence, by itself, proved defendant's guilt by 99.999967 percent certainty. The prosecutor's statement was wrong in two ways. Not only did it equate *random match probability* with *source probability*, it equated *source probability* with the probability of guilt.[17]

Some scholars have proposed that experts use a mathematical formula known as Bayes' theorem[18] to make estimates of *source probability* on the basis of forensic evidence.[19] In order to apply Bayes' theorem

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the likelihood that he, rather than another group member, was the source of the semen.

[17] For a discussion of the dangers of equating source probability with the probability of guilt, see Koehler, *supra* note 9, and Laurence Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 Harv. L. Rev. 1329, 1361-68 (1971). Among other problems, it ignores the potential weakness of the inferential connection between proof of source and proof of guilt.

[18] Thomas Bayes, *An Essay Towards Solving a Problem in the Doctrine of Chances*, 53 Phil. Transactions of the Royal Society of London 370-418 (1763). For discussions about the application of Bayes' theorem in a legal context, see Tribe, *supra* note 17; Richard Lempert, *Modeling Relevance*, 75 Mich. L. Rev. 1021 (1976-77).

[19] These proposals have been controversial. *Compare, e.g.*, Michael O. Finkelstein & William B. Fairley, *A Bayesian Approach to Identification Evidence*, 83 Harv. L. Rev. 489 (1970) (proposing use of Bayes' theorem), *with* Tribe, *supra* note 17 (elaborately critiquing such proposals). This controversy has extended to the DNA context. *Compare, e.g.*, Kaye & Sensabaugh, *supra* note 2, at 536-37, 544-45 (discussing applicability of Bayes' theorem to DNA evidence);

in this manner, however, the expert must estimate a *prior probability*, which here is an estimate of the probability that respondent was the source of the stain based on all evidence *other than* the DNA evidence. The theorem then specifies how estimates of *prior probability* and *random match probability* can be combined to generate an estimate of *source probability*.

There is no evidence that Ms. Romero used Bayes' theorem to generate her source probability estimates in this case. It appears, instead, that she simply fell victim to the source probability error. Indeed, to have used Bayes' theorem would have been improper for two reasons. First, as previously explained, a Bayesian analysis requires quantification of a prior probability, yet Ms. Romero was neither in a position to assess the non-scientific evidence nor expressly charged with that task. Second, because her testimony made no mention of Bayes' theorem or prior probability, jurors would have been misled about the basis for her scientific conclusions. That is, the jurors would never have known that Ms. Romero's putatively scientific conclusions about

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and NRC 1996, *supra* note 6 (discussing a possible method of presenting source probabilities derived from Bayes' theorem to juries), *with* William C. Thompson, *Accepting Lower Standards: The National Research Council's Second Report on Forensic DNA Evidence*, 37 Jurimetrics J. 405, 422-23 (1997) (critiquing the NRC proposal). Although Bayesian calculations have been used in civil paternity cases, *see* D. H. Kaye, *The Probability of an Ultimate Issue: The Strange Cases of Paternity Testing*, 75 Iowa L. Rev 75 (1989), such calculations have been generally been rejected, for good reason, in criminal trials, *see e.g.*, *State v. Skipper*, 637 A.2d 1101, 1105-08 (Conn. 1994).

source probability depended in part on her own veiled consideration of the value of the non-scientific evidence. Hence, even if Ms. Romero used Bayes' theorem to reach her conclusions, her testimony about source probability remains improper and highly misleading.[20]

Amici Curiae take the position that forensic scientists should never be allowed to express opinions about *source probabilities* when those opinions rest on fallacious reasoning or depend in part on their own assessment of non-scientific evidence.[21] Such testimony is easily misleading.

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[20] Here we are discussing an expert's use of Bayes' theorem to generate her own estimates of source probability, which were then presented to the jury as scientific conclusions. That is the only application of Bayes' theorem that might possibly have occurred in this case, and if it occurred it was clearly improper. There are, of course, other ways that Bayes' theorem might be used in trials that could be less problematic. For example, there have been a number of proposals to have experts explain Bayes' theorem to jurors or to provide jurors with "decision-aids" that illustrate the way Bayes' theorem might be used to draw conclusions about *source probability* from jurors' own estimates of *prior probability*. *See supra* notes 18 and 19. Although fascinating, these proposals are not directly relevant to this case. In this case Ms. Romero did not offer the jury "decision aids" to help them integrate the scientific evidence with their own evaluations of the non-scientific evidence in order to assess the source probability; she presented what purported to be her own scientific conclusions regarding the source probability.

[21] In other words, experts should not be permitted to embed a hidden assumption about a *prior probability* into a conclusion about *source probability*. *Amici Curiae* take no position on whether experts should be allowed to present "decision aids" to

Jurors are unlikely to recognize fallacies in an expert's reasoning; nor are they likely to understand instances in which the expert's scientific conclusions are derived, in part, from the expert's assumptions about the strength of other evidence in a case. Indeed, part of the problem with *source probability* testimony is that it implies that scientific evidence can prove things that it cannot prove. It suggests that the scientific evidence is all that need be considered when, in fact, scientific evidence can only be appreciated properly when considered in conjunction with all the other evidence.

This case underscores the dangers of misleading source probability testimony. Where there is evidence pointing away from the defendant and towards another possible perpetrator, such as a brother, jurors might reasonably have doubts about the probability that the defendant was the source notwithstanding the DNA evidence—if they understand the DNA evidence properly. The problem with the source probability testimony presented in this case is that it ruled out any such doubts. The expert and the prosecutor told the jury that the DNA evidence, by itself, proved that defendant was over 99% likely to be the source of the semen, and to be guilty, creating a false aura of scientific certainty about a conclusion that could properly be assessed only in light of the evidence as a whole.

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instruct jurors on how to use Bayes' theorem to make their own assessments of source probability. *See supra* note 20.

Without question, the DNA evidence in this case has a great deal of probative value. Any rational juror would increase his or her estimate of the probability that Mr. Brown was the source upon learning that he shared the same DNA profile as the semen stain. But a juror's ultimate conclusion about the source probability in this case should have rested on an assessment of the case as a whole, and with an accurate understanding of the actual statistical probabilities. By erroneously telling the jury that the DNA evidence, *by itself*, proved there was a 99.999967 percent chance that Mr. Brown was the source, Ms. Romero and the prosecutor short-circuited full consideration of the determinative issue. They provided a groundless and inappropriate "scientific" answer to the central question in the trial—a question that should have been left for the jury to answer based on all of the evidence.

II. THE JURY WAS WRONGLY INFORMED THAT THE PROBABILITY OF A FRATERNAL MATCH WAS SIGNIFICANTLY LESS LIKELY THAN WAS ACTUALLY THE CASE.

In addition to conflating the random match and source probabilities, the scientific testimony in this case dramatically understated the probability that one of respondent's brothers might also have matched the evidence. Ms. Romero calculated the probability as 1 in 6500, when the correct calculation shows that the probability that any one of the brothers considered singly would match is 1 in 263; the probability that, among respondent's four

brothers, at least one of the four would match is 1 in 66. Thus, Ms. Romero's statements suggested it was up to 100 times less probable that there would be a fraternal match than in fact was the case.

The random match probability is an estimate of the likelihood that a randomly drawn person *unrelated to the defendant* will share the characteristics that link the defendant to the evidence. It is based on the rate of occurrence of the relevant genetic traits in the population at random. Because we inherit genetic characteristics from our parents, however, genetic variation is far more limited among siblings, which increases the likelihood of a match.[22]

Standard formulae exist for computing the probability of a match between siblings. However, Ms. Romero appears to have both used an inappropriate formula and used it incorrectly.

A. ***The formula that the government's expert claimed to have used for computing the fraternal match probability was inappropriate.***

Ms. Romero told the jury that she based her calculation on a formula published by the National

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[22] Specifically, each person has two pieces of genetic material, called "alleles," at each locus. They inherit one from each parent (*i.e.*, one of each parent's own two alleles). Thus, whereas the possible number of combinations among related people is limited to the alleles possessed by their parents, the combinations among unrelated people reflect the full range of possible alleles.

Research Council. From the context of her remarks, it is clear that she was referring to the 1992 NRC Report.[23] This report contains only one formula concerning the probability of a match between brothers.[24]

This formula is not appropriate for estimating the probability that another brother would have respondent's DNA type. The formula estimates the *average* probability that two brothers will have the same genetic types at a series of loci –without regard to the specific types in a particular case. The probability of a fraternal match in any particular case may be higher or lower depending on the genetic characteristics that the individual happens to have. Relying on the average in a particular case is analogous to using the average income of all lawyers to estimate the income of a particular lawyer. The average will overstate the income of some lawyers and understate the income of others.

B. ***The calculations that the expert made using the inappropriate formula were themselves incorrect.***

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[23] NRC 1992, *supra* note 4.

[24] The report uses the formula to illustrate the fact that, on average, the DNA of brothers is more similar than the DNA of randomly selected individuals. It does not suggest that the formula be used, as Ms. Romero did, to estimate the probability of a match in a specific case. *Id.* at 87. Formulas that are more suitable for the latter purpose are available in the NRC 1996 report that updated the previous edition.

Amici attempted to replicate Ms. Romero's computations of the fraternal match probability, using the formula Ms. Romero testified that she had used, and obtained a result significantly more favorable to respondent than the result that Ms. Romero presented to the jury. Ms. Romero testified that the probability a brother would match was 1 in 6500. However a correct application of the NRC formula yields a match probability exceeding 0.0045, or approximately 1 in 222.[25] Either Ms. Romero did

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[25] According to the NRC 1992 formula, the probability that two siblings will match at k genetic loci is approximately $(.25 + 0.5p + 2p^2)^k$ where p is the average chance that two alleles will match (also called the apparent homozygosity rate). The DNA test in this case examined five loci, so k would be 5. The homozygosity rates for those loci ranged from .07 to .21. *See* Bruce Budowle et al., *Fixed-bin analysis for statistical evaluation of continuous distributions of allelic data from VNTR loci, for use in forensic comparisons*, 48 Am. J. Hum. Genetics 841 (1991) (the relevant data appear in Table 8). Hence, the value of p should have been .10 or higher. Consequently, if Ms. Romero had applied this formula correctly, she should have computed the probability of a match between brothers to be at least $(.25 + 0.5(.10) + 2(.10)^2)^5 = 0.0045$, or approximately 1 in 222 rather than 1 in 6500. Her error is difficult to understand. The only variable she would have needed to look up was the "homozygosity rate," p, but even if she had mistakenly taken that rate to be zero, she should still have estimated the probability of a match between brothers to be $.25^5 = 0.00098$ or approximately 1 in 1024, which is considerably higher than 1 in 6500. All of these calculations are, of course, based on the inappropriate formula in the 1992 NRC report. As explained *infra*, the appropriate formula, from the 1996 NRC report, produces a fraternal match probability in this case of 1 in 263, as Professor Mueller correctly reported.

not use the formula she testified to or her computations were wrong.

C. *The misleading fraternal match testimony invited the repetition of the source probability error with regard to the fraternal match probability.*

Ms. Romero's gross misrepresentation of the fraternal statistical probabilities was exacerbated when, prompted by the prosecutor, she illustrated her inaccurate calculations before the jury. Using the earlier exhibit that wrongly depicted the *random match probability* as the *source probability*, Exhibit G, the prosecutor asked Ms. Romero to translate her calculations into percentages. (JA 471). Ms. Romero accordingly subtracted her estimates from 100, as she had done in the earlier illustration. The prosecutor then asked her whether it "would be fair, then to say that the likelihood of the parents having one child, and then the very next child having same genetic code would be .02 percent." (JA 472). Ms. Romero responded "yes." (JA 472).

This illustration -- no doubt persuasive and vivid, given the prosecutor's repeated desire to express the numbers to the jury visually and by "mak[ing] this into a percentage where I can understand it" -- compounded the prejudicial effect of Ms. Romero's various incorrect statements. (JA 461). Having been told earlier that the exhibit represented the probability that the defendant was the source of the semen stain rather than a random person (the *source probability*), the jurors might well have concluded

that this exercise depicted the probability that the defendant rather than one of his brothers was the source (a *fraternal source probability*, if you will). In other words, the display could well have led jurors to interpret the erroneous fraternal match probability in a manner consistent with the prosecutor's fallacy or source probability error.

Based on this presentation, jurors would have wrongly understood that the DNA evidence established that there was a 99.982 percent chance the semen stain came from Troy Brown and only a .02 percent chance it came from one of his brothers. But this impression is false because, as discussed above, the DNA evidence, *by itself*, cannot establish a *source probability*—it cannot establish the probability that respondent (rather than one of his brothers) was the source of the semen. Source probabilities can only be assessed in light of all the evidence. The rarity or commonness of genetic material in the population at large, or even among a particular pool of suspects, is only one factor that must be considered to assess source probability, even if it is clearly an important factor. In a case such as this one, where some of the evidence pointed away from respondent and toward one of his brothers, it was vitally important to have an accurate estimate of the probability of a fraternal match.

D. ***The government's expert wrongly implied that the source probability was unaffected by respondent's having multiple brothers.***

After presenting the figure of .02 percent in a manner that implied that it represented the probability that one of respondent's brothers was the source of the semen, the defense lawyer asked Ms. Romero whether that number "would change at all with two brothers?" She said "no." (JA 472). By giving this terse negative response, without elaborating or explaining, Ms. Romero undoubtedly left the jury with the false impression that her (incorrectly) low statistic of 1 in 6500 (or .02 percent) reflected the probability of that one of defendant's brothers was the source of the semen, regardless of the number of brothers.

The fact that respondent has four brothers does not affect the *conditional probability* of a match to any particular brother,[26] which remains one in 263,[27] but it does affect the probability that *at least one* of the brothers will have the matching profile. Hence, it is an important factor for jurors to consider when assessing the likelihood that someone other than respondent could be the source of the semen stain. Just as the chances of winning a raffle increase as one buys more tickets, so does the likelihood of

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[26] The term "conditional probability of a match" means the probability that the brother would match if he was *not* the source of the semen—in other words, the probability of a random match for a brother.

[27] As discussed below, the fraternal match probability in this case was actually 1 in 263. This number represents the conditional probability of finding a match to one of respondent's brothers *given that* the brother was *not* the source—it does not reflect the probability that the brother *was* the source.

finding a DNA match to a brother increase as one has more brothers.

E. *The correct calculation of the fraternal match probability paints a dramatically different statistical picture than the one presented to the jury.*

As the record reflects, Dr. Mueller computed the probability of a fraternal match using the formula found in the 1996 NRC report on DNA evidence.[28] This formula takes into account the specific genetic characteristics (alleles) of the person in question and is therefore appropriate for use in a forensic case. We have done our own independent computation of the fraternal match probability in this case, using the same formula, and using frequencies derived from the FBI's Caucasian database, and have obtained results that are virtually identical with those in the Mueller report.

By our computations, the probability of a fraternal match to the genetic profile of the respondent is 1 in 263.[29] The probability of finding this profile among

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[28] NRC 1996, *supra* note 6, at 113 (Formula 4.9).

[29] The table on the following page shows the DNA profile found in the semen stain, the frequency of the profile's various genetic characteristics (alleles) using the FBI's Caucasian database, and the probability of a fraternal match at each locus as computed by NRC 1996 formula 4.9, *supra* note 6. Discrepancies between our and Dr. Mueller's numbers are insignificant and probably due to the use of a different number of digits for purposes of rounding.

one or more of the four brothers can be computed based on elementary principles of probability.[30] There is one chance in 66 of finding it at least once among all four brothers and one chance in 131 of finding it in any two of them.

To the extent that other evidence created room for doubt about whether respondent or one of his brothers was the assailant, the precise value of the fraternal match probability constituted a critical component of a rational evaluation of respondent's guilt. The difference between the inaccurate number that the prosecution's expert presented and the true

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Locus	**Allele**	**Frequency**	**Frat. Match Prob.**
D2S44	3297	.089	.314
	1640	.141	
D4S139	14577	.124	.320
	10101	.124	
D10S28	4386	.065	.269
	653	.009	
D14S13	1846	.166	.361
	1517	.209	
D17S79	1757	.186	.391
	1525	.276	
Overall Probability			**.0038**
or... **1 in**			**263**

[30] The probability that at least one of several brothers will match is computed using the formula $1-(1-p)^n$, where p is the probability a single brother will match and n is the number of brothers.

probability could very well have made the difference between conviction and a reasonable doubt.

CONCLUSION

This case provides an unfortunate example of forensic science gone seriously awry and of the failure of the lawyers and the trial judge to recognize the errors. Ms. Romero's testimony about source probabilities was flawed and inappropriate. Her testimony about the probability of a fraternal match was flatly inaccurate. The prosecutor made matters worse by manipulating Ms. Romero's incorrect testimony into a fallacious argument that the DNA evidence, *by itself*, constituted proof beyond a reasonable doubt of respondent's guilt. By claiming that the scientific evidence proved something that it did not and could not prove, the government built an unfair and misleading case against respondent.

Convictions based on forensic science have become increasingly common.[31] Yet the criminal justice system has sometimes faltered in the task of

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[31] NRC 2009, *supra* note 15. This Court has observed that "DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty." *District Attys. Off. for the Third Jud. Dist. v. Osborne*, 129 S.Ct. 2308, 2312 (2009). At the same time, this Court has acknowledged both that "[s]erious deficiencies have been found in the forensic evidence used in criminal trials," and that forensic analysts "sometimes face pressure to sacrifice appropriate methodology for the sake of expediency," *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2537 (2009).

ensuring the reliability of such evidence.[32] Clearly the task is not an easy one. The erroneous testimony in this case did not come from a charlatan, but from a forensic scientist with respectable credentials. Ms. Romero had an advanced degree and at the time of her testimony served on a national advisory committee; she currently serves as the crime laboratory director of her county. The attorneys here undertook direct and cross-examination of the evidence, and even the judge on occasion intervened in an effort to clarify. All the normal accoutrements of the trial process were present here and it undoubtedly appeared, to most observers, that the system was functioning fairly. But this trial was not fair. The DNA evidence, on which the case turned, was presented in a manner that seriously misrepresented its meaning and value with respect to the central issue of the case—respondent's identity as the perpetrator.

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[32] *Melendez-Diaz*, 129 S.Ct. at 2536-38; NRC 2009, *supra* note 15, at 3-17 to 3-19 (noting that with regard to many problematic forms of forensic science judicial gatekeeping has been "utterly ineffective"); Brandon L Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1, 14 (2009); Erin Murphy, *The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence*, 95 Calif. L. Rev. 721 (2007); William C. Thompson, *Beyond Bad Apples: Analyzing the Role of Forensic Science in Wrongful Convictions*, 37 Sw. L. Rev. 1027 (2008); William C. Thompson & R. Dioso-Villa, *Turning a Blind Eye to Misleading Scientific Testimony: Failure of Procedural Safeguards in a Capital Case*, 18 Alb. L.J. Sci. & Tech. 151 (2008); Jane Campbell Moriarty, *"Misconvictions," Science, and the Ministers of Justice*, 86 Neb. L. Rev. 1 (2007).

Upon learning from the Mueller Report of the serious deficiencies in the scientific evidence in this case, the District Court found that respondent's right of due process had been violated. The Court of Appeals upheld this ruling. *Amici Curiae* express no opinion about whether these courts followed correct legal procedures in considering the Mueller report and ruling as they did. However, *Amici Curiae* wish to assure this Court that the Mueller report was correct and that a scientific assessment of the testimony fully supports the lower courts' finding that the prosecution's evidence in this case was seriously flawed and that the jury was likely to have been misled. We believe, as a matter of simple fairness, that the problems in this trial need to be remedied whether or not the specific remedy entailed in the rulings of the lower courts is the correct one.

If this Court decides, on procedural grounds, to remand the case for further proceedings, we hope that it will offer a clear discussion of the underlying problems in the scientific evidence, and particularly the confusion of *random match probability* and *source probability*, for the edification and guidance of lower courts. In our opinion, forensic scientists should not be allowed to express opinions about *source probability* when those opinions rest on fallacious reasoning or depend, in part, on the expert's assessment of non-scientific evidence. An authoritative statement from this Court to that effect would help raise awareness of this important issue and thus improve the quality of scientific

testimony. Fallacious, misleading testimony of the type seen in this case should never be allowed in a court of law.

Respectfully Submitted,

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July 24, 2009

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AMICUS CURIAE BRIEF

122

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No. 08-559

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

E.K. McDANIEL, Warden
Petitioner,

vs.

TROY BROWN
Respondent.

BRIEF OF WAYNE COUNTY, MICHIGAN AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I.

1. What is the standard of review for a federal habeas court for analyzing a sufficiency-of-the-evidence claim under the Anti-Terrorism and Effective Death Penalty Act of 1996 (ADEPA)?

2. Does analysis of a sufficiency-of-the-evidence claim pursuant to *Jackson v Virginia*, 443 US 307, 318-319 (1979) under 28 U.S.C. § 2254(d)(1) permit a federal habeas court to expand the record or consider non-record evidence to determine the reliability off testimony and evidence given at trial?

TABLE OF CONTENTS

PAGE

Index of Authorities . . . . . -3-

Statement of Questions Presented for Review . . -1-

Interest of the Amicus . . . . . -5-

Argument . . . . . -6-

Conclusion . . . . . -14-

INDEX OF AUTHORITIES

CASE PAGE

Federal Cases

Cunha v Brewer,
511 F2d 894 (CA 8, 1975).....7

Curley v United States,
160 F2d 220 (CA DC, 1947).....8

Fields v Strickland,
444 F.Supp 795 (DC SC, 1977).....10

Holloway v Cox,
437 F2d 412 (CA 4, 1971).....10

In re Winship,
397 US 358 (1970).....7

Jackson v Virginia,
443 US 307 (1979).....6, passim

Lockhart v Nelson,
488 US 33 (1988).....6, 13

United States v Cruz,
363 F3d 187 (CA 2, 2004).....13

United States v Feinberg
140 2d 592 (CA 2, 1944.....8

United States v Riggi,
541 F3d 94 (CA 2, 2008).....13

United States v Taylor,
464 F2d 240 (CA 2, 1972).....8

State Cases

People v Eaton,
59 Mich 559, 26 NW 702 (1886).....11

People v Hampton,
407 Mich 354, 285 NW2d 284 (Mich, 1979).....11

Interest of the Amicus

Amicus is the County of Wayne, Michigan. Wayne County is the largest County in the State of Michigan, and the criminal division of Wayne County Circuit Court is among the largest and busiest in the entire United States. The Wayne County Prosecuting Attorney, charged by state statutes and the State Constitution with responsibility for litigating all criminal prosecutions within his jurisdiction, has an interest in the outcome of the current litigation, as it may well affect the execution of her constitutional and statutory duties. Amicus defends convictions against claims of sufficiency of evidence in state courts, and also on federal habeas corpus review.

As the legal representative of a unit of state government, Supreme Court Rule 37 permits *Amicus* to file a supporting brief without permission of the parties.

No party or counsel connected with a party contributed any funds towards this brief nor contributed in any way to its writing. Counsel were notified timely of the intent to file as amicus.

Argument

I. The Standard For Review of a Sufficiency-of-the-Evidence Claim on Review Under Federal Habeas Corpus of a State Conviction

A. Introduction

Amicus confesses to being somewhat nonplused by the opinion of the 9th circuit in this case. *This* Court has plainly stated that the evidence reviewed on a sufficiency claim is that heard by the jury (that "adduced at the trial," see *Jackson v Virginia*, infra, at 324)—and yet the majority of the 9th circuit panel considered an expanded record. And this Court has held that a court reviewing a sufficiency claim must consider *all* evidence heard by the jury, even that which is held on appeal to have been improperly admitted, see *Lockhart v Nelson*, 488 US 33 (1988)—and yet the majority of the 9th circuit panel found the evidence constitutionally insufficient by discarding evidence it determined to be "unreliable" through its consideration of evidence never heard by the jury in the "expanded" record. For these reasons alone, the 9th circuit must be reversed. But also involved here is the fundamental question of the standard to be applied under the AEDPA to federal review of state convictions on sufficiency-of-the-evidence claims.

B. Jackson v Virginia Should be Reconsidered, At Least in the Context of Habeas Corpus Review of State Convictions

In *Jackson v Virginia*, 443 US 307 (1979) this Court found that the evidence presented was sufficient to allow a rational trier of fact to find guilt proven beyond a reasonable doubt. But in reaching this conclusion, the Court concluded that the

requirement of *In re Winship*, 397 US 358 (1970) that a trier of fact in a criminal case test the evidence by a standard of persuasion of beyond a reasonable doubt also provides the standard of appellate review for a verdict of guilt so reached by the trier of fact. The rule previously had been, at least on federal habeas corpus review, that the *Winship* requirement was an *instructional* one, setting the standard of persuasion that the fact-finder is to apply, with review of a verdict on habeas being only as to whether there was any evidence at all on each element, given that the weight of the evidence—the logical and probative force to be given to the evidence individually and collectively—belongs to the jury. See *Jackson*, 443 US at 316, and citing *Cunha v Brewer*, 511 F2d 894 (CA 8, 1975) as an example.

Jackson established that the question on habeas review from that time forward is not whether the jury was properly instructed on its burden, and reached the conclusion of guilt by applying the reasonable-doubt standard where there was some evidence on every element, but whether a "rational jury" could have concluded, on the evidence, that guilt was proven beyond a reasonable doubt, based necessarily on the reviewing court's assessment of the evidence. To be sure, this Court cautioned that the reviewing court was not to decide whether *it* was convinced beyond a reasonable doubt, but only whether any rational fact-finder *could* be so convinced, taking the evidence in the light most favorable to the verdict. *Jackson*, at 319. But though the Court said that this review standard gives "full play" to the jury to resolve conflicts in testimony, to weigh evidence, and to draw reasonable inferences, the standard ineluctably involves the reviewing court in weighing evidence, and determining whether the weight given to evidence by the properly instructed jury was for some

reason "improper," even though supported by some evidence in the record.

Application of the *Jackson* standard necessarily intrudes upon the historical authority of the jury to draw inferences and weigh evidence. At least where state convictions are reviewed by federal courts on habeas review, that intrusion should be ended, for much the reasons stated by Justice Stevens in his concurring opinion in *Jackson*. As Judge Learned Hand in the lamentably repudiated *United States v. Feinberg* 140 F.2d 592, 594 (CA2, 1944) put the matter:

> . . .courts-at least federal courts- have generally declared that the standard of evidence necessary to send a case to the jury is the same in both civil and criminal cases; and that, given evidence from which a reasonable person might conclude that the charge in an indictment was proved, the court will look no further, *the jury must decide, and the accused must be content with the instruction* that before finding him guilty they must exclude all reasonable doubt. . . .We agree with Judge Amidon. . . who refused to distinguish between the evidence which should satisfy reasonable men, and the evidence which should satisfy reasonable men beyond a reasonable doubt. While at times it may be practicable to deal with these as separate without unreal refinements, in the long run the line between them is too thin for day to day use.

The contrary view, expressed in cases such as *United States v Taylor*, 464 F2d 240 (CA 2, 1972), where the second circuit repudiated the former rule, became known as the "Curley rule." See *Curley v United States*, 160 F2d 229 (CA DC, 1947). But that

rule is, amicus submits, fundamentally flawed in its premise. In *Taylor* the court stated the premise this way: "more 'facts in evidence' are needed for the judge to allow" jurors "'of ordinary reason and fairness' to affirm the question the proponent 'is bound to maintain' when the proponent is required to establish this not merely by a preponderance of the evidence but, as all agree to be true in a criminal case, beyond a reasonable doubt." *Taylor*, at 242. But this is manifestly untrue. No more "facts in evidence" are required to convince a jury in a criminal case than in a civil one; rather, the jury must be *persuaded* by a higher *standard*, not necessarily by "more facts"—and so instructed—in the criminal case. It would not be at all surprising that "fewer facts in evidence" might persuade a properly instructed jury beyond a reasonable doubt in one case, where "more facts in evidence" might fail to persuade a jury by a preponderance of the evidence in a civil case, as the matter turns not on the number of facts in a case but the force or weight of those facts. It is quite possible for few facts to be compelling—to persuade a properly instructed jury beyond a reasonable doubt—or on the other hand for an extensive factual record to be unpersuasive to a given jury. And where there is evidence on an element, to say that the evidence is *not* sufficient to prove guilt on that element beyond a reasonable doubt is to say nothing other than that the reviewing court views the weight of that evidence and its logical force *differently* than did the jury. This intrudes on the historical function of the jury, and unnecessarily so.

As Justice Stevens well stated in his opinion concurring in *Jackson*, "nothing in the *Winship* opinion suggests that it bore on appellate or habeas corpus procedures....it never mentioned the question of how appellate judges are to know whether the trier of fact really was convinced beyond a reasonable doubt, or indeed, whether the fact-finder was a

'rational' person or group of persons." *Jackson*, at 331 (Stevens, J., concurring). Further, "the very premise of *Winship* is that properly selected judges and properly instructed juries act rationally, that the former will tell the truth when they declare that they are convinced beyond a reasonable doubt and the latter will conscientiously obey and understand the reasonable-doubt instructions they receive before retiring to reach a verdict, and therefore that either fact-finder will itself provide the necessary bulwark against erroneous factual determinations. To presume otherwise is to make light of *Winship*." *Jackson*, at 333 (Stevens, J., concurring). This is correct, and, at least in federal review of state convictions, the Court should avoid intrusion into the jury function.

Other decisions also well state the matter. The 4th circuit in *Holloway v. Cox* 437 F.2d 412, 413 (C.A.4 1971) cogently observed that:

> we think the 'some evidence' standard is still appropriate in federal courts' review of sufficiency of the evidence before the state trial court in federal habeas corpus proceedings. To hold otherwise would require federal courts to exhaustively explore the state court transcript of the trial of every habeas corpus petitioner to be certain that there was evidence upon which the trier of fact should have found guilt beyond a reasonable doubt. *To require such exhaustive review would transfer the ultimate fact finding function from state court juries to the federal courts.* In re Winship, we hold, does not dictate this drastic change (emphasis supplied).

See also *Fields v. Strickland*, 444 F.Supp. 795, 803 (D.C.S.C. 1977): "The factfinding process is not transferred to a federal judge where a state jury

convicts a defendant who later seeks federal habeas relief."

Moreover, Justice Stevens has proven prescient in his concern regarding the reach of the *Jackson* rule. Reasonable courts previously disagreed on occasion even under the "any evidence" test for review of sufficiency. Allowing reviewing courts to second-guess the weight given to evidence by jurors to determine whether the reviewing court is satisfied that the properly instructed jurors were "reasonable" in their determination that guilt was shown beyond a reasonable doubt has heavily involved federal courts in review of the everyday decision of sufficiency of the proofs involved, and intrudes both on state juries and state reviewing courts. The Court should now set is face against this review, and limit the reach of habeas review with regard to sufficiency-of-the-evidence claims to whether a state court unreasonably concluded that a the verdict found by a properly instructed jury was supported by any evidence, the weight and force of that evidence being solely for the properly instructed jury.

C. Application of the AEDPA

Because of *Jackson v Virginia*, states were required to engage in weighing evidence and reviewing jury verdicts for "reasonableness," to determine whether on the evidence a reasonable jury could find guilty proven beyond a reasonable doubt. For example, in Michigan the law had long been that "The sufficiency of the evidence was exclusively for the jury. It is only where there is no evidence upon a material point that the court can take the case from the jury." *People v. Eaton*, 59 Mich. 559, 562, 26 N.W. 702, 703 (Mich. 1886). But in *People v. Hampton*, 407 Mich. 354, 366, 285 N.W.2d 284, 286 (Mich., 1979) the court was forced to change its view, saying that "the resolution of this issue is now

controlled by the rationale underlying the decision in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)." Should this Court determine that it mis-stepped in *Jackson v Virginia*, states would be free to determine whether to return to "any evidence" standard, leaving the weight and credibility of evidence to the jury. But whether they do so or not, review on habeas is governed by the AEDPA's requirement that the state-court conclusions not be overturned unless they are either contrary to settled law from this Court, or constitute an unreasonable application of that law. Were a state court to determine that a reasonable jury could have found guilt beyond a reasonable doubt, that conclusion should be upheld on habeas review if it is not unreasonable to find the verdict supported by "any evidence."

II. Analysis of a sufficiency-of-the-evidence claim pursuant to *Jackson v Virginia*, 443 US 307, 318-319 (1979) under 28 U.S.C. § 2254(d)(1) does not permit a federal habeas court to expand the record or consider non-record evidence to determine the reliability off testimony and evidence given at trial.

Amicus leaves to the well-stated argument of the Petitioner the point that the 9th circuit's finding that the Nevada court's decision was "contrary" to *Jackson v Virginia* because it employed the term "rational jury" rather than "reasonable jury" is, to be generous, fanciful. Even more startling is the 9th circuit's consideration of non-record evidence to undermine the evidence considered by the jury. It is *this* that is "contrary" to settled law from this Court.

First, *Jackson v Virginia* holds that "the applicant is entitled to habeas corpus relief if it is found that *upon the record evidence adduced at the trial* no rational trier of fact could have found proof of guilt

beyond a reasonable doubt" (emphasis added). *Jackson v. Virginia* 443 U.S. 307, 324. This seems rather clear. Further, assume that it is determined on appeal that certain evidence should *not* have been admitted. Under the approach taken by the 9th circuit here, that evidence is to be excluded from the record and the reviewing court is to determine whether on the remaining evidence a rational jury could find guilt proven beyond a reasonable doubt. But this is also contrary to settled law from this Court, for in *Lockhart v Nelson*, supra, this Court held that all the record evidence, including that determined to be admitted improperly, is considered on the sufficiency question, so that retrial cannot be barred by consideration of the evidence for sufficiency by purging from the record improperly admitted evidence. And see also, for example, *United States v. Cruz,* 363 F.3d 187, 197 (CA 2, 2004): "In situations where some government evidence was erroneously admitted, we must make our determination concerning sufficiency taking into consideration even the improperly admitted evidence." And see *United States v. Riggi*, 541 F.3d 94, 108 (CA.2, 2008).

Conclusion

Because *Jackson v Virginia* necessarily involves federal courts in assessing the weight of evidence and the strength of inferences drawn from that evidence by state juries, it should be reconsidered. On habeas review, the verdict should be upheld unless it can be said that the state court unreasonably determined that the verdict was supported by some evidence on each element. And this Court should reaffirm that review is limited to the evidence actually presented at trial, and must include all evidence, even that a reviewing court determines was improperly admitted.

Relief

WHEREFORE, this Court should reverse the 9th Circuit

KYM L. WORTHY
Wayne County
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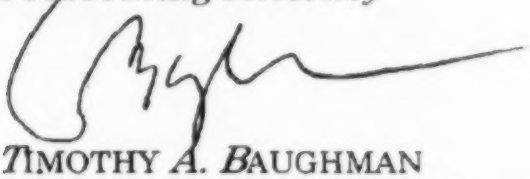

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